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

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

COMMENTS OF THE
RECORDING INDUSTRY ASSOCIATION OF AMERICA, INC.

The Recording Industry Association of America, Inc. ("RIAA") provides these comments in response to the Copyright Office's second Notice of Inquiry ("NOI") in the above-captioned proceeding. *Music Licensing Study: Second Request for Comments*, 79 Fed. Reg. 42,833 (July 23, 2014).

The subject matter of the Copyright Office's study is extremely important to RIAA and its members because record companies occupy a central place in the ecosystem the Office is studying. Record companies work with talented artists (many of whom are also songwriters) to create recordings and find an audience for their music, and at the same time enable consumers to enjoy a broad selection of music products in as many ways as possible. To do these things, record companies obtain licenses to musical works, and both distribute music products and license out recordings. Across this full spectrum of activity, RIAA and its members believe it is critical for all creators to receive fair market value for the use of their works.

Many commercial musical works are both created and given their commercial life as part of the album projects record companies orchestrate and finance, and the core record company functions of production, promotion and distribution of sound recordings significantly impact

songwriter/publisher royalties. Likewise, broadcasters and digital music services would not have music to play or distribute if record companies did not invest tremendous resources in nurturing talent, producing, marketing and distributing music products, and helping fans take full advantage of innovative ways to find, access and enjoy their favorite music. Over the last decade, the major record companies have invested more than $20 billion in U.S. talent, and an additional $6 billion to market recordings in the U.S. As the economic engine that drives the music industry, record companies commend the Office for its focus on music licensing, and hope that this study will ultimately help make America's music industry even more vibrant than it is.

The initial comments filed pursuant to the Office's Notice of Inquiry ("NOI"), 79 Fed. Reg. 14,739 (Mar. 17, 2014), and the subsequent public roundtables confirmed that there are significant problems and widespread dissatisfaction with current systems for licensing musical works, as well as significant agreement concerning at least a few key principles for reform. Broadly speaking, commenters generally seem to agree that it is important to move in the direction of a more rational licensing process that streamlines administration, eliminates separate licensing of different rights implicated by a single product or service, and provides for fair compensation for all contributors to music products. RIAA encourages the Office to identify in its report those principles on which it believes consensus exists or seems achievable, along with the issues it believes require further thought and attention. Within the framework established by such principles, RIAA looks forward to working with the Office and with its partners in the music industry to explore possible approaches and see whether it will be possible to achieve the kind of meaningful reform that almost all stakeholders believe is needed.

By contrast, stakeholders mostly agree that sound recording licensing[1] works reasonably well, although RIAA and many other stakeholders suggested targeted changes to the statutory provisions concerning sound recordings. Most importantly, RIAA believes that Section 114 should be amended to incorporate the concept of "platform parity," including a terrestrial performance right, and that pre-1972 recordings should be brought within the statutory license system. *See* RIAA Comments, at 30-33, 36-37. Many other stakeholders agree that there should be platform parity and that something should be done to address the status of pre-1972 recordings. If the Office is inclined to recommend any other changes to the statutory licenses, RIAA believes that the other changes suggested in RIAA's comments also should be considered for inclusion in any proposed package of reforms. *See* RIAA Comments, at 33-35.

We begin these comments with RIAA's thoughts concerning the overall landscape of this proceeding, which RIAA provides in response to question number 10 in the Office's Second Request for Comments, 79 Fed. Reg. 42,833 (July 23, 2014). Part I of these comments addresses musical works, and Part II addresses sound recordings. In Part III, we address the Office's specific questions numbered 1 through 9 in the Second Request for Comments.

I. Musical Works

The initial comments and public roundtables in this proceeding confirm that many stakeholders believe the current system for licensing musical works "is in need of substantial improvement."[2] As David Israelite, the CEO of NMPA recently put it:

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[1] When these comments refer to "licensing" of sound recordings, we primarily mean the statutory licensing of sound recordings pursuant to Sections 112/114.

[2] Transcript of Los Angeles Roundtable at 6 (June 16, 2014) (statement of Jacqueline Charlesworth, Copyright Office General Counsel); *see also* Transcript of New York Roundtable at 6 (June 23, 2014) (statement of Jacqueline Charlesworth that "there is, certainly agreement

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> Music licensing certainly is too difficult and frustrating for both licensors and licensees. A tremendous amount of value is being lost due to the inefficient and complex ways in which music is licensed. It can, and should, be better.[3]

In considering how to make musical work licensing better, we focus our discussion on the products that are central to the music business and occupy most of the attention of other commenters, although the record reflects dissatisfaction with various narrower aspects of musical work licensing as well.[4] "[A]s the market further shifts away from physical goods and digital downloads towards a 'rental'-like streaming market,"[5] almost all stakeholders involved in licensing of musical works for use in music products agree that the musical work licensing models developed for the early twentieth century are not up to the task of fully enabling creation and commercialization of music products in today's digital environment.

Stakeholders cite different reasons for their dissatisfaction. Broadly speaking, songwriter and publisher groups view the Section 115 compulsory license and ASCAP and BMI consent decrees as "historic relics" that "establish governmental price controls resulting in royalty rates

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that this is a system that could be working better."). As we read the initial comments addressing musical work licensing, only Brigham Young University and Music Reports, Inc. express general satisfaction with current systems for musical work licensing. The former finds that existing systems generally work well for acquiring licenses for its limited purposes, but is not representative of stakeholders more involved in musical work licensing. The latter is an independent license administrator that makes a business of helping its customers navigate the problems cited by other stakeholders.

[3] Continuing the Songwriter Compensation Conversation, https://www.nmpa.org/aboutnmpa/presidentscorner.asp.

[4] *E.g.*, Global Image Works Comments; National Public Radio Comments, at 6; Netflix Comments; Public Television Coalition Comments; Society of Composers & Lyricists Comments; Willey Comments.

[5] NMPA/HFA Comments, at 20.

disconnected from the free market."[6] As a result, "many songwriters and music publishers believe the compulsory license should be phased out to allow the market the chance to operate freely,"[7] and think the consent decrees "must be updated, if not eliminated."[8] In particular, they complain that "recent ASCAP and BMI rate court decisions have set what many publishers consider below-market rates."[9]

Conversely, digital music services complain that the current "framework enhances the negotiating leverage of rights owners."[10] They view Section 115 as "vital," but having "a number of significant problems with the licensing process that currently limit its effectiveness."[11] Among these problems, they cite an "inefficient and expensive" licensing process, "incredibly costly" administrative burdens, and various accounting difficulties.[12] They likewise believe the ASCAP and BMI "consent decrees serve several important roles that are critical to an efficient, properly functioning marketplace for these rights."[13] However, they worry that "[w]ithdrawals of musical works from the repertories of ASCAP and BMI threaten to undermine the

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[6] NMPA/HFA Comments, at 21; *see also* SGA Comments, at 4 ("the governmentally imposed consent decrees to which the PROs remain subject are severely outdated, crippling the ability of the PROs to establish fair, market value rates for the performance of musical compositions in digital environments on behalf of music creators").

[7] NMPA/HFA Comments, at 8.

[8] ASCAP Comments, at 2.

[9] BMI Comments, at 9.

[10] DiMA Comments, at 8.

[11] DiMA Comments, at 20 (emphasis omitted).

[12] DiMA Comments, at 20-22.

[13] DiMA Comments, at 26.

effectiveness of the current process,"[14] and cite other ways in which the current performance licensing process "could be made more effective."[15]

Stakeholders across the spectrum view current systems of overlapping, separately-licensable rights and work-by-work reproduction/distribution licensing of musical works as unnecessarily complicated, and noted difficulties tracking copyright ownership. They complained about the overhead costs of the licensing process, including the costs of performance and mechanical ratesetting proceedings. A number of commenters also noted the need to further address widespread music piracy.[16] It remains a problem that the legitimate market for licensed musical works must operate in an environment in which there is also a huge amount of infringing use. These are significant and broad-ranging issues. As a result, it seems clear that the problems in musical work licensing cannot be remedied with a little tinkering and will instead require a comprehensive solution.

Fortunately, the initial comments and roundtable discussions also confirm that there is significant agreement on at least a few key principles for reform. We encourage the Office to identify in its report those principles on which it believes widespread agreement already exists (or is reasonably achievable) along with the issues it believes require further thought and attention. Hopefully, the points of agreement will provide a framework within which the Office

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[14] DiMA Comments, at 27.

[15] DiMA Comments, at 28.

[16] *E.g.*, DotMusic Comments, at 2, 7-8; Geo Music Group Comments, at 2, 4, 32-33; NAB Comments, at 9; NMPA/HFA Comments, at 35; Novak Comments; RIAA Comments, at 43; SGA Comments, at 2, 33-35; Shocked Comments.

and the stakeholders could explore whether it might be possible to find common ground on a comprehensive solution to the problems identified.[17]

As we review the record of this proceeding to date, we believe there is significant agreement concerning five principles for reform, which we describe briefly in the remainder of this section.

A. Royalty Rates Should Reflect Fair Market Value

"There was general agreement, at least in principle, to the concept that music creators deserve fair compensation for their work."[18] It is appropriate that "[m]usic publishers seek a robust and successful digital music marketplace providing fair market royalties when their musical compositions are exploited,"[19] and that representatives of songwriters and publishers believe it is a "simple and self-evident notion that creators should be paid at a fair-market-value

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[17] *See* Transcript of Nashville Roundtable at 14 (June 4, 2014) (statement of Jacqueline Charlesworth, Copyright Office General Counsel, that "I'm hoping we can find some points of common ground. There are clearly many points of disagreement, but there may be areas where compromise is possible, where we can think about tradeoffs that might benefit both users of music and the creators and the intermediaries in this sector and see if we can think creatively about some solutions.").

[18] Transcript of Los Angeles Roundtable at 10 (June 16, 2014) (statement of Jacqueline Charlesworth).

[19] NMPA/HFA Comments, at 8; ABKCO Comments, §§ 1, 2, 19 (rates should reflect market conditions and willing buyer/willing seller price; current allocation not fair); Geo Comments, at 5 (free market would require payment of "an actual fair market rate"); Wixen Comments, at 2 (compulsory rates "ought to be based on fair market rates negotiated by a willing seller and willing buyer"); Transcript of Nashville Roundtable at 217 (June 4, 2014) (statement of Brittany Schaffer, NMPA, that "if we are going to keep 115, there has to be . . . a fair market base rate for how we set the 115 compulsory licensing rate"); Transcript of New York Roundtable at 291 (June 24, 2014) (statement of Peter Brodsky, Sony/ATV Music Publishing, that "a willing buyer/willing seller standard[] we think will create fair market value for us"); Transcript of Los Angeles Roundtable at 17 (June 16, 2014) (statement of Ed Arrow, UMPG, that "we represent the rights of songwriters, and are interested in making sure that they're fairly compensated for their creativity").

rate."[20] However, licensees also seek "fair and reasonable license fees"[21] and "fair market" licensing of musical works.[22] Thus, while there are divergent views concerning what the fair market value of a musical work is, and how to best arrive at musical work royalty rates that represent fair market value, nobody seems to question the basic premise that royalty rates *should* reflect fair market value. Accordingly, any reformed system for the licensing of musical works should be designed in a manner that will satisfy stakeholders across the spectrum that the royalties payable do reflect fair market value.

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[20] BMI Comments, at 3; *see also, e.g.*, ASCAP Comments, at 15, 24-25 (criticizing the consent decrees as allowing users to avoid paying fair market value); Copyright Alliance Comments, at 2 (referring to "fair market value for songwriters and music publishers"); IPAC Comments, at 1, 6 (expressing preference for licensing based on willing buyer/willing seller negotiations, but supporting creation of licensing agencies to negotiate fair market license rates); LaPolt Comments, at 12 (supporting legislation to "enable the rate courts to reach fair market value when setting license fees"); Recording Academy Comments, at 1 ("Performers, songwriters and studio professionals should always receive fair market value for their work across all platforms."); SESAC Comments, at 5 (supporting legislation encouraging rate courts "to set a 'willing buyer/willing seller' rate"); SGA Comments, at 3 (referring to "indispensible need[]" for "fair market value compensation for the use of musical works"); Transcript of Nashville Roundtable at 34 (June 4, 2014) (statement of John Barker, IPAC, expressing desire for licensing system "in which rates can truly be fair market value").

[21] RMLC Comments, at 1-2*see also, e.g.*, TMLC Comments, at 1 (TMLC seeks "fair and reasonable licenses").

[22] Music Choice Comments, at 5 ("Although the rate court process is not perfect, it is essential to the fair market collective licensing of musical composition copyrights."); *see also, e.g.*, CTIA Comments, at 13 (rate courts have done an "excellent job" of setting rates "at a level that approximates the fees that would be charged in a competitive market, taking into account the economic value of the performance"); DiMA Comments, at 12, 27 & n.57, 30 & n.64 (quoting approvingly rate court statements concerning fair market value); RIAA Comments, at 2, 18 ("any reform effort must . . . ensure that everyone in the value chain receives fair market value for their works"); TMLC Comments, at 4 (encouraging early negotiation of performance rates "when meaningful negotiation over their fair market value can take place").

B. Collective Licensing and Administration Is Necessary

Collective licensing has been a central part of the musical work licensing landscape ever since the sale of sheet music ceased to be the primary means of commercializing musical works.[23] Given the vast number of commercial musical works and their fractional and widely-distributed ownership, many stakeholders pointed to the benefits – and indeed the necessity – of collective licensing and administration.

The musical work performing rights organizations ("PROs") think collective licensing of musical works is "effective, efficient and compelling."[24] They particularly emphasized the ability of PROs "to handle large volumes of transactions on a cost-efficient basis."[25] Collective administrators of mechanical rights view aggregation of such rights as important whether they bring together rights owned by "tens of thousands of music publishing clients and self-published

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[23] We use the term collective licensing to mean simply that one source can provide licenses to works owned by a large number of copyright owners, without necessarily implying anything about the nature of those licenses or the details of the collective's relationship with those copyright owners. Various collective licensing models are represented in the marketplace. Performance licenses for essentially all commercial musical works are available through ASCAP, BMI and SESAC, but they each have different ownership and control structures. Mechanical licenses to many commercial musical works are available on an agency basis through HFA.

[24] ASCAP Comments, at 1-2, 20-21; *see also* Transcript of New York Roundtable at 46 (June 23, 2014) (statement of Matt Defilippis, ASCAP, that "collective licensing plays a very critical role in the broader ecosystem . . . [a]nd that is serving the music users and, therefore, and ultimately consumers").

[25] BMI Comments, at 6; *see also, e.g.*, SESAC Comments, at 2 ("By aggregating large catalogs of musical works that are most often licensed collectively, the PROs bring economies of scale and efficiency to the marketplace.")

songwriters,"[26] administer "direct licensing agreements among publishers and digital music service providers,"[27] or "administer the Section 115 license for services in innovative ways."[28]

Many representatives of songwriters and publishers also view the "tradition of collective performing rights licensing" as "important,"[29] and think "the music marketplace would benefit from a collective licensing entity or entities."[30] Licensees also think "[c]ollective administration of musical work copyrights has worked in the context of public performance rights in musical works."[31] Pointing to benefits of collective licensing, they "would oppose any amendments to the Copyright Laws that would undermine the collective licensing of public performance of musical works."[32] One of the key benefits of collective licensing that stakeholders cited is efficiency, which leads to more money for creators and licensees.[33]

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[26] NMPA/HFA Comments, at 2.

[27] *Id.*

[28] MRI Comments, at 2.

[29] SGA Comments, at 7.

[30] IPAC Comments, at 7-8.

