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COPYRIGHT OFFICE VIEWS ON MUSIC LICENSING REFORM

HEARING

BEFORE THE

SUBCOMMITTEE ON COURTS, THE INTERNET, AND INTELLECTUAL PROPERTY

OF THE

COMMITTEE ON THE JUDICIARY
HOUSE OF REPRESENTATIVES

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COPYRIGHT OFFICE VIEWS ON MUSIC LICENSING REFORM

TUESDAY, JUNE 21, 2005

HOUSE OF REPRESENTATIVES,
SUBCOMMITTEE ON COURTS, THE INTERNET,
AND INTELLECTUAL PROPERTY,
COMMITTEE ON THE JUDICIARY,
Washington, DC.

The Subcommittee met, pursuant to notice, at 10:04 a.m., in Room 2141, Rayburn House Office Building, the Honorable Lamar Smith (Chair of the Subcommittee) presiding.

Mr. SMITH. The Subcommittee on the Courts, the Internet, and Intellectual Property will come to order. I am going to recognize myself for an opening statement, then the Ranking Member, then the Ranking Member of the full Committee.

This is a wonderful turnout this morning. It's nice to see a lot of familiar faces and a lot of new faces, as well, which is an indication, I think, of how important the subject at hand is. Let me recognize myself for an opening statement.

Today, the Subcommittee continues its inquiry into issues surrounding music licensing. However, instead of identifying the problems in the music industry, you will hear about a possible solution that has been suggested by the Copyright Office.

The music industry has evolved from simple business models focused around either the distribution of physical items, such as compact disks or broadcasts on the radio, to a dynamic digital marketplace where new business models evolve rapidly. The laws that set out the framework for the licensing of musical rights in this industry are outdated, and some say beyond repair. The Copyright Office's idea, therefore, represents a creative way for how mechanical and performing rights would be administered in this country.

Since the draft focuses on what the Copyright Office feels is the best approach to music licensing laws, it does not address any of the issues that would accompany the transition to such a system nor does it address the operation of the music industry before the enactment of such legislation, if that were to occur. The Copyright Office has not addressed such issues because it is more important to first determine whether the system suggested by the Copyright Office is worth considering than determining how best to accomplish the required transition.

Some issues that the Subcommittee would need to resolve but that are not included in the draft include how to handle any rate disputes that may arise. Should copyright royalty judges' decisions or other similar processes be used to settle rate disputes, or should

a pure free market approach rule? We have already seen this issue arise in the context of the Television Music Licensing Committee's dispute with SESAC that was debated during the Subcommittee's Public Performing Rights Organization oversight hearing last month.

Members of this Subcommittee have an open mind on how to reform American music licensing laws, but not on the need to do so. Music licensing reform is essential. If legal services are going to be able to compete with free, they must be able to quickly offer legal music. That does not mean that the music licensing laws should be written for the sole benefit of online services.

For example, some music groups have suggested the creation of one super-agency to handle all music licensing. Others have suggested a direct negotiations approach. Whether or not it makes sense to create new entities will be considered as a part of the process of developing legislation.

Finally, I would note that for the interested parties, following the testimony today, that there are seven calendar days to submit written testimony for the record commenting on the Copyright Office's draft and their testimony given today and we very much encourage those comments just so we'll have a feel for how everyone thinks about the subject.

With that, I'll recognize the Ranking Member, Mr. Berman, for his opening statement.

Mr. BERMAN. Thank you very much, Mr. Chairman. Thank you for scheduling this hearing on what my at least preliminary look at is a very bold initiative by the Copyright Office. The Copyright Office continues to serve as a valuable resource on many different copyright issues, including section 115, and I'm especially interested in hearing its opinions on improving our current system of music licensing.

In anticipation of the Grokster decision, I think it's important to recognize that a problem of—the problem of rampant piracy over peer-to-peer networks serves as a reminder of the dire need to address digital music licensing reform. Piracy harms an industry that provides jobs throughout the country, including my district, from the recording artist to the sound engineer to the many businesses that support the full range of musical arts. In order to enable legitimate online music distributors to compete with the choice and ease of so-called free music provided by Internet pirates, we need to give users the ability to receive their share of music anytime, anyplace, and in any format while ensuring that the creator receives his or her rightful compensation.