[31] DiMA Comments, at 24-25; *see also, e.g.*, Music Choice Comments, at 3 ("The current process for collective licensing of musical composition performance rights through ASCAP and BMI works well").

[32] Spotify Comments, at 11; *see also, e.g.*, TMLC Comments, at 6 (describing the need to balance "the potential benefits of such aggregations" with potential competition concerns).

[33] *E.g.*, IPAC Comments, at 6-7 (to provide "an efficient process by which to obtain licenses . . . IPAC supports the creation of one or more licensing agencies"); Public Knowledge/CFA Comments, at 28 ("Collective licensing offers the benefit of decreasing transaction costs, both in negotiating and in paying licensing fees."); Spotify Comments, at 10-11 ("public performance rights are efficiently administered through collective licensing").

Because there is so much support for collective licensing, there is widespread concern over the "looming specter of publisher withdrawals from ASCAP and BMI."[34] Stakeholders would like to keep ASCAP and BMI viable for traditional licensing (such as for bars, retail establishments, radio and television[35]) and, if possible, for new media licensing as well.[36] However, one large publisher expressed the view that even if it were to withdraw from ASCAP and BMI, "[t]he societies don't go away. The societies continue to exist for those writers and publishers who don't have the resources that we're fortunate enough to have to create infrastructures to deal with licensing and data management."[37]

The Office has observed that "there are many who think . . . there's still an ongoing need for collective licensing, for reasons of efficiency and to meet the needs of smaller market participants."[38] Indeed, noting that "neither BMI nor ASCAP currently license mechanical rights, synchronization rights or lyrics rights for digital music services," many stakeholders advocated extending collective licensing to "reproduction and distribution rights required by

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[34] DiMA Comments, at 15; *see also, e.g.*, ASCAP Comments, at 36 ("[d]espite the clear benefits and pro-competitive efficiencies of collective licensing for both music creators and users – and the complexities and expense that would inevitably arise in the absence of collective licensing – [publishers' complete withdrawal] is a legitimate possibility"); SGA Comments, at 8 (SGA "cannot and does not support a solution that will allow music publishers to partially or fully withdraw their catalogs . . . without formal commitment to complete transparency as well as to music creators being granted the full value of their rights").

[35] These are huge revenue streams for songwriters and publishers that today represent approximately 90% of ASCAP/BMI revenues. Corresponding revenue streams are not available to sound recording copyright owners and their artist partners, even though these revenue streams are driven to a significant degree by interest in, and use of, popular sound recordings.

[36] *E.g.*, DiMA Comments, at 15-16; IPAC Comments, at 10; NMPA/HFA Comments, at 20; RIAA Comments, at 21; SGA Comments, at 7-9.

[37] Transcript of Los Angeles Roundtable at 35 (June 17, 2014) (statement of David Kokakis, UMPG).

[38] Transcript of Los Angeles Roundtable at 9 (June 16, 2014) (statement of Jacqueline Charlesworth, Copyright Office General Counsel).

digital services, either separately or as part of bundled rights."[39] As NMPA pointed out, "digital services can only go to so many people to negotiate."[40] Another publisher representative elaborated:

> I don't know how you could expect them to go to 300,000 music publishers, independent copyright owners and get licenses. It doesn't make sense for them and it doesn't make sense for us. So I would be certainly in favor of more discussion around the collective entities, agencies, whatever they may be considered.[41]

However, while collective licensing is necessary, and some stakeholders express concerns about direct licensing agreements,[42] many more stakeholders note that copyright owners and licensees

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[39] BMI Comments, at 6-7; *see also, e.g.*, ASCAP Comments, at 30-34 (advocating collective licensing of bundled performance and mechanical rights); Lincoff Comments, at 6-7 (advocating designation of a single collective management organization to administer a new digital transmission right, or failing that "a combination of voluntary collective rights management and direct licenses"); Modern Works Music Publishing Comments, at 4 ("Congress should authorize a collective rights society to license mechanicals in a manner similar to societies in foreign markets"); NPR Comments, at 3 ("we seek a reasonable and predictable collective licensing scheme"); Spotify Comments, at 9 (advocating receiving agent/designated agent system for Section 115); Transcript of Nashville Roundtable at 48-49 (June 4, 2014) (statement of Lee Knife, DiMA, that "the idea of some type of collective licensing, whether or not that's actually compulsory or blanket or whether it's statutorily set or it's voluntarily set, I think that a blanket license, a collective license has to happen"); *see also* Transcript of Nashville Roundtable at 38 (June 4, 2014) (statement of Brittany Schaffer, NMPA, that "I think what you'll see happen if 115 is eliminated and we end up with a free market system is that you'll see collective license agencies evolve"); Transcript of Nashville Roundtable at 165-66 (June 4, 2014) (statement of Brittany Schaffer, NMPA, that "there is going to have to be some type of a collective licensing"); Transcript of Los Angeles Roundtable at 113 (June 17, 2014) (statement of Vickie Nauman, CrossBorderWorks, that services "want to know that they can come to a simple source and pay for the rights"); Transcript of New York Roundtable at 75 (June 23, 2014) (statement of Jay Rosenthal, NMPA, that "by proposing that we get rid of Section 115 we are not, in any way, proposing that we walk away from collective licensing").

[40] Transcript of Nashville Roundtable at 171 (June 4, 2014) (statement of Brittany Schaffer, NMPA).

[41] Transcript of Nashville Roundtable at 68 (June 4, 2014) (statement of Marc Driskill, AIMP, that "if you don't have [collective licensing], I don't know how the digital companies, I don't know how anybody really works – I don't know how licensing works").

[42] *E.g.*, SGA Comments, at 7.

should retain the option to negotiate direct agreements outside a collective licensing system.[43]

C. Licensing Should Be Made More Efficient by Reducing Transaction Costs Through Blanket Licensing

Commenters desire a more efficient licensing process, and focused on blanket licensing as one way to achieve such efficiency. Blanket licensing is a form of licensing in which a whole catalog of works is made available in a single transaction on uniform terms.[44] Blanket licensing is generally the most efficient means of licensing when large numbers of works are used. It avoids the overhead associated with negotiating and managing large numbers of licenses with varying terms and provides a way for legitimate services to mitigate infringement risk. As a result, it "has been endorsed over the decades by virtually all parties across the copyright licensing spectrum and has been embraced by Congress as a model for statutory licensing and applauded by the Registers of Copyright in several reports presented to Congress."[45]

As NMPA explained, "1400 mechanical licenses for one album is a lot, and I think that there's a recognition amongst everyone at this table that that's unrealistic for a record company when it comes to the many digital services that are out there, it's unrealistic for digital

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[43] *E.g.*, DiMA Comments, at 24-25; Geo Music Group Comments, at 5 ("It's still a free country and any author should have the choice to direct license their own property or not since it's their property."); NAB Comments, at 3 ("Even where statutory or collective licenses are appropriate, they should allow for direct licensing alternatives."); NRBMLC Comments, at 10 ("direct licensing is an important alternative to the PRO blanket licenses"); NMPA/HFA Comments, at 29-30 (describing benefits of direct licensing).

[44] Although collective licensing of musical work performances has generally involved blanket licensing, the two concepts are distinct. Licenses are available from the PROs on other than a blanket basis, and reproduction and distribution licensing is often collective, but rarely blanket.

[45] BMI Comments, at 1; *see also, e.g.*, Transcript of Nashville Roundtable at 66-67 (June 4, 2014) (statement of Marc Driskill, AIMP, that "historically everyone has looked at the PROs as that's a model that works, not perfectly but it works, possibly the best model within licensing").

companies."[46] As an alternative to work-by-work licensing, there was broad recognition that "blanket licensing of mechanical royalties would add efficiencies to the marketplace."[47] Thus, many commenters advocated the extension of blanket licensing to mechanical rights, and some to a broader range of music products that might include audiovisual products. RIAA and its members believe that simplifying musical work licensing for music products with visual elements is particularly important, because such products are increasingly among the most common ways in which consumers wish to enjoy music.

Some representatives of songwriters and copyright owners "support[ed] the creation of one or more licensing agencies to negotiate fair market license rates and grant licenses on behalf of the copyright owners of the musical works on a blanket license or individual song basis."[48] They specifically suggested "consider[ing] a revision of the mechanical compulsory license to make blanket licenses available as an option."[49] They also explained that songwriters and publishers would "benefit greatly from blanket licensing," noting that "[b]lanket license agreements would create ease of use of music . . . and would help Licensees minimize notification and reporting issues."[50] As one PRO stated:

> blanket licensing is not really a concept that is controversial. Blanket licensing brings a lot of efficiencies to the process, both from music users, and creators of music. So it sounds like that is a

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[46] Transcript of Nashville Roundtable at 165 (June 4, 2014) (statement of Brittany Schaffer, NMPA).

[47] Recording Academy Comments, at 3-4 (all caps omitted).

[48] IPAC Comments, at 6-7.

[49] BMI Comments, at 5; *see also* ASCAP Comments, at 30-31 (ASCAP could license reproduction rights "on a blanket repertory-wide basis").

[50] ABKCO Comments, at 1-2; *see also, e.g.*, Modern Works Music Publishing Comments, at 5 ("A blanket licensing scheme for mechanical rights would be desirable if a collective rights society were able to afford a greater weight to specific successful recordings").

> fundamental and a foundation, you know, for going forward with any kind of improvement in copyrights.[51]

Other commenters agreed that "the music marketplace would benefit greatly from replacing the current process of licensing music on a song-by-song basis with a blanket license system."[52]

Blanket licensing does not need to imply that licensees would account to a collective, or a collective would account to its payees, on a less granular basis than any other licensing model. A blanket licensing regime can and should ensure that songwriters and publishers have appropriate visibility into royalty distributions, and that licensees provide appropriately detailed usage data to support the royalty distribution methodology employed.[53] In the first instance, songwriters and publishers should be the ones to figure out how they would like their collectives to allocate blanket license royalties.

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[51] Transcript of New York Roundtable at 279-80 (June 24, 2014) (statement of Bill Lee, SESAC).

[52] DiMA Comments, at 24; *see also, e.g.*, FMC Comments, at 4 ("[b]lanket licensing of the mechanical right may offer greater efficiencies"); Global Image Works Comments, at 1 ("to have some form of blanket licensing rubric in place would actually open up markets and allow more money to flow more freely through the system"); Kohn Comments, at 7 ("Section 115 should be amended to compel a blanket license"), 8, 9-11; Public Knowledge/CFA Comments, at 28; RIAA Comments, at 6 ("the modem marketplace needs a blanket license that conveys all necessary publishing rights"); Spotify Comments, at 3, 5-6 ("the effectiveness of the Section 115 license can be ensured if uses of musical works were covered pursuant to a blanket license").

[53] *E.g.*, Geo Music Group Comments, at 14 ("If we want to calculate blanket fees after the fact, fine, but it's scary to think the Copyright Office would even consider eliminating individual copyright royalty calculation."), 18 (criticizing ASCAP use of two-week samples); NMPA/HFA Comments, at 18 (a blanket license "is likely to reduce the incentives for compulsory licensees to invest in and operate the processes necessary to accurately account for their use of musical works on a track-by-track basis"); Simpson Comments, at 2 (criticizing PRO tracking of live performances).

D. Bundling of Rights Should Be Enabled So That Separate Licensing of Overlapping Rights Is Avoided

There is widespread agreement that bundling performance, reproduction/distribution and any other rights needed to exploit modern music products in the ways consumers have come to expect and demand "would be beneficial to the rights holders and music users."[54]

The comments reflected a range of suggestions for how such bundling might be accomplished. NMPA/HFA suggested that "the efficiency of bundled licenses" could be achieved by "obtain[ing] the complete bundle of necessary rights directly from music publishers."[55] NMPA/HFA also noted that "the only thing stopping performance rights organizations such as ASCAP and BMI from offering a bundle of reproduction, performance, and distribution rights from songwriters/publishers willing to appoint them as their agents for

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[54] ASCAP Comments, at 30; *see also, e.g.*, DiMA Comments, at 25 ("A mechanism should be put in place that enables the collective administration of an 'all-in,' combined mechanical and performance royalty."); IPAC Comments, at 8 ("A unified licensing scheme for uses that require both public performance and mechanical licenses could benefit both licensees and copyright owners"); Kohn Comments, at 7 ("Licenses under Section[] 115. . . should include any necessary reproduction licenses and public performance licenses"); Lincoff Comments, at 4-5 (suggesting new digital transmission right that would combine reproduction, distribution and performance rights in musical works, and also apply to sound recordings); Public Knowledge/CFA Comments, at 28 (to "maximize the benefits of collective licensing" Congress should "consolidate licensing for the reproduction, distribution, and public performance rights"); RIAA Comments, at 6 ("the marketplace needs bundles of rights"); Society of Composers & Lyricists Comments, at 12 ("music creators will be best served by rights collection organizations having the ability to bundle all rights").

[55] NMPA/HFA Comments, at 18; *see also* Transcript of New York Roundtable at 239 (June 24, 2014) (statement of Jay Rosenthal, NMPA, that "we need to talk more about where we can empower publisher rights to get involved in this world and to make some things simpler. The bundling of rights, absolutely."); Continuing the Songwriter Compensation Conversation, https://www.nmpa.org/aboutnmpa/presidentscorner.asp ("we could simplify the licensing process significantly by removing the artificial divisions among different types of licenses").

such rights are outdated consent decrees."[56] Other commenters looked for "[a] *singular* rights-clearing platform . . . essential to conform to current consumer behavior and online distribution methods."[57] It was noted that such bundling would "bring the United States into line with collective licensing practices in Europe."[58] Either way, there seemed to be broad agreement that for the use of a musical work in any activity it should not be necessary separately to license and pay for multiple rights to that work.[59]

E. Provide Better Access to Information About Repertoire and Payments

A flourishing musical work licensing marketplace requires both that potential licensees can get licensed and that royalties flow properly to music publishers and songwriters. Reliable and accessible information is critical to making that happen, and is a key part of creating a

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[56] NMPA/HFA Comments, at 18; *see also* ASCAP Comments, at 30-34 ("amending the ASCAP Consent Decree or the Copyright Act to allow bundled licensing would be beneficial to the rights holders and music users"); BMI Comments, at 15-16 ("BMI should be able to bundle rights to meet marketplace demand"); Modern Music Publishing Comments, at 5-6 ("Performing rights organizations . . . should be authorized by Congress to license mechanical rights."); Transcript of New York Roundtable at 274 (June 24, 2014) (statement of Richard Reimer, ASCAP, that "it is imperative that the ASCAP and BMI consent decrees be modified to allow for licensing of multiple rights"); Transcript of New York Roundtable at 38, 40 (June 24, 2014) (statement of Stuart Rosen, BMI, that the PROs should "have the flexibility to bundle rights").

[57] Cate Comments, at 1 (emphasis in original); Spotify Comments, at 10 (a "licensing regime in which public performance rights and mechanical reproduction rights could be obtained from a single source or pursuant to a single license is an interesting idea").

[58] BMI Comments, at 6; Transcript of Nashville Roundtable at 32-33 (June 4, 2014) (statement of Dan Coleman, Modern Music Works Publishing, that "I believe that Congress should expand the mandate of collective rights societies in the model of Europe").

[59] Some digital music services suggested achieving this result by expanding exemptions where multiple rights overlap. *See* CTIA Comments, at 13-18; DiMA Comments, at 25; Music Choice Comments, at 11-13; NRBMLC Comments, at 12-17; Sirius XM Comments, at 7-10. To the extent their purpose in making such proposals is to pay less than fair market value for all the rights they use, their proposals are contrary to the premise accepted by some of the same commenters that royalty rates should reflect fair market value, and such a rationale should be rejected. To the extent their purpose is to reduce marketplace friction, bundling of rights would achieve the same purpose.

flourishing musical work licensing marketplace. This proceeding has revealed a wide recognition of the difficulty of tracking musical work ownership. Even owners of rights to musical works often do not know the identities of their co-owners "after decades of catalog sales, estate transfers, bankruptcies, mergers and other transfers."[60] As a result it is necessary to "spend vast resources independently researching and updating ownership information related to musical compositions."[61] Many stakeholders agreed that it should be easier for everyone to understand which musical works are owned[62] and licensable[63] by whom. Various commenters noted that "[t]he digital marketplace needs a publicly available, centralized database that contains information about rights ownership."[64]

Various commenters also called for direct licensing and payment/accounting relationships between publishers (or their collectives) and services, along with an audit right of

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[60] NMPA/HFA Comments, at 12.

[61] *Id.*; *see also, e.g.,* Menell Comments, at 2 (lack of reliable databases for tracking ownership causes high costs).

[62] *E.g.*, DiMA Comments, at 28-29 (citing "the lack of transparency regarding rights ownership"); Sirius XM Comments, at 4 (repertoires of publishers withdrawing from the PROs); Spotify Comments, at 4 (describing problems identifying copyright owners).

[63] Public Knowledge/CFA Comments, at 28; RMLC Comments, at 7-9; Spotify Comments, at 11; TMLC Comments, at 16.

[64] DiMA Comments, at 4; *see also, e.g.*, Kohn Comments, at 7; Menell Comments, at 2; Modern Works Music Publishing Comments, at 10-11; RIAA Comments, at 17 n.32; Sirius XM Comments, at 7; Transcript of Nashville Roundtable at 29-30 (June 4, 2014) (statement of Lee Knife, DiMA, that "some type of data base where we could know what all of the rights were that were attendant to a particular musical work and be able to license all of the potential uses and potential exploitations that would be best for songwriters, best for their agents, best for consumers, and best for services that are trying to serve both of them"); Transcript of New York Roundtable at 381 (June 23, 2014) (statement of Waleed Diab, Google/YouTube, that "there is absolutely a need for a centralized, standardized, data base, somewhere that services can go and pull that information"); Transcript of Nashville Roundtable at 38 (June 4, 2014) (statement of Brittany Schaffer, NMPA, that "[w]e would like to see, you know, a database where we know the rights just like they know who we need rights from").

publishers/collectives as to services to ensure accuracy of payments.[65] The major record companies generally support in principle the elimination of pass-through licensing (*i.e.*, licensing where a record company "passes through" its music publishing licenses to digital service providers or other record company licensees) within the context of a structure that makes it unnecessary, and support the idea that where there is direct licensing, publishers/writers should have a direct audit right with respect to third parties that use their works.

* * *

These principles are less than a comprehensive solution to the problems stakeholders have identified, but they provide a good framework for structuring an updated system of musical work licensing. Comprehensive reform would eventually require resolving innumerable implementation details. We look forward to working with the Office and our colleagues in the music industry to make that happen.

II. Sound Recordings

The initial comments and roundtable discussions concerning sound recordings also reflected significant agreement concerning several issues. We identify and comment upon these points, and then address two other issues relating to sound recording licensing.

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[65] Castle Comments, at 2-3 (audit right under Section 115); FMC Comments, at 5 (importance of "transparency" in payments to writers); Kohn Comments, at 11 (service providers should "provide transparent access to transaction data in real-time to an independent validation service"); Modern Works Music Publishing Comments, at 3-4 (pass-through licensing); NMPA/HFA Comments, at 12-13, 14-15 (pass-through licensing and audit rights); SGA Comments, at 6-7 (pass-through licensing and royalty verification); Spotify Comments, at 9 (royalty "allocation and distribution should be fair, timely and transparent"); Transcript of Nashville Roundtable at 70 (June 4, 2014) (statement of John Barker, IPAC); Transcript of Nashville Roundtable at 191-92 (June 4, 2014) (statement of George Johnson, Geo Music Group); Transcript of Nashville Roundtable at 86, 200 (June 4, 2014) (statement of Brittany Schaffer, NMPA).

A. Areas of Significant Agreement

1. Sound Recording Licensing Generally Works Reasonably Well

The initial comments and roundtable discussions of sound recordings were markedly different in character from those concerning musical works. Stakeholders find that "the Section 112/114 statutory license system generally works well,"[66] while proposing various adjustments in its details.[67] There were almost no calls for wholesale restructuring of sound recording statutory licensing.[68]

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[66] SoundExchange Comments, at 2.

[67] E.g., DiMA Comments, at 33-35 (stating that "there is currently a need for the Section 112 and Section 114 statutory licensing process" and suggesting changes); FMC Comments, at 7-8 ("Future of Music Coalition supports the Section 114 statutory license"); MRI Comments, at 6 ("Music Reports believes that the Section 112 and 114 statutory licensing processes are necessary, and they are effective for license users."); Music Choice Comments, at 11 ("the exemptions and licenses in Sections 112 and 114 remain essential"); NAB Comments, at 2 ("The statutory sound recording licenses and exemptions are critical to music licensing."); NRBNMLC Comments, at 16 (stating that "sections 112 and 114 have been somewhat effective in according noncommercial licensees lower rates than commercial licensees" and proposing fixed fee for certain noncommercial licensees); Public Knowledge/CFA Comments, at 21-23 ("the statutory licenses in §§ 114 and 115 strike a balance"); Recording Academy Comments, at 4 ("The Recording Academy supports the statutory license under Section 114, which is beneficial for performers and efficient for licensees."); RIAA Comments, at 30 ("systems for selling and licensing sound recordings are working reasonably well where they apply"); SAG-AFTRA/AFM Comments, at 2 ("the Section 114 statutory license has delivered extraordinary benefits to music creators, music investors, digital music services and music listeners"); Sirius XM Comments, at 11 ("the statutory licenses are a necessity").

[68] *See* Geo Comments, at 22-23 (suggesting abolition of the sound recording statutory licenses); Kohn Comments, at 6-8 ("Section 114 should be expanded so that its compulsory provisions cover all forms of digital audio deliveries and transmissions").

2. There Should Be Platform Parity, Including a Terrestrial Performance Right

A diverse group of commenters agreed that "[p]latform parity is a lofty principle that should be the goal."[69] As one commenter explained, "[t]he use of different rate standards for different licenses and different delivery platforms is both irrational and inequitable."[70] Except for broadcasters,[71] pretty much everyone agrees that "[p]erhaps the most glaring disparity in the current licensing environment for music is the lack of a public performance right for terrestrial radio."[72] "Continuing the distinctions . . . whereby AM/FM radio is exempted from any sound

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[69] CFA/Public Knowledge Comments, at 9 (noting an "important caveat" that "[p]latforms should be treated at parity, as long as they provide similar functions."); SESAC Comments, at 8-9 ("To the extent that the Copyright Act continues to offer statutory licenses, the ratesetting standards underpinning those licenses should reflect the fundamental truth that the various services are competing for the same users."); Sirius XM Comments, at 2 ("platform parity must be the goal" (all caps omitted)).

[70] Recording Academy Comments, at 8; Transcript of Nashville Roundtable at 230 (June 4, 2014) (statement of Lee Knife, DiMA, that "it does make sense to have a unified rate standard").

[71] *E.g.*, NAB Comments, at 28-30 (inaccurately referring to statutory royalties as a "performance tax"); NRBMLC Comments, at 17-19; *see also* Transcript of Los Angeles Roundtable at 143 (June 16, 2014) (inquiry by Steve Marks, RIAA, whether, after NRBMLC representative left the room, "anybody disagrees on the terrestrial rights," was met with laughter).

[72] FMC Comments, at 14; *see also, e.g.*, A2IM Comments, at § 13 ("AM/FM broadcasters make billions selling ads to folks who tune in for our music while our sound recording creators get nothing"); Copyright Alliance Comments, at 2 ("[a]mong the obstacles hindering equitable compensation of musicians and others involved in the creation and delivery of musical works and sound recordings are the lack of a full public performance right in sound recordings"); DiMA Comments, at 40 ("the current system lacks balance and further tilts the competitive landscape in favor of some music service providers, to the disadvantage of others"); LaPolt Comments, at 2 ("American recording artists still do not receive performance royalties from terrestrial radio, thus missing out on a large revenue stream, including substantial revenues from foreign countries, which artists in nearly every other industrialized country receive"); Recording Academy Comments, at 9 ("Nowhere is this disparity more clear, however, than in the context of terrestrial AM/FM radio."); SAG-AFTRA/AFM Comments, at 6 ("The single most fundamental platform parity issue facing Artists today is the absence from U.S. law of a full public performance right in sound recordings."); SoundExchange Comments, at 16 ("The loophole that allows terrestrial radio (*i.e.*, over-the-air broadcast channels on AM/FM/HD) to use copyrighted sound recordings without paying continues to be the most glaring inequity in music licensing.).

recording performance right obligation, while satellite, Internet, and other digital audio services (including simulcasts of those very same AM/FM broadcasts) are not – is bad and unjustified policy."[73]

Similarly, three services "grandfathered" under Section 114(f)(1) enjoy rates set under the Section 801(b) standard at levels that are intentionally below-market as the result of decisions made years ago on the theory they were start-ups in need of a break.[74] However, these grandfathered services are no longer start-ups – after more than 20 years, they are the oldest and most mature digital music services. The largest grandfathered service, Sirius XM, argues vigorously in support of platform parity, although it would prefer to have such parity on the basis that all services would have the opportunity to have rates set at below-market levels pursuant to the Section 801(b) standard.[75] Only Music Choice[76] seriously argues that the grandfathered

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[73] Sirius XM Comments, at 3; *see also, e.g.*, ABKCO Comments, at § 13 ("[t]errestrial radio should start paying out on sound recordings"); Content Creators Coalition Comments, at 1 ("we support a full public performance right for sound recordings, to apply in areas beyond digital audio transmission such as terrestrial radio"); Gear Comments, at 3 ("we support the right of performers to receive separate performance royalties on terrestrial radio"); Geo Music Group Comments, at 22 ("Radio more than television must start paying for all the copyrights they have used for free and stop calling it a tax."); Kohn Comments, at 7 ("Section 106(6) be expanded to provide sound recording owners with the exclusive right of public performance *by any means*." (emphasis in original)).

[74] *See* RIAA Comments, at 31 & n.45 (explaining how the Section 801(b) standard has been used to set royalty rates for the grandfathered services that are deliberately less than fair market value); SoundExchange Comments, at 14-15 (same); *see also* Transcript of New York Roundtable at 302 (June 23, 2014) (comment by Jacqueline Charlesworth, Copyright Office General Counsel, that "even the people who support 801(b) sort of tend to frame it in terms of we need the CRB to be able to adjust rates, to help grow new services").

[75] Sirius XM Comments, at 2-4, 13-15. It is only as a fall-back, if Sirius XM could not have platform parity on the terms it wants, that it half-heartedly suggests that it might be entitled to special treatment after all. Sirius XM Comments, at 14-15.

[76] Music Choice Comments, at 34-36. However, if there is a theme to Music Choice's comments as a whole, it is that rates should be set to reflect competitive, free market dynamics. Addressing

Footnote continued on next page

services should be specially advantaged relative to newer services.[77] The time has come to erase the arbitrary distinctions that have put some types of performance services on a significantly different footing than others.

While almost everyone agrees that there should be one rate standard for all types of services, there is disagreement concerning what that standard should be. Services advocate making that standard the one set forth in Section 801(b)(1), or frequently a variation on it that is somewhat more favorable to them.[78] It is not surprising that services would favor Section

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the topic of "platform parity," Music Choice explains that in competitive markets, rates would reflect "different business models, cost structures, consumer demand, and price sensitivities, among other factors." *Id.* at 34. What is notably absent from Music Choice's list is longevity. Thus, Music Choice reserves for itself a special principle that as a long-time incumbent provider, it should be shielded from competition and other marketplace forces that apply to every other stakeholder in the music marketplace. Muzak, the other grandfathered service, did not file initial comments in this proceeding.

[77] *E.g.*, FMC Comments, at 8 ("it has become apparent that the original rationale for satellite and Internet radio falling under different rate standards may no longer be appropriate"); Recording Academy Comments, at 6 ("The Recording Academy believes that all digital music services should use the same standard that pays fair market value to artists."); SAG-AFTRA/AFM Comments, at 5 (preexisting subscription services/SDARS "are well-established, and neither they, nor any other business, should have the benefit of a rate standard designed to lower rates beyond the fair market value that will fairly reward struggling Artists for their creative work."); SoundExchange Comments, at 6-7 ("The special status of Sirius XM, Music Choice and Muzak cannot be justified on a public policy basis"); Transcript of Nashville Roundtable at 230 (June 4, 2014) (statement of Lee Knife, DiMA, that "it does make sense to have a unified rate standard").

[78] *E.g.*, DiMA Comments, at 35-37 (noting that willing buyer/willing seller "has consistently resulted in royalty rates that are disproportionately higher than in contexts that rely on the 801(b) standard"); EMF Comments, at 13-14 (advocating modified Section 801(b)(1) with special consideration of noncommercial service mission); Music Choice Comments, at 38 (Section 801(b)(1) is "superior" because "it has been in use longer" and is "policy driven and flexible," but suggesting that it "be improved and clarified"); NAB Comments, at 26-28 (same); NRBMLC Comments, at 22 (advocating Section 801(b)(1) but suggesting "adjustments"); NRBNMLC Comments, at 18-19 (advocating Section 801(b)(1) "as modified by NAB"); Sirius XM Comments, at 13 ("The 801(b) standard should be retained as written."); *see also* Spotify Comments, at 6-7 (calling Section 801(b)(1) "probably appropriate" for Section 115 and criticizing willing buyer/willing seller).

801(b)(1). Services have seen the preexisting subscription services/SDARS enjoy rates set under the Section 801(b)(1) standard at levels intentionally below fair market value, at a loss to artists and copyright owners of approximately $1 billion in the case of satellite radio over the period 2007-2013.[79]

While these services try to articulate principled justifications for a rate standard that permits the Copyright Royalty Judges to set rates at less than fair market value, these justifications ring hollow. First, many of the same services have praised application of a fair market value or willing buyer/willing seller standard[80] to ASCAP and BMI.[81] Second, the Copyright Royalty Judges have held that the Section 801(b)(1) standard should be applied by starting with consideration of benchmarks that are indicative of fair market value, and then adjusting only as necessary where the Section 801(b)(1) "policy objectives weigh in favor of

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[79] RIAA estimate based on publicly-reported revenues of Sirius XM and its predecessors, adjusting for differences between such revenues and the statutory royalty base for SDARS, and taking the difference between 13% of the adjusted revenues (the royalty rate indicated by the *SDARS I* marketplace benchmarks) and the actual statutory royalty rates, which grew from 6% to 9% over the 2007-2013 period.

[80] The ASCAP and BMI consent decrees contemplate that the rate courts will set a reasonable royalty, and have interpreted reasonable in that context to mean "the fair market value – 'the price that a willing buyer and a willing seller would agree to in an arm's length transaction.'" *United States v. Broad. Music, Inc.*, 316 F.3d 189, 194 (2d Cir. 2003) (quoting *ASCAP v. Showtime/The Movie Channel, Inc.*, 912 F.2d 563, 569 (2d Cir. 1990)); *see also* Transcript of New York Roundtable at 49 (June 24, 2014) (statement of Paul Fakler, NAB/Music Choice, explaining that "[t]he legal standard, in both of the rate courts, is fair market value. . . . And it is a willing buyer/willing seller, in a competitive market, a hypothetical competitive market.").