According to reports of the NDP group, legal online music sources have gained a solid foothold against file sharing networks. Though proliferation and success of new digital music services, such as the Apple iTunes download service, the recent launch of Rhapsody and Yahoo portable subscription services, and the recent success of new physical formats, such as dual-disk CD/DVD all speak to innovation in the distribution mechanisms for music content. However a fundamental question remains as to whether the current licensing system or the one being proposed gives these new music products and services a realistic opportunity to compete and

overcome the free alternatives provided by the peer-to-peer networks.

Rewards for innovation are hard enough to come by for the songwriters who oftentimes are the first to create but the last to be paid. But the unfettered distribution of music content over file swapping services prevents them from receiving a major source of potential revenue. Our focus must remain on providing rightful compensation to those that provide our music.

Philosophically, the idea of repealing any of the compulsory licenses, 114 or 115, has great appeal and is, pardon the expression, music to my ears. The idea that the market would be required to yield fair value for a musical work has long been the hope of many copyright owners. However, at the same time, we need to be mindful of the consequences that a free marketplace may have on online music distribution services. They compete in a marketplace where the market price of the pirated music is free. Therefore, we must facilitate legitimate digital online music services in order to combat the pirates and reclaim the treasure.

I look forward to hearing from the Register of Copyrights to provide further details of how this draft would address some of the practical issues, such as a transition period and creation of a fluid marketplace to begin leveling the playing field for music services with those of Grokster and Kazaa.

Thank you very much, Mr. Chairman. I yield back.

Mr. SMITH. Thank you, Mr. Berman.

The gentleman from Michigan, Mr. Conyers, the Ranking Member of the Judiciary Committee, is recognized for an opening statement.

Mr. CONYERS. Thank you, Mr. Chairman. I am happy to be here and to see our Register of Copyrights with us to make a major presentation this morning.

I look out in the audience and the gang's all here. This could be a potentially significant discussion that we have amongst ourselves, and so I'm happy you're doing this.

Could I just indicate for the record that I'm weighing in on the side of a narrow redrafting of section 115. It seems to me that the larger the proposals around this bill get, the more dangerous this is going to become to some of those who are in the music business.

I raise a small flag of recognition to the songwriters in this music industry who are paid less than anybody else I know for their creative works and I am hoping that we will be able to retain the ability of these writers to negotiate a fair rate for their musical content. While a rate court would appease some seeking a quick resolution of royalty disputes, it seems to me that private negotiations are still the most appropriate forum for these circumstances, and so I am happy to add these comments and look forward to the witness's contribution. Thank you.

Mr. SMITH. Thank you, Mr. Conyers.

With that introduction, other Members' opening statements will be made a part of the record, and may I ask our witness to stand and be sworn in, please. Would you please raise your right hand.

Do you swear that the testimony you are about to give is the truth, the whole truth, and nothing but the truth, so help you, God?

Ms. PETERS. I do.

Mr. SMITH. Thank you. Please be seated.

Marybeth Peters became the United States Register of Copyrights in August 1994. From 1983 to 1994, she held the position of Policy Planning Advisor to the Register. She has also served as Acting General Counsel at the Copyright Office. Previously, Ms. Peters, from 1986 to 1995, was a lecturer in the Communications Law Institute of the Catholic University of America's Law School, and previously served as Adjunct Professor of Copyright Law at the University of Miami School of Law and at the Georgetown University Law Center.

Ms. Peters is the author of the General Guide to the Copyright Act of 1976. Ms. Peters received her undergraduate degree from Rhode Island College and her law degree with honors from the George Washington University Law School.

Ms. Peters, we welcome you today. We look forward to your testimony, and as we discussed previously, because you are the only witness, please feel free to take more than the 5 minutes. We understand you'll be somewhere between five and ten. That'll be great. Whatever time you need, we're interested to hear what you have to say, and please proceed.

TESTIMONY OF THE HONORABLE MARYBETH PETERS, REGISTER OF COPYRIGHTS, COPYRIGHT OFFICE OF THE UNITED STATES, THE LIBRARY OF CONGRESS

Ms. PETERS. Mr. Chairman, Mr. Berman, Members of the Subcommittee, thank you for asking me to testify on my recommendations on how to facilitate the licensing of music by reforming section 115 of the Copyright Act, the compulsory license for the making and distribution of physical phonorecords and digital phonorecord deliveries of nondramatic musical compositions.