[81] DiMA Comments, at 12, 27 & n.57, 30 & n.64 (quoting approvingly rate court statements concerning fair market value); Music Choice Comments, at 5 ("Although the rate court process is not perfect, it is essential to the fair market collective licensing of musical composition copyrights."); NRBMLC Comments, at 12; Sirius XM Comments, at 4 ("the ASCAP and BMI consent decrees and the licensing process that they mandate work relatively well").

divergence from the results indicated by the benchmark marketplace evidence."[82] Thus, the main difference between the two standards is Section 801(b)(1)'s potential for the Judges to make a conscious decision that rates should be other than fair market value.[83]

Just as stakeholders agree that musical work rates should reflect fair market value, so too should sound recording rates. Where fair market value is not determined through free market negotiations, there should be one rate standard, and it should be some form of a fair market value standard.[84]

3. Something Should Be Done About Pre-1972 Recordings

Many commenters supported some form of federal legislation to address the status of pre-1972 recordings that are not already protected under federal copyright law. Some commenters advocated that "federal copyright protection should be extended to pre-1972 sound recordings"

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[82] Adjustment of Royalty Payable Under Compulsory License for Making and Distributing Phonorecords; Rates and Adjustment of Rates, 74 Fed. Reg. 4510, 4523 (Jan. 26, 2009) (quoting Determination of Rates and Terms for Preexisting Subscription Services and Satellite Digital Audio Radio Services, 73 Fed. Reg. 4080, 4094 (Jan. 24, 2008).

[83] This potential complicates rate proceedings by inviting the participants to place every aspect of their businesses at issue, in the hope that the Judges will sympathize with something they hear and decide to deviate from the more objectively-established fair market value. *See* SoundExchange Comments, at 7-8.

[84] *E.g.*, SAG-AFTRA/AFM Comments, at 5 ("the royalties paid to copyright owners and creators should not be artificially lowered below a fair market value"); SGA Comments, at 12-13 ("we believe that both sound recording owners and the creators and owners of musical compositions deserve fair market value for their works"); SoundExchange Comments, at 6 ("all statutory licenses should be governed by the principle that creators should receive fair market value for their work"); SESAC Comments, at 9 ("the principal goal of any statutory license ratesetting should be to reflect rates that would otherwise be agreed to in a free market"); Transcript of New York Roundtable at 22 (June 23, 2014) (statement of Richard Bengloff, A2IM, that "I'm very much in favor of willing buyer, willing seller").

(sometimes referred to as "full federalization").[85] Other commenters said that "[p]re-1972 sound recordings do not necessarily need federal copyright protection," but that "pre-72 recordings should absolutely be included under Sec. 112 and 114."[86] The latter simpler and more limited approach is the one embodied in the Respecting Senior Performers as Essential Cultural Treasures (RESPECT) Act (H.R. 4772), which RIAA and its members support.

While it's clear that some Section 114 statutory licensees would prefer not to pay for pre-1972 recordings, and they attempted to litigate in this proceeding the issues now presented in

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[85] SESAC Comments, at 7; *see also, e.g.*, BYU Comments, at § 10 ("federal copyright protection should definitely be extended to pre-1972 sound recordings"); FMC Comments, at 8-10 (advocating full federalization of pre-1972 recordings); Gear Comments, at 3 ("we support the right of performers . . . to receive copyright protection, compensation and termination rights on pre-1972 sound recordings"); Geo Music Group Comments, at 23 (pre-1972 recordings should be federalized, but not subject to licensing at rates set by the Copyright Royalty Judges); IPAC Comments, at 10-11 ("[t]he music marketplace would benefit by extending federal copyright protection to pre-1972 sound recordings"); Kohn Comments, at 14-15 (advocating federalization); Modern Works Music Publishing Comments, at 8-9 (advocating federalization for pre-1972 recordings that are unpublished or still owed by their creators).

[86] ABKCO Comments, at § 10; *see also, e.g.*, A2IM Comments, at § 10 ("Pre-1972 sound recordings should be included within the Section #112 and #114 statutory licenses."); LaPolt Comments, at 8-11 (advocating full federalization, but in the absence thereof suggesting that Congress address non-payment by statutory licensees); Library of Congress Comments, at 2-4 (advocating full federalization, or at least application of statutory licenses and Sections 107 and 108); NMPA/HFA Comments, at 23 ("Artists releasing pre-72 recordings deserve to be paid for exploitation of their works, including by non-interactive services."); Recording Academy Comments, at 6-8 (advocating full federalization, but "[a]t a minimum, and as a stop-gap until full federalization can be achieved," advocating inclusion in statutory licenses); RIAA Comments, at 32 ("we propose incorporating pre-1972 recordings into the federal statutory license system"); SAG-AFTRA/AFM Comments, at 5 ("whether or not pre-72 works are ever accorded full federal copyright protection, they should, at a minimum, be brought within the purview of the Section 114 statutory license"); SoundExchange Comments, at 10 ("Pre-1972 sound recordings should be incorporated into the statutory licenses.").

various state court actions,[87] services do not uniformly oppose legislation to address pre-1972 recordings. DiMA takes a neutral position concerning federalization of pre-1972 recordings, but advocates either full federalization or no federalization.[88] While Music Choice argued against any current or future state law performance right in pre-1972 recordings, it advocated creation of "an express safe harbor for licensees who choose to report and pay SoundExchange (or any other designated collective) for uses of pre-1972 sound recordings." It also indicated that "[i]f such a safe harbor could not be implemented, the only alternative would be to extend federal copyright, including the digital performance right and statutory limitations on that right, to pre-1972 sound recordings."[89] While Sirius XM argued against federalization of pre-1972 recordings in its initial comments,[90] at the hearing conducted by the House Judiciary Subcommittee on Courts, Intellectual Property and the Internet on June 25, 2014, Sirius XM suggested that it would be supportive of addressing pre-1972 recordings as part of addressing the terrestrial radio loophole.[91]

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[87] *E.g.*, Music Choice Comments, at 13-16; NAB Comments, at 7-8; Sirius XM Comments, at 22-23. We believe these services are incorrect in their characterizations of state law, and note that at least one court has recognized the existence of digital performance rights under state law for pre-1972 recordings. *E.g.*, *Capitol Records, LLC v. BlueBeat, Inc.*, 765 F. Supp. 2d 1198, 1205-06 (C.D. Cal 2010). However, we do not think it is productive to debate the point at length in these comments.

[88] DiMA Comments, at 39.

[89] Music Choice Comments, at 16.

[90] Sirius XM Comments, at 22-24.

[91] Hearing: Music Licensing Under Title 17 Part Two, Webcast Part One (June 25, 2014), http://judiciary.house.gov/index.cfm/2014/6/hearing-music-licensing-under-title-17-part-two (statement of David Frear, Sirius XM, at approximately 2:10:10 of the archived webcast, that "I would be supportive of closing the loophole that Mr. Conyers referred to. That loophole includes terrestrial radio as well as pre-72.")

If not addressed legislatively, the issues will likely continue to be addressed through litigation. If services relying on the convenience of the statutory licenses for licensing of federally-protected recordings eventually come to understand that they will have to obtain direct licenses under state law rights for their use of pre-1972 recordings, we expect that they will join Music Choice in advocating some form of federalization of pre-1972 recordings. We think it makes sense to address the needs of legacy artists now, and what is achievable now is incorporation of pre-1972 recordings into the statutory licenses as proposed in the RESPECT Act.

B. Additional Issues

With so many parties filing initial comments or appearing at one or more of the roundtables, and an even larger number of issues raised by all those commenters, it is not feasible to respond point-by-point to everything that anyone had to say.[92] We address just two further points relating to the statutory license system.

1. Interactivity and Other Section 114 Statutory License Conditions

Numerous commenters addressed the definition of "interactive service" in Section 114(j)(7), and whether that or other statutory license conditions should be relaxed to permit licensees to engage in a broader scope of activity under the Section 114 statutory license.

In considering any possible changes in Section 114, it is important to understand the relationship between statutory license rates, the emergence of access models, and the expanding personalization of services since the Second Circuit's decision in *Arista Records, LLC v. Launch*

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[92] For example, it does not seem necessary to respond point-by-point to certain commenters' insinuations of impropriety in various types of commercial transactions. If there is anything to such charges, any aggrieved parties have other forums in which to address those issues.

Media, Inc., 578 F.3d 148 (2d Cir. 2009).[93] As RIAA explained in its initial comments,[94] in a market in which access models are rapidly becoming more important, and replacing ownership models for some consumers' enjoyment of music, it does not make sense to permit increasingly personalized webcasting functionality at rates set on the assumption that services will provide a non-interactive user experience.

Some commenters called for modification of the interactivity limitation to allow even more personalization functionality to be covered by Section 114.[95] However, the market is functioning well for interactive services, and there is no market failure of the type that has traditionally justified statutory licensing. Thus, calls to include more interactive functionality within the scope of the statutory license should be rejected. Instead, and at a minimum, services

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[93] Various commenters noted the expansion of functionality being offered in purported reliance on the statutory licenses. *E.g.*, A2IM Comments, at § 8 ("the line between interactive and non-interactive services is increasingly getting blurred"); ASCAP Comments, at 44 ("Customized Internet radio has approached interactivity in every sense of the word except under the outdated requirements of the statutory definition."); Music Choice Comments, at 16 (subsequent to the *Launch* decision, "the industry and licensing practices have adapted to this ruling"); NMPA/HFA Comments, at 25 (referring to the emergence of "new digital music services that blur the line between interactive and non-interactive transmissions"); Recording Academy Comments, at 4 ("in today's marketplace the line between interactive and non-interactive services is increasingly blurred"); SAG-AFTRA/AFM Comments, at 6 ("there now exist a variety of 'customized' digital music services with a myriad of gradations of functionality").

[94] RIAA Comments, at 33-34, 37-38.

[95] A2IM Comments, at § 8 (suggesting that more services should be allowed to operate within the statutory license); Kohn Comments, at 7 ("Section 114 should be expanded so that its compulsory provisions cover all forms of digital audio deliveries and transmissions, including interactive digital audio transmissions and digital phonorecord deliveries."); Recording Academy Comments, at 5 ("the definition of 'interactive service' should be narrowly defined to cover those services that truly offer an 'on-demand' experience"); *see also* FMC Comments, at 12 ("FMC would also consider supporting the expansion of a statutory license for sound recordings on interactive music services."); SAG-AFTRA/AFM Comments, at 6 (stating that "most customized services belong within the scope of the Section 114 statutory license" but not clearly advocating change in the definition of interactivity).

offering more functionality within the current scope of the statutory licenses, such as personalization features, should pay higher rates.[96]

Various representatives of services – and particularly broadcasters – suggested other modifications to statutory license conditions and related exemptions to allow them to make expanded use of sound recordings under those provisions.[97] The existing conditions on the statutory licenses represent carefully crafted compromises that have allowed thousands of services to operate successfully for many years. We do not believe it makes sense to reopen negotiations over the scope of the statutory licenses at this time. Record companies certainly have their own views concerning things they would like to see changed if the scope of the statutory licenses and exemptions were thrown open to renegotiation.

2. Ephemeral Recordings

Some services proposed repealing the Section 112(e) statutory license and substituting a broadened Section 112(a) exemption to avoid purported "double-dipping."[98] These services quote selectively and misleadingly from a study of incidental copying completed by the Office in

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[96] *See* RIAA Comments, at 33-34.

[97] *E.g.*, NAB Comments, at 4 ("The sound recording performance complement and other restrictions related to the Section 114 license should be re-evaluated and most of the restrictions should be removed."); NRBMLC Comments, at 22-25 (suggesting modification of various conditions as to broadcasters); Sirius XM Comments, at 17-21 (suggesting "a thorough review of all of the various requirements and their continued necessity/viability"); SRN Broadcasting Comments (suggesting modification of the sound recording performance complement to permit "tribute" shows).

[98] Sirius XM Comments, at 7-10 (suggesting broadening of Section 112(a) as "one possibility" for addressing the "'double dip' problem" in musical work licensing); CTIA Comments, at 1, 17-18 (referring to "double-dip rights claims" and advocating that "the ephemeral recording exemption in section 112(a) should be broadened for both musical works and sound recordings, and the statutory license in section 112(e) should be eliminated"); *see also* Music Choice Comments, at 11-13 (advocating broadening of Section 112(a) and repeal of Section 112(e)); NAB Comments, at 5-7; NRBMLC Comments, at 13-15.

2001. By confusing the Office's discussion of server and buffer copies and sound recordings and musical works, these commenters use the Office's words to try to justify exemptions beyond the scope of the Office's 2001 study and recommendations.[99]

Whatever the Office might have believed based on the record before it in 2001, these services' proposals in this proceeding reflect a misunderstanding of the current role of ephemeral recordings, as well as relevant marketplace agreements and the operation of the 112 license. First, the value of ephemeral recordings is a factual question that the Copyright Royalty Judges have answered multiple times since 2001 by assigning value to ephemeral recordings based on evidence adduced in litigated proceedings.[100] The Office should not decide based on conjecture, intuition or the unsupported arguments of services' lawyers that the Judges' conclusions have been wrong. In fact, reproduction of ephemeral recordings by services does have value. Simply by way of example, services frequently make additional ephemeral copies (*e.g.*, on edge servers) because that provides them improved quality of service, operational efficiencies or other

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[99] In that study, the Office rejected calls for a blanket exemption for incidental copies; analyzed the status of temporary copies incidental to licensed performances of musical works; observed licensing problems for musical works similar to those addressed in Part I, while finding no such problems in the case of sound recordings; and recommended legislation "to preclude any liability arising from the assertion of a copyright owner's reproduction right with respect to temporary buffer copies that are incidental to a licensed digital transmission." Register of Copyrights, U.S. Copyright Office, DMCA Section 104 Report, at 132-43 (Aug. 2001). The Office concluded that "buffer copies have no independent economic significance." *Id.* at 143. By analogy, it noted that exempt ephemeral recordings "have no economic value independent of the public performance that they enable." *Id.* at 144. In a footnote, the Office expressed its preference for the repeal of Section 112(e) and a broadened ephemeral recordings exemption. *Id.* at 144 n.434.

[100] *E.g.*, Determination of Royalty Rates for Digital Performance Right in Sound Recordings and Ephemeral Recordings, 79 Fed. Reg. 23,102, 23,104-05 (Apr. 25, 2014) ("agreed provisions are supported by the parties and the evidence"; "testimony offered by SoundExchange supported this proposal").

competitive advantages. One would naturally expect them to pay for a privilege having such effects.

These services' concerns about the continued existence of the Section 112(e) license also are misplaced. The current statutory scheme replicates marketplace agreements for sound recordings, in which licensees commonly acquire performance and related reproduction rights in a single transaction and pay a bundled royalty that covers both rights. As the Section 112/114 licenses have been implemented in practice, the Judges set a bundled royalty that covers both statutory licenses where they apply, and SoundExchange allocates licensees' payments in a way that is completely transparent to the services.[101] There is no reason to change a system that is working, replicates the marketplace, and places no additional burden on statutory licensees.

III. The Office's Specific Questions

A. Data and Transparency

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

As described in RIAA's initial comments in this proceeding, stakeholders all devote significant resources to maintaining redundant and often inconsistent databases of musical work ownership and split information. [102] It clearly would be desirable to have a single, comprehensive and authoritative source of musical work data, and maintaining such a database would doubtless require less collective cost and effort than stakeholders presently put into

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[101] *See, e.g.*, DiMA Comments, at 26 (SoundExchange "collects a single 'all-in' royalty that covers both the Section 112 and Section 114 rights").

[102] RIAA Comments, at 17 n.32, 20, 22.

maintaining many separate databases. However, putting the question of how to achieve that result before considering the overall architecture of the musical work licensing systems is putting the cart before the horse. If there was to be a new collective licensing structure for musical works, it seems reasonably clear that the collective(s) should maintain a central database, and the primary questions would be how to populate and pay for that database. If the law was changed in any other way, the data question would have to be answered with an eye toward what the market might look like after such changes.

In the case of sound recordings, it is not evident to us that there is a significant data problem. Ownership of commercial recordings is rarely divided among multiple co-owners (except by territory); record companies owning commercially significant recordings are less numerous than music publishers (including self-published songwriters) owning shares of commercially significant songs; ownership information typically appears on physical product packaging or is provided to digital music services in metadata feeds they receive from record companies delivering recordings to them;[103] ownership of recordings generally changes less frequently than in the case of musical works; and label and other information about many commercial recordings is available from publicly-available internet sources such as allmusic.com and discogs.com. However, as RIAA has explained elsewhere, the Office could facilitate the availability and use of authoritative data by collecting, on a voluntary basis, standard identifiers as part of the registration and recordation processes.[104]

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[103] Transcript of New York Roundtable at 334-36 (June 23, 2014) (testimony of Andrea Finkelstein, Sony Music, describing metadata delivered by record companies).
[104] RIAA Comments in Docket No. 2014-1, at 10-12.

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?

As RIAA has explained elsewhere, the International Standard Musical Work Code or "ISWC" (ISO 15707) is the preferred standard identifier for musical works. For sound recordings, it's the International Standard Recording Code or "ISRC" (ISO 3901). And for contributors to and distributors of creative works, the preferred standard identifier is the International Standard Name Identifier or "ISNI" (ISO 27729).[105] However, while ISRCs are at this point generally used for commercial recordings (because many record companies assign them as a matter of course and iTunes requires them[106]), the Office should recognize that a particular standard identifier may not in all instances be associated with a particular work (or version thereof) or person or entity involved with a work.

ISRCs are ultimately managed by the International ISRC Agency (the International Federation of the Phonographic Industry ("IFPI") Secretariat). One of its key functions is to appoint ISRC agencies at the national level. In the United States, RIAA is the National ISRC Agency. As such, RIAA manages the assignment of registrant codes, which allow record companies or "ISRC Managers" (typically distributors) to assign ISRCs to the recordings they bring to market. Further details concerning this process are explained in the Comments of IFPI and RIAA (the "ISRC Agencies") in Docket No. 2013-2, at 3-4. We understand that ISWC and

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[105] RIAA Comments in Docket No. 2014-1, at 10.

[106] Transcript of New York Roundtable at 382 (June 23, 2014) (testimony of Andrea Finkelstein, Sony Music, that "for the majors, everything that is in digital release has an ISRC associated").

ISNI have somewhat similar tiered administrative structures, but leave it to the relevant groups to describe their details.[107]

The Copyright Royalty Judges could incentivize greater use of ISRCs, and enable more accurate payments to artists and copyright owners under the statutory licenses, by giving ISRCs a larger role in accounting under the statutory licenses. ISRCs are the cornerstone of accounting between digital music services and record companies under most private agreements, and preexisting subscription services are required to use ISRCs in their reporting under the statutory licenses "where available and feasible." 37 C.F.R. § 370.3(d)(8). However, the notice and recordkeeping regulations applicable to other types of services have always treated ISRCs merely as an option, with reporting of album title and marketing label an equally acceptable alternative. 37 C.F.R. § 370.4(d)(2)(v). This arrangement, which the Office has recognized as a "minimal level of reporting,"[108] enables significantly less matching of reported usage to known repertoire than would reporting of ISRCs. This matter is currently under review by the Judges.[109] They should adopt SoundExchange's proposal to include ISRC reporting for additional types of services on the same basis as for the preexisting subscription services.

In discussion at the New York roundtable, it was suggested that assignment of ISRCs and ISWCs might be better coordinated than it has been in the past (*e.g.*, by having the record company first recording a new song assign the ISRC and ISWC in tandem to ensure that the

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[107] *See, e.g.,* ASCAP Comments in Docket No. 2013-2, at 5-6; ISNI International Agency Comments in Docket No. 2013-2.

[108] *Notice and Recordkeeping for Use of Sound Recordings Under Statutory License*, 69 Fed. Reg. 11,515, 11,522 (Mar. 11, 2004).

[109] *Notice and Recordkeeping for Use of Sound Recordings Under Statutory License*, 79 Fed. Reg. 25,038 (May 2, 2014).

ISWC will be available to relevant stakeholders when the song is released and facilitate better mapping of ISRCs to ISWCs).[110] This possibility is worth exploring, but does not involve an obvious role for the Office.

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 nonusage-based forms of compensation (e.g., advances against future royalty payments and equity shares).

Payees of royalties should expect to receive, and payors of royalties should expect to provide, payments in accordance with the relevant payment terms, and reasonably detailed accounting appropriate to substantiate the relevant payments. That is why, for example, the record companies supported so-called "total content cost integrity" provisions in the last mechanical royalty settlement clarifying the royalty base applicable under the various Section 115 percentage-rate structures,[111] and have for the last five years participated in a collaborative process with other stakeholders to overhaul the Section 115 accounting regulations.[112]

However, methods of reporting are inherently context-dependent, and significantly addressed by private contracts. When rights are granted by contract, the contracts typically provide for compensation (which may or may not be usage based) and contain reporting and accounting provisions consistent with the applicable agreed-upon compensation model. The law could not effectively, and should not try, to rewrite all those contracts.

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[110] Transcript of New York Roundtable at 227-28, 336-44 (June 23, 2014).

[111] Adjustment of Determination of Compulsory License Rates for Mechanical and Digital Phonorecords, 78 Fed. Reg. 67,938, 67,943-44 (Nov. 13, 2013) (adding definition of "applicable consideration" and various references thereto).

[112] Mechanical and Digital Phonorecord Delivery Compulsory License, 77 Fed. Reg. 44,179, 44,180 (July 27, 2012).

Focusing on areas where there is no contract (*i.e.*, because there is a statutory license) or the terms of contracts are regulated (*e.g.*, ASCAP/BMI), an appropriate level of transparency should be provided, in a manner appropriate to the specific context. In the case of Section 115, significant progress has been made through the process noted above. If that process is not preempted by the consequences of the Office's current study, the remaining open issues are ready for resolution by the Office as it completes its rulemaking proceeding to revise the mechanical royalty accounting regulations. If there were a process to design a new collective licensing structure for musical works, designing that structure for transparency would be appropriate and desirable, and where the issue is accounting by a collective to its members, the collective and its members should be the ones to figure out such details.

B. 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.

It would be unfortunate if the widespread agreement that musical works should be licensed at fair market value, and that collective licensing is desirable, as discussed in Part I.A above, did not lead to agreement on a collective licensing structure that stakeholders would accept as resulting in fair market value royalty payments. Such a structure would moot the issue of withdrawal.

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

We think writers and publishers should determine such issues concerning the governance and internal operation of their collective licensing organizations.

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?

Industry-wide, there has been a long-term increase in performance revenue, as illustrated by the data in Exhibit A to RIAA's initial comments. This is why PROs have announced record-high revenues. Unfortunately, that increase has been more than offset by a long-term decline in recorded music product sales and associated mechanical royalty revenue, driven by piracy and other factors. Since the original Napster peer-to-peer file-sharing service emerged in 1999, total recorded music retail revenues in the U.S. have dropped about 53%. While the overall music business has declined, music consumption has increased. This increase in music consumption has driven performance revenue because it is the one part of the music business that is not easily impacted by piracy. The sad fact is that every other segment of the music industry has been hit by declining sales, although the income of any particular individual or entity (songwriter or otherwise) is a function of many factors, including industry-wide trends like these and individual circumstances such as the popularity of the relevant catalog of music, and the efforts being made to market and commercialize those works, at a particular moment in time. Without more monetization of music at retail there will simply be less money, and hence fewer career opportunities and often less personal income, in every part of the music industry. Songwriters and recording artists have become more dependent on performance revenue, but that revenue is not sufficient on its own to sustain a livelihood.

Record companies certainly have not been immune to these effects, and they have had to cut employees and artists as their revenues have fallen. Indeed, as between record companies and songwriters, songwriters have done reasonably well. The U.S. songwriting royalties paid by the major record companies, as a share of net sales revenue, increased by 44% over the decade from 2003-2012. That is to say, as the total music industry "pie" has shrunk, songwriters and publishers have received a significantly larger share, while record companies' share is correspondingly smaller. We have attached as Exhibit A to these comments a new report *#LabelsAtWork: Music Business In The Digital Age*, which was recently released by RIAA and contains additional data relevant to this inquiry.

These are long-term structural issues for everyone whose business involves creating or distributing music, and there are no easy or quick fixes. However, the music licensing system can help address these issues by removing unnecessary impediments to commercialization to allow the size of the total "pie" to grow, and ensuring fair market value compensation to creators and copyright owners when their works are used.

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

These are critically important questions that can't be answered casually or quickly. All stakeholders should want better answers than we have now about what a post-deregulation musical work licensing market might look like before moving decisively in a new direction.

RIAA supports the principle that copyright rights should be licensed in the free market whenever possible. RIAA also proposed in its initial comments a new structure for musical work licensing that embodies significant changes to Section 115 as we know it. We are not wed to that proposal, but rather to the principle that musical work licensing must be simplified and improved. We are ready to roll up our sleeves and get to work figuring out with our industry partners and the Office what a different musical work licensing structure might look like, and how we might get from here to there.

Ultimately, we expect that reform of Section 115 would require significant time to figure out and then implement whatever might replace it. If the vision for the musical work licensing market of the future involves new entities, new business relationships and new business practices – which seems quite likely – working out the details and then implementing them would have to be a multi-year process.

A transition would also need to recognize and respect the substantial base of agreements predicated on existing structures. Just by way of example, record companies have for a century been entering into mechanical license agreements incorporating by reference compulsory license provisions. There must be millions of such agreements that are active and many millions more that are latent but still technically in effect. A century worth of agreements could not all be renegotiated in a transition, and should not be disturbed by any legislation.

Looking prospectively, the 100-year history of musical work licensing suggests that some entities would have to aggregate rights to musical works (and shares thereof) for licensing under any reform scenario.[113] Whatever one thinks royalty rates should be, it just isn't realistic to think

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[113] *See* Part I.B *supra.*

that small-scale users of musical works are going to negotiate meaningfully, and on an individual basis, with owners of small catalogs of musical works (or shares of musical works) for royalty payments in the amounts implied by the small scope of the usage. As a result, where the scale of ownership or usage is small, rights either will be aggregated or the relevant works won't be well monetized.

The most obvious candidates to perform an aggregating role are the kinds of entities that have aggregated musical work rights in the past: any or a combination of larger publishers, musical work collectives such as the PROs, independent administrators and record companies. As a result, it seems possible that a new musical work licensing regime would look a lot like the current musical work licensing market, except that –

- In the absence of a regime to standardize rates, rates would be less uniform (*i.e.*, some works might command higher rates and others would likely command lower rates), and as a result decisions about which songs will be recorded may become more driven by monetary constraints than is the case today;
- Repertoire that was not aggregated for licensing would be less available (and some works might effectively drop out of the market altogether);
- In the absence of a regime to aggregate shares of songs with split ownership, there likely would be more demand for co-owners of musical works to license their works in the entirety, rather than requiring licensees to deal separately with each co-owner;
- In the absence of a single collective, there may be more overhead cost associated with clearing and tracking repertoire and royalty payments;
- There could be consolidation as works migrate toward entities that can exploit them most effectively and efficiently; and

- If there were not other mechanisms to ensure the availability of licenses, it would seem prudent for record companies to consider negotiating in advance of making a recording all the rights they would need to exploit the recording then and in the future.[114]

Absent some special provisions, oversight would normally depend on application of general principles of antitrust law to each such entity's unique circumstances.

Uses within and outside the scope of Section 115 would likely be handled similarly, because the current scope of Section 115 is a historical artifact representing only a subset of modern music products. In today's marketplace, it would make sense for the same organizations (and even the same agreements) to address broader collections of rights than those encompassed within the current limits of Section 115.[115]

C. 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?

Perhaps. Stakeholders agree that proceedings before the Copyright Royalty Judges "are long and complex" and the cost "is very high."[116] As a result, there seems to be interest in

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[114] *See* Transcript of New York Roundtable at 220 (June 23, 2014) (statement of Andrea Finkelstein, Sony Music, that "one of the things that would be an anathema, to any business, is to say that you are going to leave yourself exposed by not having the ability to exploit the thing that you are creating, in all ways you need to, in order to run your business").

[115] *See, e.g.*, Transcript of Nashville Roundtable at 39 (June 4, 2014) (statement of Brittany Schaffer, NMPA, that in a free market system agreements may also grant "lyric video rights and other rights that come with that mechanical license").

[116] DiMA Comments, at 34; *see also, e.g.,* EMF Comments, at 7 ("very time consuming and expensive proceedings"); Geo Music Group Comments, at 23 ("[t]he CRB rate setting process costs million of dollars" [sic]); Music Choice Comments, at 29 (proceedings are "incredibly

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exploring whether it might be possible to enhance the efficiency of such proceedings. Some possible streamlining measures we think might be worth considering include:

- a single-factor rate standard – like a fair market value rate standard – that can be predictably applied though economic analysis;[117]
- emphasis on early and efficient settlement, and regulations that facilitate settlement;
- earlier disclosure of a focused set of critical information;
- more limited written submissions and discovery; and
- a single hearing.

Services have proposed a variety of procedural changes too, some of which are consistent with the suggestions above. However, some of their proposals are transparently designed to tilt proceedings in their favor,[118] and should be rejected out of hand. While bemoaning the cost of proceedings, services also proposed adding additional process that would certainly have the

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expensive"); NAB Comments, at 19 ("parties expend significant time and resources"); NRBMLC Comments, at 26 (procedures "were intended to be efficient and fair" but "they are neither"); RIAA Comments, at 36 ("proceedings before the Copyright Royalty Judges are costly"); Sirius XM Comments, at 15 ("incredible expense and burdens").

[117] The current Section 801(b)(1) standard invites the parties to adduce evidence of four broad-ranging factors. The Section 114(f)(2)(B) standard invites the parties to adduce evidence of both fair market value and two additional specific factors. Each and every one of the relevant factors is litigated aggressively by all sides in every proceeding, and millions of dollars have been spent doing so, yet (fortunately) the Judges' have only occasionally based their decisions on evidence of anything other than fair market value. Proceedings will be more efficient if cases are less sprawling, and focusing the rate standard on a single decision point is a way to do that.

[118] DiMA Comments, at 34 (permit consideration of Webcaster Settlement Act agreements entered into on the understanding they would be nonprecedential); Music Choice Comments, at 32 (burden of proof on copyright owners); NAB Comments, at 20 (same).

effect of increasing costs for all participants.[119] The Office has heard this tune before. After the CARP proceeding to set the initial royalty rates for webcasting under Section 114, services that were unhappy with the result complained to Congress that paying arbitrators was prohibitively expensive, but if only rate proceedings involved more process, there would be fairer outcomes. As a result, Congress completely overhauled Chapter 8 of the Copyright Act and vested ratesetting in the Copyright Royalty Judges.[120] Due to expanded discovery and other changes they sought, proceedings before the Judges are predictably more expensive than those before the CARPs. Now, these same services don't like the Judges' decisions any better than the CARP's, so they are repeating their familiar refrain that there should be more process, and particularly more discovery, because it might allow them to find some elusive evidence that the fair market value of recordings is really much less than it has repeatedly been found to be. Rate proceedings are expensive today because there is already too much process and too many resources poured into the pursuit of collateral issues that have ultimately not proven important to the Judges' decisionmaking. If the Office is interested in improving the ratesetting process, it should look for ways to simplify and streamline proceedings, not complicate them.