Let me start by contrasting how public performance rights and the reproduction and distribution rights of music are licensed. Songwriters and music publishers license public performances through three Performing Rights Organizations, PROs—ASCAP, BMI, and SESAC. Virtually every song that anyone could ever wish to license is in its repertoire, in the repertoire of one of the three, which offer blanket licenses for public performances of all of the songs in their repertoires.

In contrast, a record company or digital music service that wishes to obtain a license to reproduce and distribute phonorecords of a musical work must obtain a separate license for each musical work it wishes to license. The license must be obtained directly from the music publisher or, in many cases, the agent, the Harry Fox Agency.

Harry Fox claims that it licenses over 90 percent of the commercially significant music distributed in the United States, but the Digital Music Association claims that Harry Fox licenses only about 65 percent of, quote, "available music." Whatever the figure may be, it seems clear that the Harry Fox Agency can license only a fraction of the works licensed by the PROs.

Last year in its testimony, the National Music Publishers Association stated that Harry Fox's available catalog is well in the hundreds of thousands of musical works. In contrast, at a hearing last

month, BMI stated that it oversees a repertoire of more than 6.4 million musical works. ASCAP testified that there are millions of millions and millions of works in its repertoire.

Thus, it's relatively easy for a digital music service to clear the rights to publicly perform any and all nondramatic musical works. It's not quite one-stop shopping, but it literally is three-stop shopping.

In contrast, it's virtually impossible to clear the reproduction rights for all such works, no matter how many stops you make. Unlike the public performance right, the reproduction and distribution rights are subject to section 115's compulsory license. As a practical matter, section 115 simply sets a ceiling on the rates that can be charged for the making and distribution of phonorecords and licenses are actually obtained from the music publisher, Harry Fox or another agent.

These differences in the licensing regimes for public performances and for reproduction and distribution have only recently created difficulties due to the rise of digital music services, which aspire to be celestial jukeboxes that can provide you with performances or copies of any song you may wish to hear. Digital music services need to clear reproduction rights for all songs. While they can fairly easily obtain blanket licenses from PROs, obtaining the reproduction and distribution rights has proved to be extremely difficult.

The second major hindrance to music licensing for digital transmission is that almost all—almost any kind of digital transmission of music involves the implication of both rights. PROs will assert a right to license and receive royalties for the performance right, and Harry Fox and music publishers will assert a right to license and receive royalties for the reproduction and distribution rights. And in many cases, both rights are, in fact, implicated.

This is a problem because licensing of music is today divided into two separate markets, one for public performance, one for reproductions and distribution. This pits two different middlemen who represent the same copyright owner against each other. Each wants and demands a piece of the action. But whether or not two or more separate rights are truly implicated and deserving of compensation, it seems inefficient and unfair to require a licensee to seek out two separate licenses from two separate sources in order to compensate the same copyright owner for the right to engage in a single transmission of a single work.

There are no such difficulties when it comes to the licensing of rights in sound recordings embodying the same musical work, and that's because record companies, unlike music publishers, have not split up the rights and engaged separate middlemen to exploit separate rights. They issue a single license to cover everything.

Because of this, section 115 needs to be reformed to ensure that our music industry can continue to flourish in the digital age. The question is not whether to reform section 115, but how.

One solution would involve expansion of the compulsory license to cover all the rights necessary to make digital transmissions, and that is still worth exploring. But I am convinced that I was right last year when I told you that, as a matter of principle, I believe that the section 115 license should be repealed and that licensing

of rights should be left to the marketplace, most likely by means of collective administration.

The Copyright Office has long held that statutory licenses should be enacted only in exceptional cases, when the marketplace is incapable of working, and it is worth noting that the United States is virtually alone in having a compulsory license for phonorecords. The rest of the world has managed to resolve music licensing issues without compulsory licenses, and most frequently by collective licensing.