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[119] DiMA Comments, at 38-39 (more and longer discovery); EMF Comments, at 12 (separate proceedings for noncommercial licensees); Music Choice Comments, at 30-32 (longer discovery, more depositions, Federal Rules, third party subpoenas, broader appellate review); NAB Comments, at 20-21 (Federal Rules of Civil Procedure and Evidence, broader document discovery, more depositions, longer discovery period); NRBMLC Comments, at 27 (Federal Rules discovery "for an expanded time period" and "the ability to take depositions of all testifying witnesses"); Sirius XM Comments, at 15-17 (more and longer discovery).

[120] Copyright Royalty Distribution and Reform Act of 2004, Pub. L. No. 108-419, 118 Stat. 2341.

D. 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?

We think the society-based models for reproduction/distribution licensing of musical works that are employed in Europe (as well as Japan and Australia) have permitted much simpler and more efficient musical work licensing than in the U.S., and provide useful examples of what might be possible in reform of U.S. systems of musical work licensing if there was agreement to move in that direction.

Probably most importantly, having a single society in each country that is able to handle musical work licensing of all or virtually all commercial repertoire for the full range of music products – including both audio and audiovisual products – is very efficient. In territories using society models for reproduction/distribution licensing of musical works, the society tracks ownership of musical works (at the share level), and distributes royalties accordingly. This has advantages for both musical work copyright owners and licensees. Copyright owners need only deal with the society to address ownership and payment issues, such as, for example, to ensure that royalties will go to the proper payee in the event of an ownership change. And licensees need only deal with the society to address their licensing and accounting issues. By contrast, in the U.S., it is necessary for each individual licensee to replicate the infrastructure and operations of a society, such as by researching ownership and verifying and tracking co-ownership shares. The inefficiency of the U.S. model is quite striking. Major record companies have many times more employees devoted to administering musical work licensing in the U.S. than in territories that have society licensing models.

The various musical work collecting societies and recorded music industry representatives have also historically negotiated percentage rate structures. These percentage-rate structures provide greater flexibility to explore new business models than the fixed cents-rate structures that have historically been dominant in the U.S., and that limit the ability of licensees to respond to new market dynamics such as the rapid decline of the ringtone market. These percentage-rate structures are also simpler to administer than the percentage rate structures that have more recently been implemented in the U.S.

These two key differences between the U.S. and other major markets have a definite effect on the music marketplace and the selection of products available to consumers. There are products that record companies release in other countries that are not released in the U.S. because the economics of U.S. mechanical royalty rate structures would make the release of those products unprofitable and/or licensing for the U.S. market would be too difficult.

The details of musical work licensing models vary from country to country, and we do not advocate wholesale copying of any other country's licensing model. We also wish to be clear that we are not suggesting a government mandate that would be imposed over the objection of the affected parties. Most of the European societies are the result of unforced developments, and we have said throughout this proceeding that reform of U.S. music licensing will be neither possible nor desirable unless songwriters and music publishers embrace it. Thus, we simply mean to suggest that, as part of voluntary, industry-wide discussions of reform, consideration should be given to adopting the aspects of musical work licensing that have worked well in other countries, and it may make sense to move in the direction of a single collective system that looks somewhat like the systems that are common in Europe and elsewhere. Embracing these concepts has the potential to grow the overall U.S. music market, which is becoming a smaller part of the global market with each passing year.

CONCLUSION

RIAA appreciates the Office's examination of the music licensing landscape and will be pleased to participate in any further discussions concerning the many important issues raised by the Office's study.

Dated: September 12, 2014

Respectfully submitted,

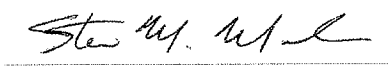

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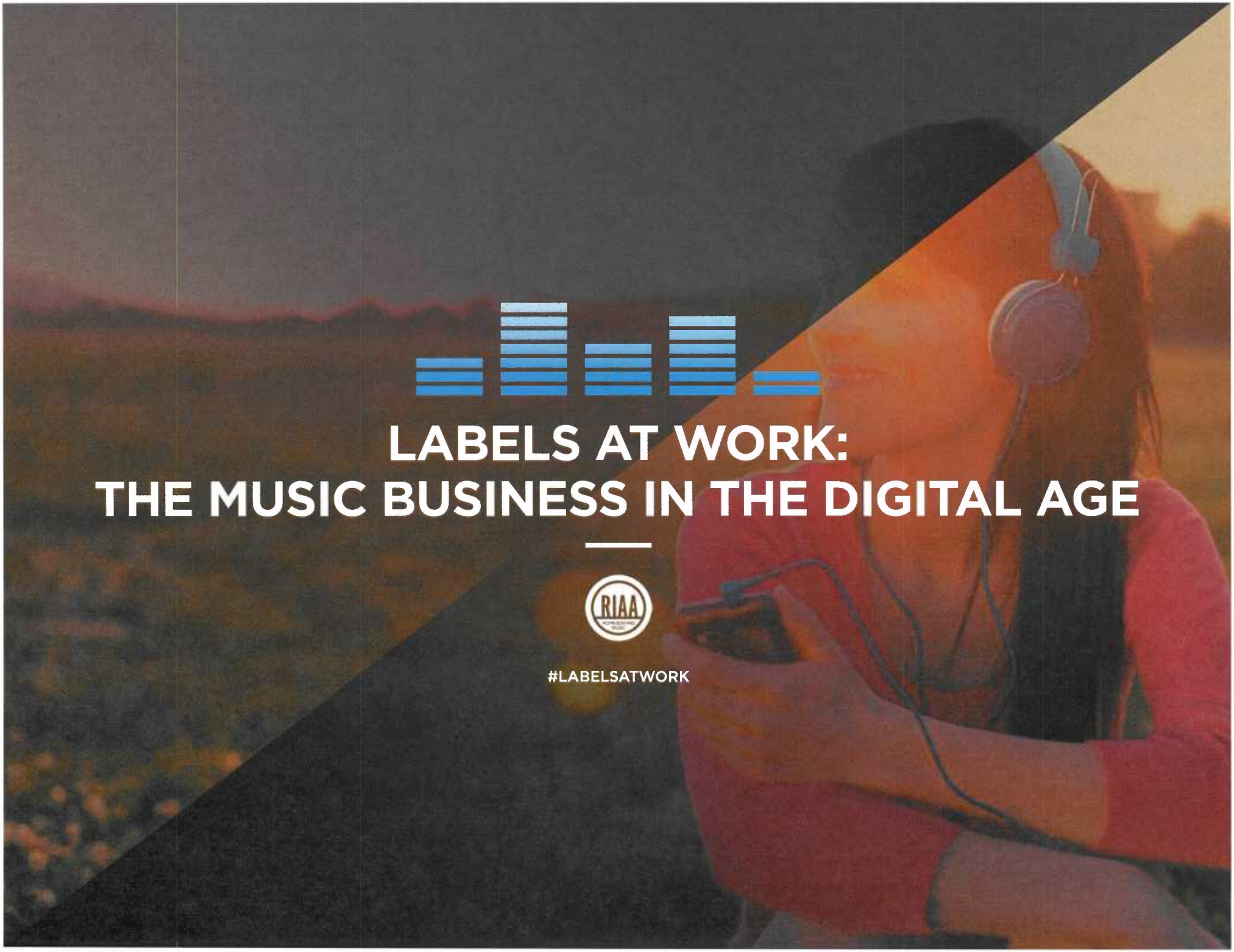
Exhibit A

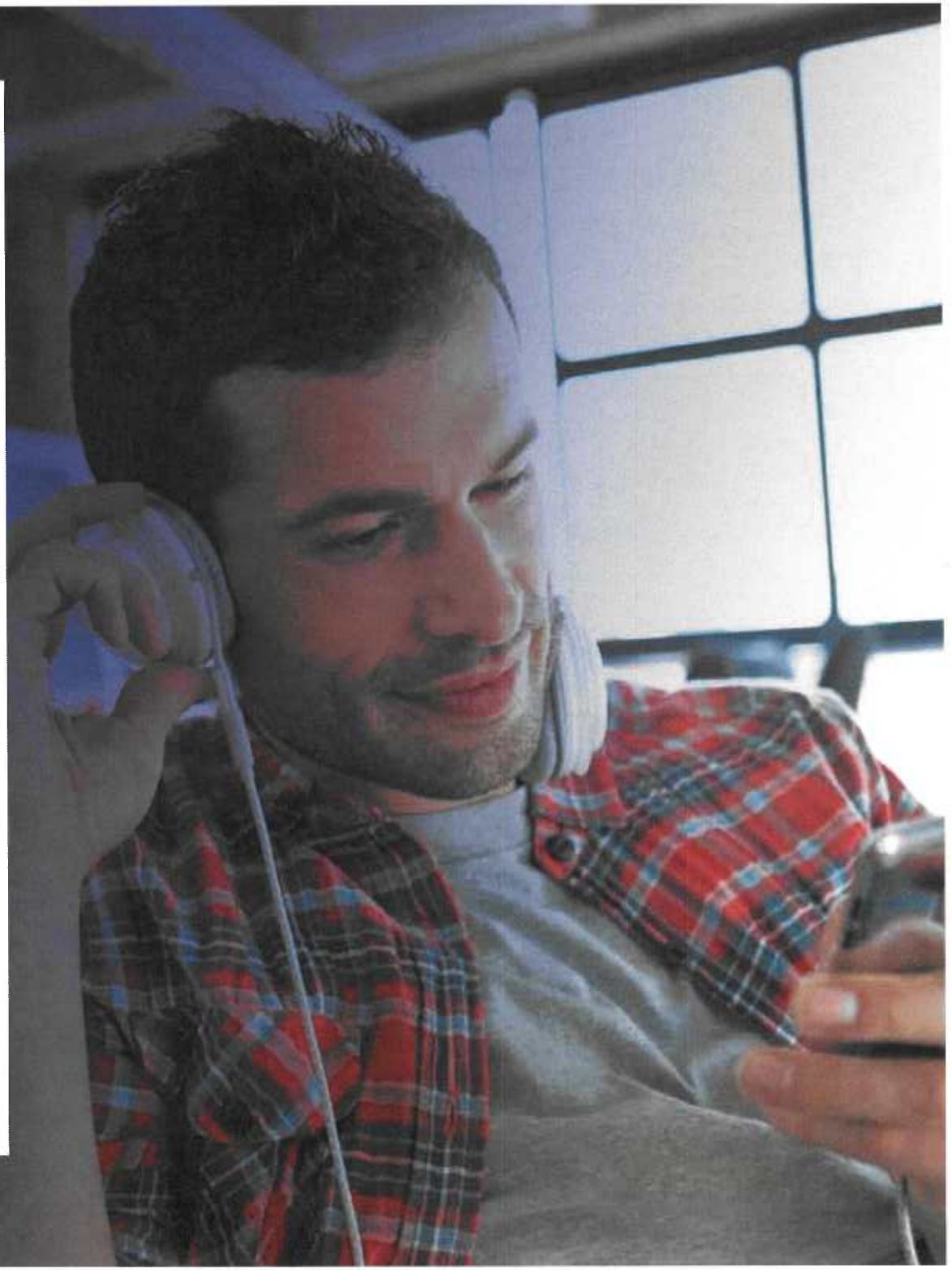
#LabelsAtWork: Music Business In The Digital Age



LABELS AT WORK:
THE MUSIC BUSINESS IN THE DIGITAL AGE

#LABELSATWORK

CONTENTS



THE DIGITAL REVOLUTION

Over the past two decades, digital, Internet and mobile technologies have revolutionized the way we create, find and enjoy music. Walking down the street, riding the subway, or sitting at a desk, the shift from stereo equipment to screens is so ubiquitous we take it for granted. For many in the music industry, the changes have made for a bumpy ride. But these innovations have also opened up nearly limitless possibilities.

Artists can create in new ways and reach fans with tools that weren't even imaginable just a few years ago. Music lovers can share what we're listening to with our friends, family and colleagues in real time, turning them on to new favorites the instant we find them ourselves. Record collections are going virtual. And new streaming services have stretched our car stereos far beyond five AM/FM presets.

REINVENTING THE MUSIC BUSINESS

Major record labels are still focused on what we do best: finding great artists, helping them reach their creative potential, and connecting them to fans. The difference is that we're embracing new digital tools to do a better job than ever before. We're essentially venture capitalists for music: investing in the great, unknown artists of today so they can become the superstars of tomorrow.

We've built digital networks to wire the 21st Century music business, digitize recordings, and connect seamlessly to retailers and services selling and streaming digital and mobile music. The result is a new, leaner, more nimble music business – one that gives our artists broader reach, creates new ways for them to earn a living from the work they love, and empowers fans to find and enjoy more music in more ways than ever.

We're still evolving, but a quick glance over the last decade or so proves that we're on the right track.

- Over 2,500 digital services licensed and operational today.
- $13.4 billion spent by major labels to find new artists and help them reach an audience.
- $20 billion spent by major labels on artist and songwriting royalties.
- Artist royalties paid by major labels increased over 36% as a share of major labels' net sales and gross licensing revenue.
- Songwriting royalties paid by major labels increased 44% as a share of net sales revenue.

RIAA represents the three major labels in the U.S. – Universal Music Group, Sony Music Entertainment, and Warner Music Group – and their wholly-owned affiliate labels such as Capitol, Republic, Motown, Columbia, RCA, Epic, Elektra, Atlantic, Warner Bros., and many more.

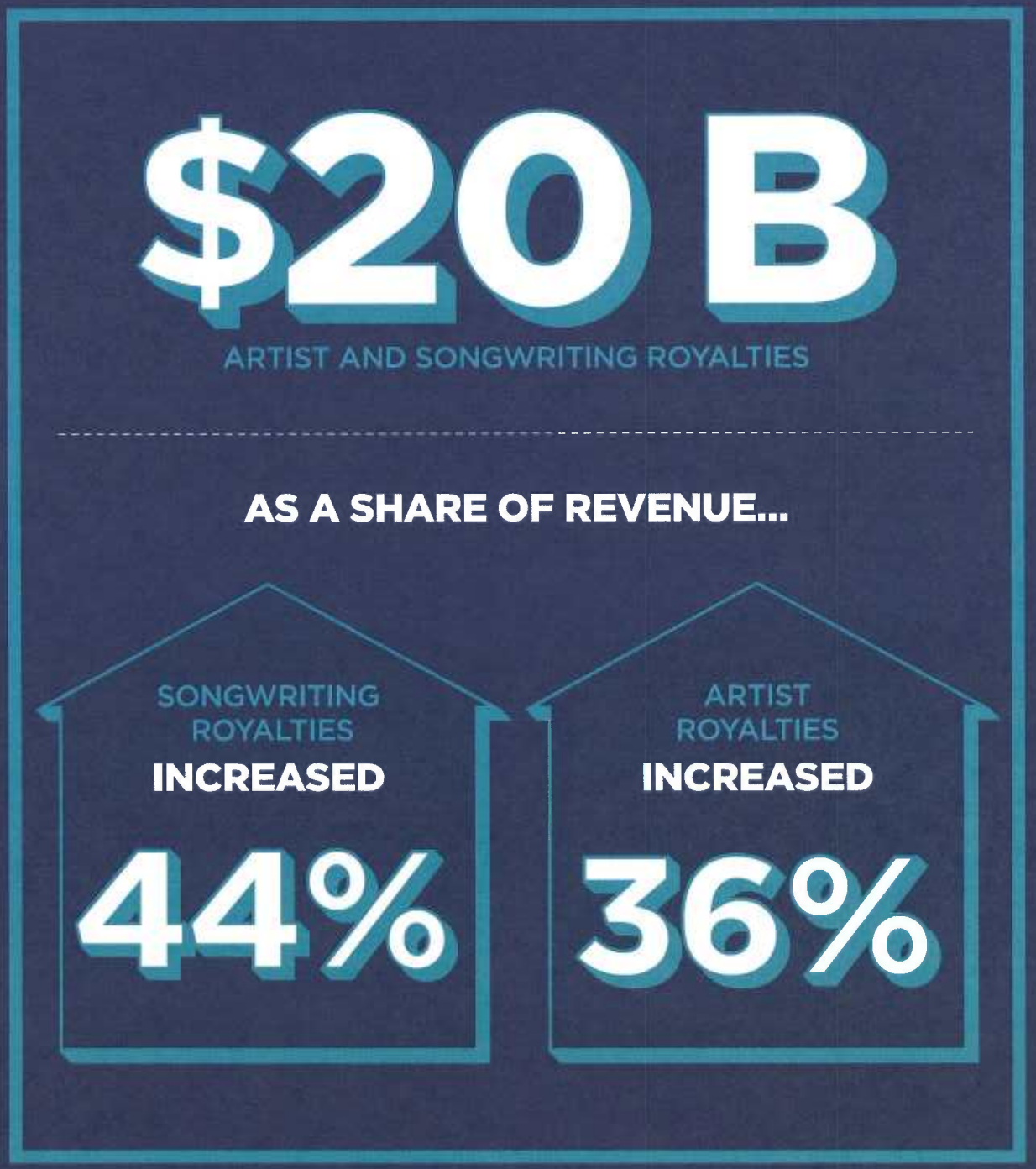
The findings in this report are based on publicly available data and data obtained from major record labels. It is limited to the US market. All decade numbers are from 2003-2012.

INVESTING IN TALENT

In the last decade, major labels have spent $20 billion in artist and songwriting royalties. And by helping craft hits that reach broad audiences, we help generate billions in additional royalties paid to performers and songwriters by performance rights organizations like SoundExchange, ASCAP, BMI, and SESAC. ASCAP and BMI paid $1.9 billion to songwriters and publishers in 2013 alone.

Songwriting royalties have skyrocketed as a share of net sales revenue[1] – increasing 44% during the last decade.

In the last decade, artist royalties have increased more than 36% as a share of major labels' net sales and gross licensing revenue.

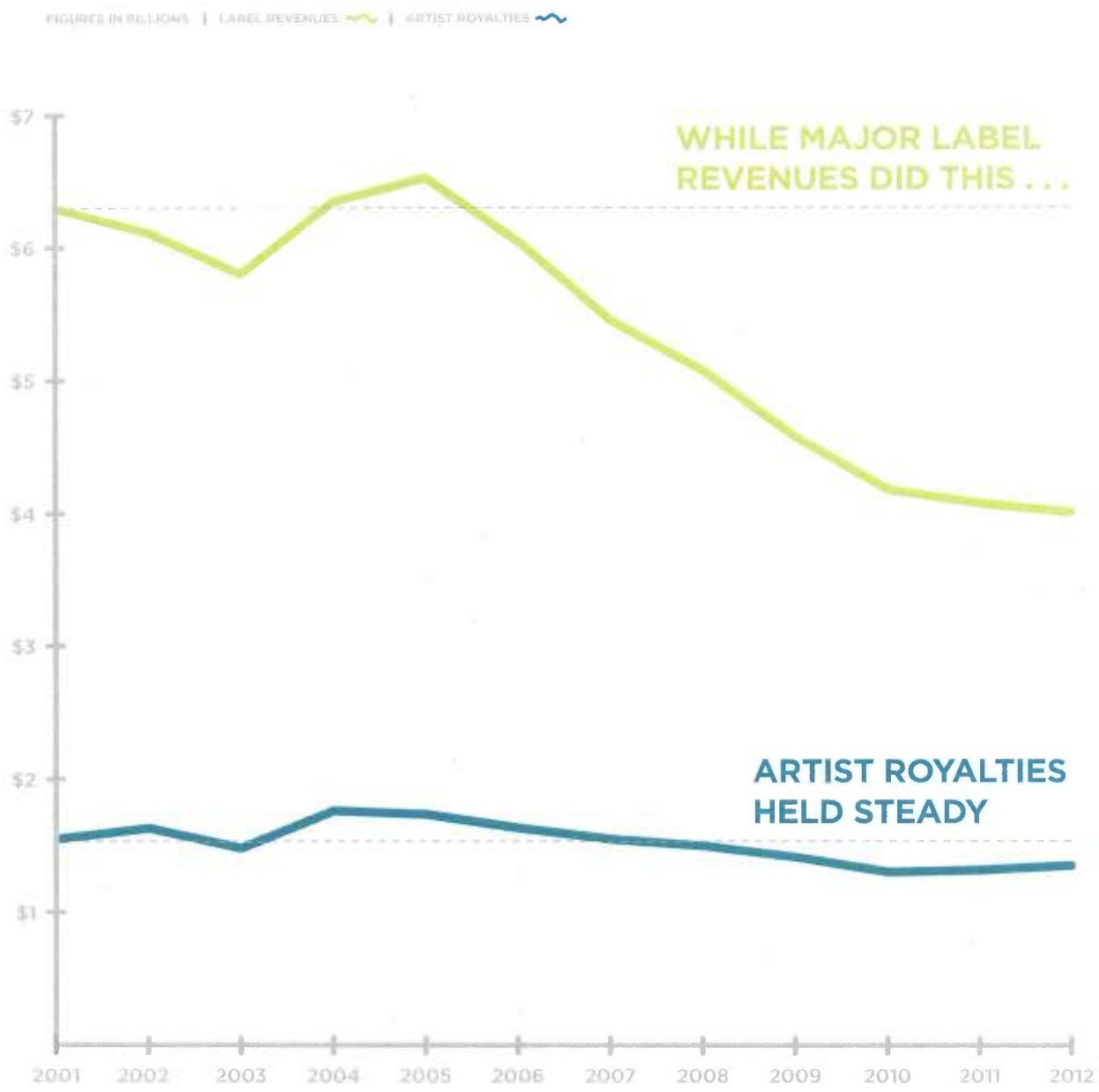


Less streaming and subscription revenue.[1]

ARTIST ROYALTIES HOLDING STEADY

Through all the changes in the music world in recent years, we've tried to protect what's most important: artists.

While major label revenues have dropped $2.3 billion since 2001, the royalties we pay artists have held steady, dropping only $134 million.



IN 2011, LABELS WORLDWIDE SPENT

16%

OF REVENUE ON

A&R

80%

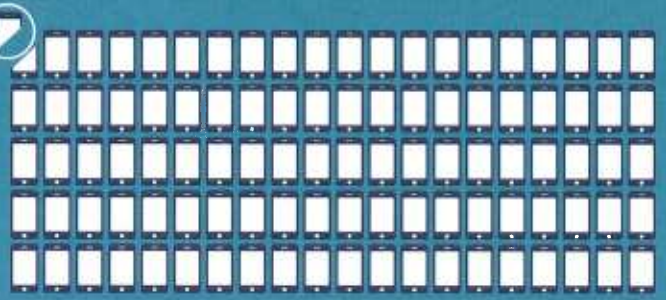
OF ALBUMS RELEASED IN 2011 SOLD LESS THAN 100 COPIES

94%

SOLD LESS THAN 1000 COPIES

HIT RECORD

IN 2011, ONLY ONE-HALF OF ONE PERCENT OF ALL ALBUMS THAT SOLD EVEN A SINGLE COPY SOLD MORE THAN 10,000



VENTURE CAPITALISTS FOR MUSIC

Major record labels are making enormous investments to find and cultivate artists. In 2011, record companies worldwide invested 16 percent of their revenues in A&R, which handles talent scouting and artist development. That investment tops other R&D-intensive industries including pharmaceuticals and biotech, computer software, and high-tech hardware.

These are risky investments, since so few songs or albums end up as hits.

- Out of 8 million digital tracks sold in 2011, 7.5 million sold less than 100 copies.[1]
- 80% of albums released in 2011 sold less than 100 copies and 94% sold less than 1000 copies.[1]
- In 2011, only one-half of one percent of all albums that sold even a single copy sold more than 10,000.[1]
- Most record companies recovered their investments in only one out of every five or six new albums.[2]

Nielsen SoundScan[1], Elberse (2013)[2]

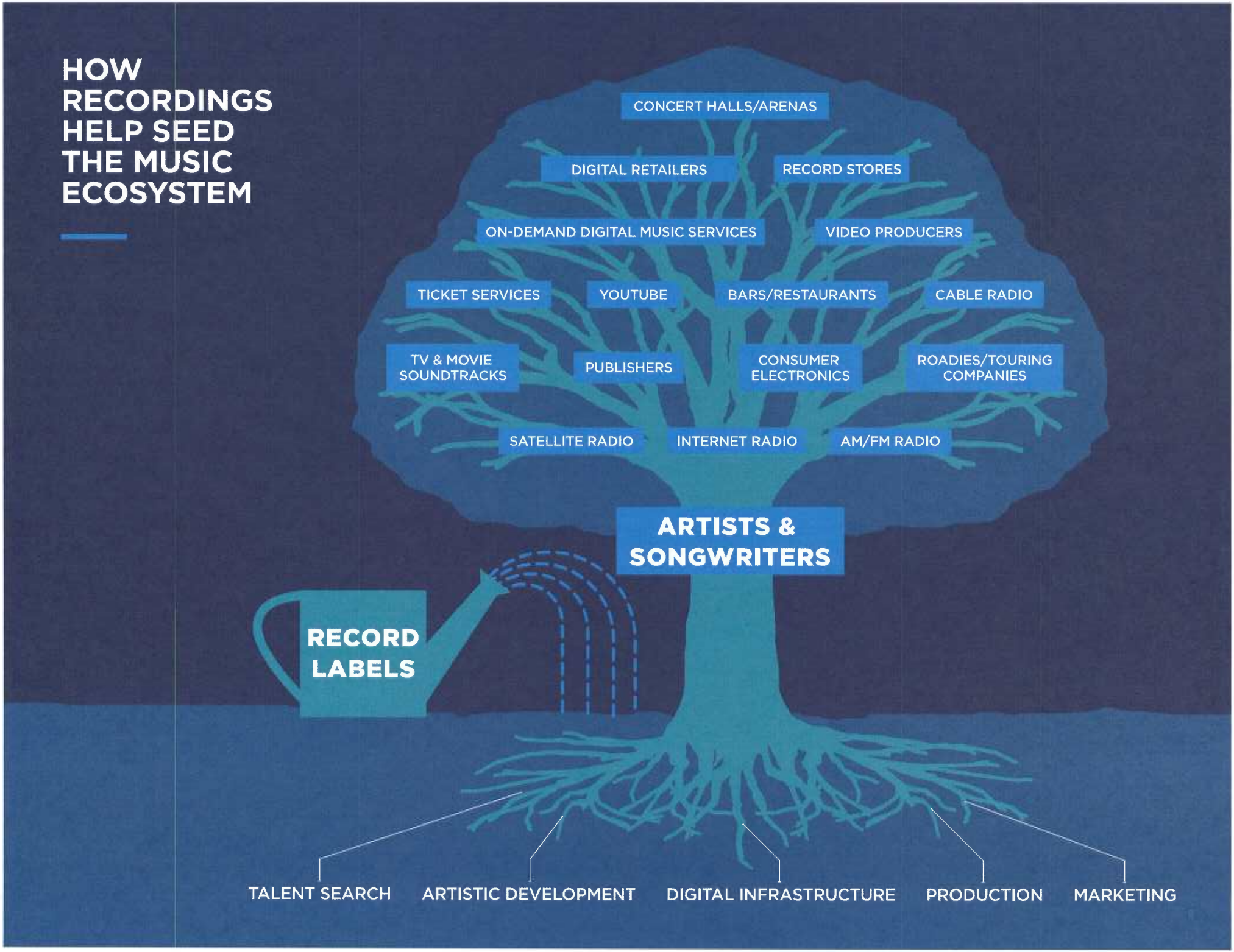
HELPING ARTISTS FIND THEIR SOUND — AND THEIR FANS

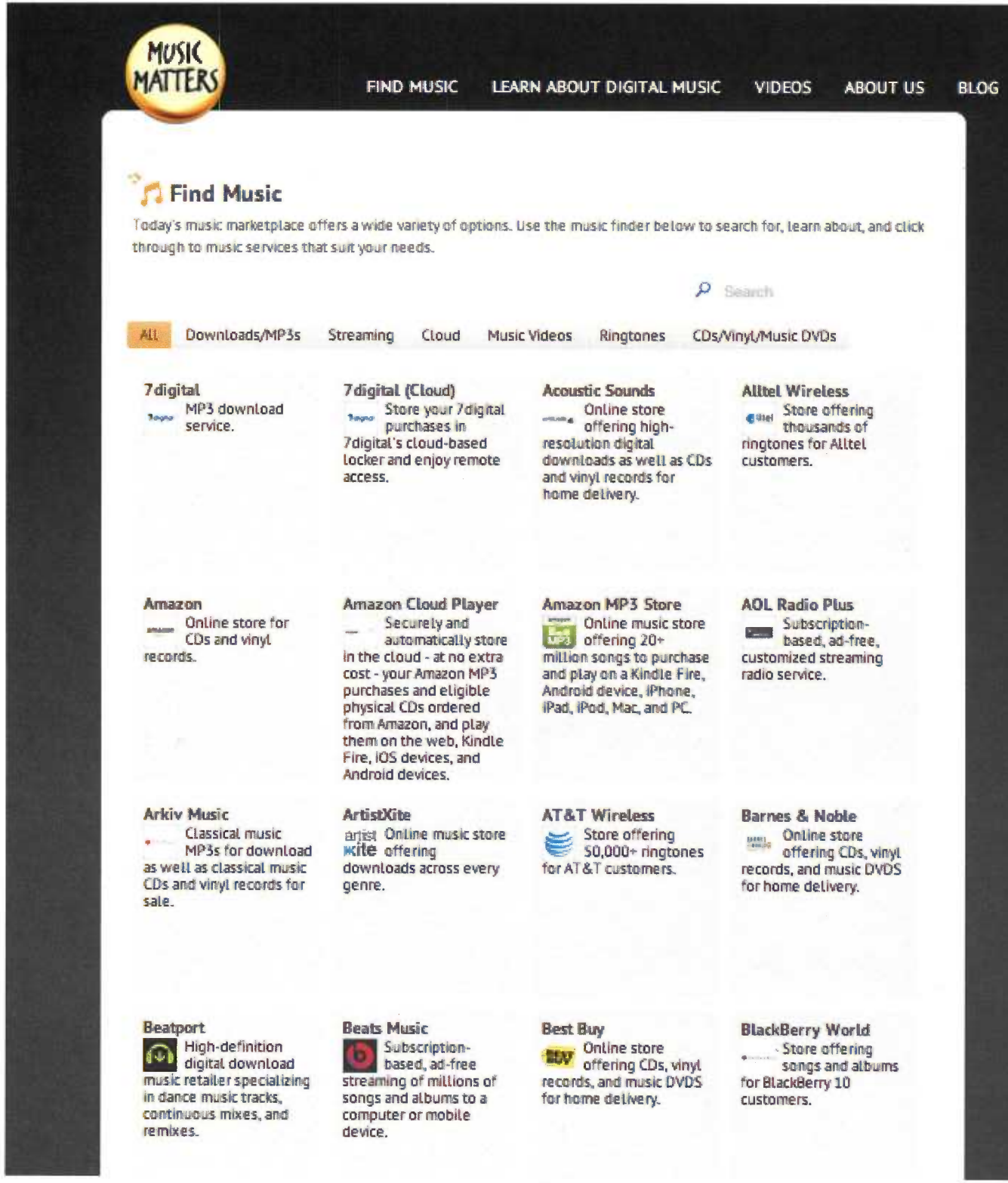
It's a tough job, but someone's got to do it. While many play an indispensable role in the music ecosystem, there is no doubting the value of record labels who find great artists and work to put them on a global stage.