We should do the same. We should let the licensing of reproduction and distribution rights take place, for the first time in our history, in the marketplace. We should do so by building on the strong record that our PROs have built in issuing blanket licenses for performance rights and allow the PROs to do the same for the reproduction and distribution rights.

I don't have time to describe all of the details in our proposal, but in my written testimony and in the accompanying draft legislative text with its section-by-section analysis, the details are provided.

In a nutshell, my proposal would convert the PROs to MROs, Music Rights Organizations, and give them the right to license the reproduction and distribution rights. It would require them to offer what is, in effect, a uni-license, a unified license, a single blanket license for digital transmissions that cover all three rights—public performance, reproduction, and distribution of phonorecords.

Thank you.

Mr. SMITH. Thank you, Ms. Peters.

[The prepared statement of Ms. Peters follows:]

PREPARED STATEMENT OF MARYBETH PETERS

STATEMENT OF MARYBETH PETERS
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Before the

SUBCOMMITTEE ON COURTS,
THE INTERNET AND INTELLECTUAL PROPERTY
OF THE HOUSE COMMITTEE ON THE JUDICIARY

109th Congress, 1st Session
June 21, 2005

Mr. Chairman, Mr. Berman, and distinguished members of the Subcommittee, thank you for the opportunity to appear before you to testify on reform of Section 115 of the Copyright Act, which governs the licensing of the reproduction and distribution rights for nondramatic musical works. As I have previously testified, the present language of Section 115, with its compulsory license to allow for the use of nondramatic musical works for the making and distribution of physical phonorecords and digital phonorecord deliveries, is outdated. Reform is necessary, and I am pleased that you have asked me for my recommendations on how to amend Section 115 to facilitate the licensing of nondramatic musical works in a way that will serve the interests of composers and music publishers, record companies and other providers of recorded music, and the consuming public, especially with respect to digital audio transmissions of music. My proposal addresses many of the problems that are currently hindering much, if not all, of the music industry and digital music services in their efforts to make a wide variety of music available to the listening public and to combat piracy.

Background

Almost a century ago, Congress added to the Copyright Act the right for copyright owners to make and distribute, or authorize others to make and distribute, mechanical reproductions (known today as phonorecords) of their musical compositions. Due to its concern of potential monopolistic behavior, Congress also created a compulsory license to allow anyone to make and distribute a mechanical reproduction of a musical composition without the consent of the copyright owner provided that the person adhered to the provisions of the license, most notably paying a statutorily established royalty to the copyright owner.[1] Although originally enacted to address the reproduction of musical compositions on perforated player piano rolls, the compulsory license has for most of the past century been used primarily for the making and distribution of phonorecords and, more recently, for the digital delivery of music online.

At its inception, the compulsory license facilitated the availability of music to the listening public. However, the evolution of technology and business practices has eroded the effectiveness of this provision. Despite several attempts to amend the compulsory license and the Copyright Office's corresponding regulations[2] in order to keep pace with advancements in the music industry, the use of the Section 115 compulsory license has steadily declined to an almost non-existent level. It primarily serves today as merely a ceiling for the royalty rate in privately negotiated licenses.

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[1] My written statement to this Subcommittee on March 11, 2004, available at http://judiciary.house.gov/media/pdfs/peters031104.pdf and http://www.copyright.gov/docs/regstat031104.html, includes a comprehensive history of this compulsory license. *See. Section 115 of the Copyright Act: In Need of an Update?; Hearing Before the Subcomm. on Courts, the Internet, And Intellectual Property of the House Comm. on the Judiciary*, 108th Cong. 5-6 (2004) (statement of Marybeth Peters, Register of Copyrights).

[2] *See, e.g.,* Section 115 of the Copyright Act of 1976, Pub. L. No. 94-553, the Digital Performance Right in Sound Recordings Act of 1995, Pub. L. No. 104-39, and Final Rule, Compulsory License for Making and Distributing Phonorecords, Including Digital Phonorecord Deliveries, 69 Fed. Reg. 34578 (June 22, 2004).