In the last decade, the major labels spent $13.4 billion to find new acts and help them develop their sound and reach an audience. That's tens of thousands of hours on the road, scouring bars and honky tonks, and thousands more online listening for the next underground sound. We connect great musicians and help them collaborate on creative new projects. We gather the producers, engineers, and technology it takes to bring a song to life. We design album launch campaigns and tours to build the kind of fan base that launches a career.

Working hand in hand with our artists, major labels provide the creative and financial fuel that generates hits. Virtually the entire music ecosystem is built atop the foundation of this initial investment, supporting not just artists and labels, but anyone whose job depends on music.

HOW RECORDINGS HELP SEED THE MUSIC ECOSYSTEM



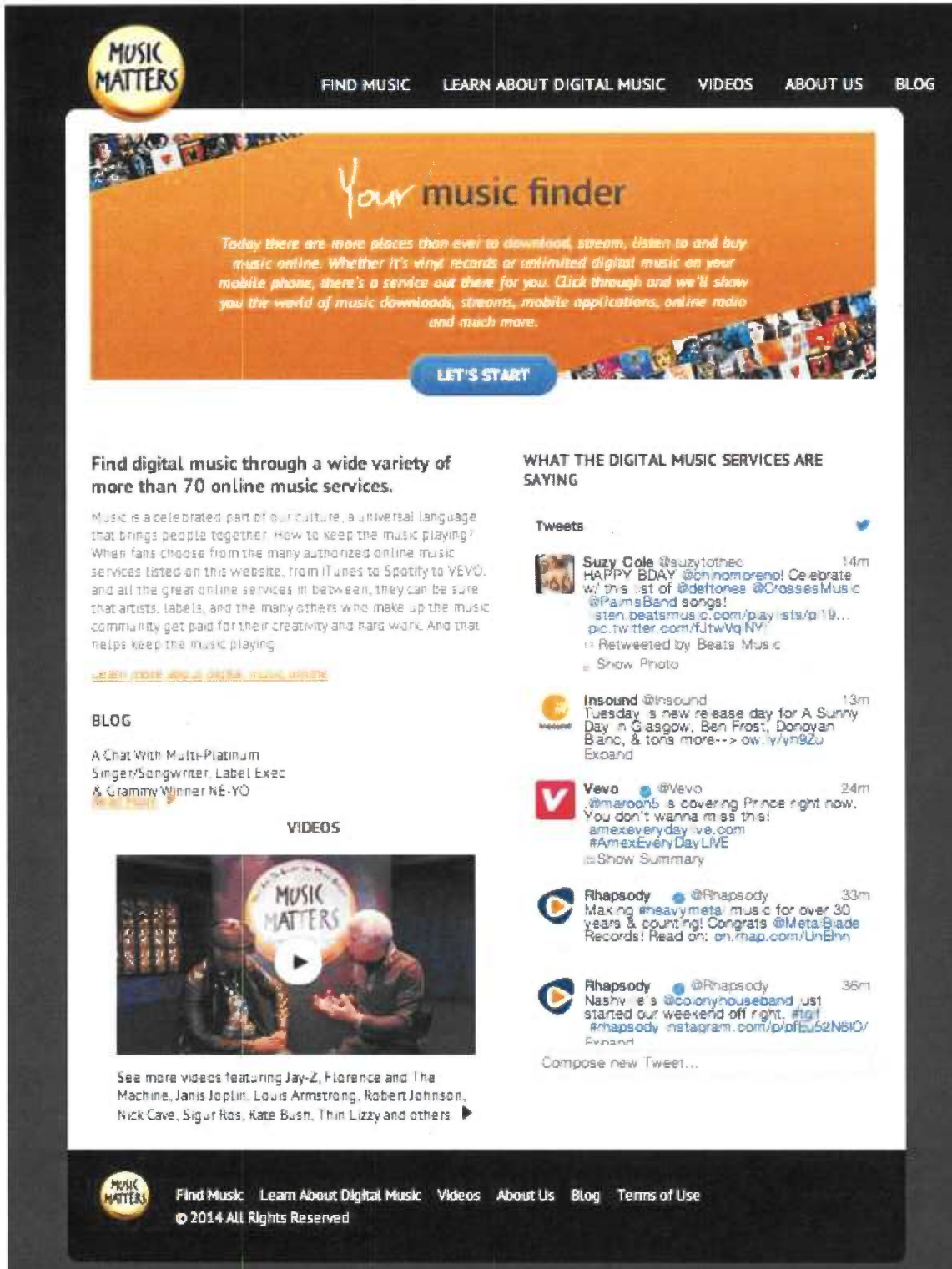


EMBRACING NEW DIGITAL TECHNOLOGIES AND SERVICES

We celebrate the success of licensing new digital services whose revenues and listeners are growing at incredible rates. And we believe that artists and fans should benefit the most from this skyrocketing growth.

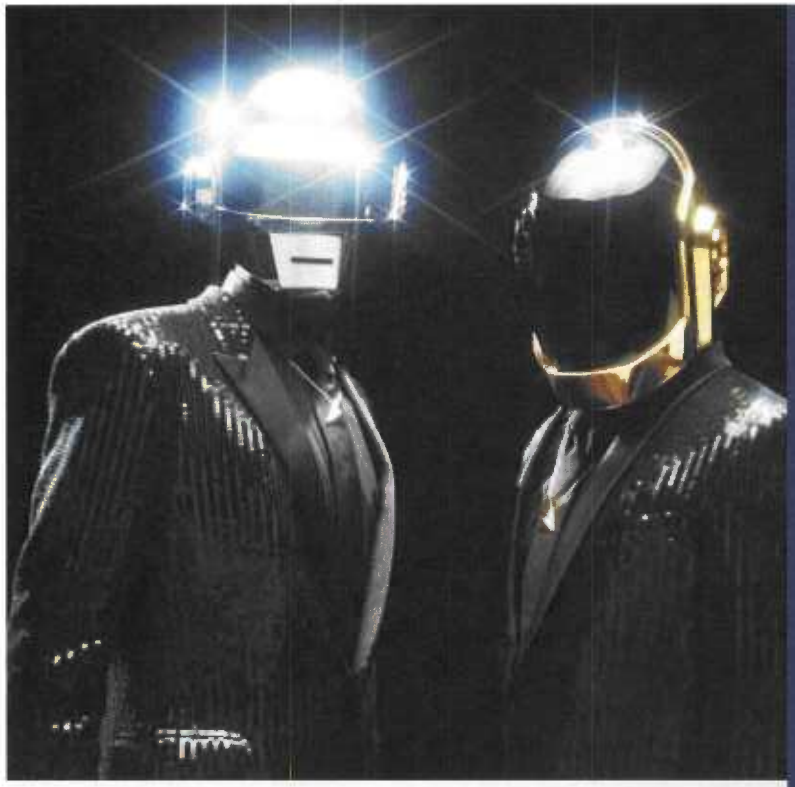
Major record labels have inked agreements with scores of new digital music services. We've also supported the Digital Performance Rights Act and the Digital Millennium Copyright Act, which give digital services easy licensing of the music they need, while making sure artists receive fair pay for their work.

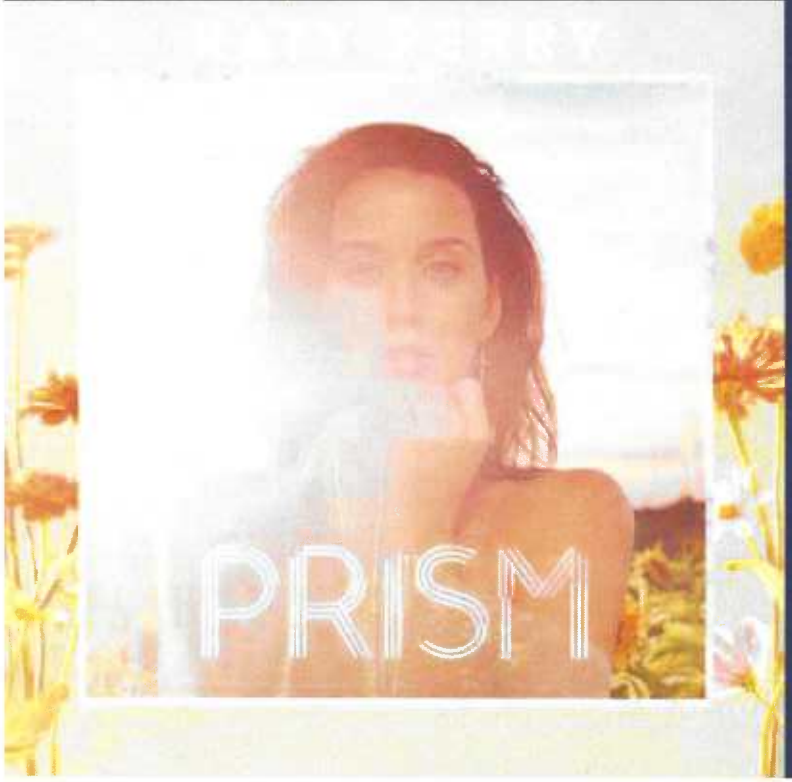
At last count, there were over 2,500 authorized digital services that pay royalties to our artists.



WHYMUSICMATTERS.COM

There are more places than ever to download, stream, listen and buy music online than ever before. We've broken it all down at whymusicmatters.com.





BREAKING THE PROMOTIONAL MOLD

Just like we're embracing new digital platforms, labels are also pioneering new ways to market artists that would have been impossible just a few years ago.

Daft Punk – Random Access Memories

Sony knew it needed a global campaign to match the ambitious scale of Daft Punk's Random Access Memories. It also faced limited funds and its artists were two robots who didn't do interviews and don't tweet.

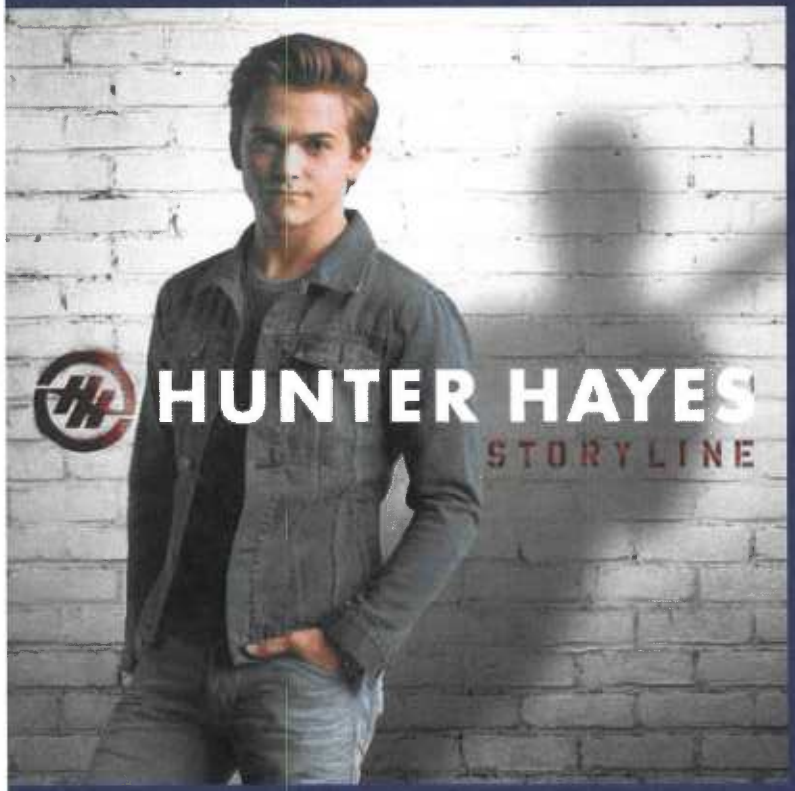
Building on Daft Punk's inspiration in film and album premieres from the '70s and '80s, Sony created a 'larger than life' campaign that coordinated giant billboards in major global cities with TV advertising blocks showing a short mysterious teaser of the riff from Get Lucky. Fans started to share the teaser all over the Internet, including one who created a 10-minute version. Daft Punk gave their first performance in the middle of the Australian outback, raising buzz to a fever pitch.

The album was released across all formats simultaneously. Random Access Memories was the biggest ever pre-ordered album on iTunes at that point. It hit number 1 in 97 iTunes stores — while simultaneously breaking the record for the most streamed album of all time on Spotify.

Katy Perry – PRISM For Katy

For Perry's third studio album, PRISM, Capitol Music Group didn't build a traditional promotional campaign that would have focused on a single release date. Instead, they used several different campaigns – making the best use of Katy Perry's natural ease on Twitter and other social media – to promote several strong singles on PRISM.

Katy released short teaser videos to celebrate the release of the first single: Roar. In one video, Katy spelled out the lyrics to Roar in emoticons, and the video generated almost 70 million views. The official video



was promoted using a classic 1930s-style Hollywood movie poster and a series of online teasers. The video went on to be viewed around 360 million times on YouTube alone, while Roar topped the charts in 97 countries.

A promotion with MTV and Pepsi gave fans the opportunity to unlock song titles, lyrics and snippets from the album by tweeting #KATYNOW. They could also listen to previews of the tracks Dark Horse and Walking on Air and vote which they wanted released early on iTunes.

The second single Unconditionally was backed by the promotional campaign #KatyUnconditionally that invited fans to share an Instagram of what unconditional love meant to them and upload it with their story and location to appear in an online PRISM map of the world.

Hunter Hayes and the YouTube Orchestra

Warner Music Nashville/ Atlantic Records wanted to help new audiences discover Hunter Hayes.

The label contacted YouTube and designed a video campaign featuring his song Everybody's Got Somebody But Me recorded with label-mate Jason Mraz. Rather than film in Nashville, Warner arranged to shoot in Los Angeles at YouTube's own creative space, the YouTube Hangar. This enabled the label to pull together a range of the 'YouTube Stars' who post their own versions of hit songs onto the platform together and invite them to perform with Hayes and Mraz.

Stars like Tyler Ward and Kina Granis submitted their own versions of Hayes' song and Warner Music Nashville along with Hunter created a mash-up of the results. It brought together Hayes, Mraz and all the 'YouTube Stars' to create a one-shot music video featuring all of them, dubbed the 'YouTube Orchestra', for the mash-up track. The individual 'YouTube Stars' released their own versions of the track and then the 'YouTube Orchestra' video was released ahead of the official music video, reaching an entire YouTube audience online in their own terms and connecting Hayes to millions of potential new fans who might never have seen a more conventional launch campaign.

CONCLUSION

The music business has changed and record labels are continuing to evolve along with it. But we haven't forgotten what's important: finding great artists, helping them realize their visions and connecting them with broad audiences.

As we embrace new technologies, we're focused on making them work for artists and fans. And we're dedicated to supporting new digital platforms to grow the pie for everyone in the business, starting with the artists whose careers are our mission.

With so much change, the future may be uncertain. But no one ever thought this business was easy.

We know one thing for sure: the challenges ahead will have one hell of a soundtrack.