1. *Last Year's Hearing.*

Last year, on March 11, this Subcommittee conducted a hearing on "Section 115 of the Copyright Act: In Need of an Update." That could be the theme for today's hearing as well. A number of witnesses testified last year about the difficulties they have in licensing the use of nondramatic musical works under this antiquated statutory scheme. Among other things, complaints were voiced about the difficulties in locating copyright owners to obtain licenses to reproduce and distribute nondramatic musical works; the procedural requirements for obtaining a compulsory license; the lack of clarity over what activities are covered by the compulsory license; difficulties in licensing the use of nondramatic musical works for sound recordings in new configurations; and problems created by the per-unit penny-rate royalty established by Section 115.

Two of the issues highlighted at that hearing – issues that we at the Copyright Office have been hearing about for several years – involve problems arising when online music services wish to license activities that involved both reproduction and public performance, leading to demands for payment to two separate agents for the same copyright owner; and the contrast between the relatively efficient licensing process for performance rights and the unsatisfactory process for licensing reproduction and distribution rights. While the three performing rights societies – the American Society of Composers, Authors and Publishers ("ASCAP"), Broadcast Music, Inc. ("BMI") and SESAC, Inc. – collectively are able to license public performances of virtually all nondramatic musical works, the main licensing agent for the reproduction and distribution rights – the Harry Fox Agency, Inc. ("HFA") – is unable to license a significant percentage of nondramatic musical works. For this and other reasons, some of which I will address below, online music

services that wish to obtain licenses to make available as many nondramatic musical works as possible find it impossible to obtain the necessary reproduction and distribution rights.

As Cary Sherman, the President of the Recording Industry Association of America ("RIAA"), testified last year, "if the overall purpose of Section 115 was to ensure the ready availability of musical compositions, that objective is no longer being achieved."

At last year's hearing, I set forth several legislative options for this Subcommittee to consider to address the problems that had been identified with respect to the existing Section 115. The first option, which forms the basis of the Copyright Office's current proposal, was to eliminate the Section 115 compulsory license. A fundamental principle of copyright law is that the author should have the exclusive right to exploit the market for his work, except where doing so would conflict with the public interest. While the Section 115 statutory license may have served the public interest well with respect to the nascent music reproduction industry after the turn of the century and for much of the 1900's, it is no longer necessary and unjustifiably abrogates copyright owners' rights today. Virtually all other countries have eliminated similar compulsory licenses in favor of collective administration, and so should the United States. Domestic performing rights organizations, such as ASCAP, BMI and SESAC, have already proven that collective licensing can and does succeed in this country. Moving towards a system of private, collective administration would restore the free marketplace as well as bring the United States in line with the global framework in which digital transactions must necessarily operate.

Recognizing that parties with stakes in the current system may resist this concept, I also suggested several other legislative options for consideration. These options would retain the

statutory license, but would amend the language of Section 115 to address specific problems which have arisen to date. Among the options I identified were:

- Clarification that all reproductions of a nondramatic musical work made in the course of a digital phonorecord delivery ("DPD") are within the scope of the Section 115 license.
- Amendment of the law to provide that reproductions of nondramatic musical works made in the course of a licensed public performance are either exempt from liability or subject to a statutory license.
- Expansion of the Section 115 DPD license to include both reproductions and performances of nondramatic musical works in the course of either digital phonorecord deliveries or transmissions of performances.

I also identified proposals made by various interested parties, some of which would involve major revision of the law and others of which would involve tinkering with the details of the Section 115 compulsory license to make it more workable, including:

- Adoption of a model similar to that of the Section 114 webcasting license, requiring services using the license to file only a single notice with the Copyright Office stating their intention to use the statutory license with respect to all nondramatic musical works.
- Establishment of a collective to receive and disburse royalties under the Section 115 license.
- Designation of a single entity, like the Copyright Office, upon which to serve notices and make royalty payments.
- Creation of a complete and up-to-date electronic database of all nondramatic musical works registered with the Copyright Office.
- Shifting to the sound recording copyright owner the burden of obtaining the rights for online music services.
- Creation of a safe harbor for those who fail to exercise properly the license during a period of uncertainty arising from the administration of the license for the making of DPDs.

- Extension of the period for effectuating service on the copyright owner or its agent beyond the 30 day window specified in the law.
- Provision for payment of royalties on a quarterly basis rather than a monthly basis.
- Provision for an offset of the costs associated with filing Notices with the Office in those cases where the copyright owner wrongfully refuses service.

Although some of these options may still be viable, my testimony today focuses on the elimination of the statutory license in favor of marketplace collective administration because that is the solution I believe is most likely not only to remedy today's problems, but perhaps more importantly, also to provide a workable solution for tomorrow's issues. Moreover, it is the solution that comports with the Copyright Office's longstanding policy preference against statutory licensing for copyrighted works and our preference that licensing be determined in the marketplace where copyright owners exercise their exclusive rights.

2. *Regulations Regarding Notices of Intention to Use the Section 115 License.*

However, before describing my current proposal for reform, I would like to summarize developments since the hearing in March of last year. In June 2004, I issued final regulations to reform the process for serving and filing notices of intention to use the Section 115 compulsory license.[3] Previous regulations required that a person wishing to make use of the compulsory license must serve a separate notice, for each nondramatic musical work to be licensed, on the owner of the copyright of that nondramatic musical work. Under the new regulations, a licensee may serve a single notice for any number of nondramatic musical works on a copyright owner or the agent of the copyright owner, so long as the enumerated works are owned by that copyright

[3] Final Rule, Compulsory License for Making and Distributing Phonorecords, Including Digital Phonorecord Deliveries, 69 Fed. Reg. 34578 (June 22, 2004).

owner. The new rules require the copyright owner or agent receiving the notice to notify the licensee promptly where to send royalty payments. Finally, the rules resolved a dispute over whether a licensee who has already served or filed a notice of intention to use a particular nondramatic musical work must submit a new notice of intention to use the compulsory license whenever the licensee begins to offer that work in new configurations. For example, must someone who has served a notice of intention to issue traditional phonorecords of a nondramatic musical work serve a new notice of intention in order to offer that work by means of digital phonorecord deliveries? The new rules provide that no new notice is required. The rules also streamlined the notice of intention process in other minor respects.

3. *Discussions Regarding Legislation*

While our efforts on the regulatory front have made some progress in making the Section 115 compulsory license easier to use, they have not addressed the fundamental problems with the license because those problems – based in the statutory framework – are beyond my power to cure by regulation.

You recognized that last July, when you asked me to bring interested parties together to address the modernization of Section 115.[4] You asked that I survey areas of concern, identify areas of agreement, and identify the positions of various parties on areas where there was no agreement. To the extent that there was agreement, you asked that I draft model legislative language reflecting that agreement. I was asked to report on the results of these efforts in September.

[4] Letter of July 7, 2004 to Marybeth Peters from E. James Sensenbrenner, Jr., Lamar Smith, John Conyers and Howard Berman.

Discussions involving the National Music Publishers' Association, Inc. ("NMPA") and its subsidiary The Harry Fox Agency, Inc. ("HFA"), the Digital Media Association ("DiMA") and the Recording Industry Association of America, Inc. ("RIAA") were held through last summer, but unfortunately they were not as productive as we had hoped they would be. On September 17 I reported to you that the parties were willing to explore legislation to establish a blanket licensing scheme in Section 115 to facilitate the licensing of copyrighted nondramatic musical works, but that there were significant differences among the parties regarding the appropriate scope of such a license and regarding operational and economic issues.[5] The good news was that the key parties were willing to consider a blanket license that, similar to the licenses for performance rights offered by organizations such as ASCAP and BMI, would relieve licensees of the burden of seeking separate licenses for each nondramatic musical work they wished to use. But on issues such as the scope of the license, the royalty rates and terms, and other issues, the parties were far apart.

My letter noted that the parties were willing to continue discussions in an effort to arrive at consensus legislation. I understand that discussions among the parties have continued to this day, although with no direct involvement by the Copyright Office, and in recent weeks various organizations representing publishers, songwriters, performing rights societies, record companies online music services, and record retailers have come to you with their separate proposals on how to reform Section 115. In general, those proposals appear to reflect the same disparity of views that I reported on last September.

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[5] Letter of September 17, 2004 from Marybeth Peters to E. James Sensenbrenner, Jr., Lamar Smith, John Conyers and Howard Berman.

The Need for Reform

There is no debate that Section 115 needs to be reformed to ensure that the United States' vibrant music industry can continue to flourish in the digital age. As evident from the numerous proposals for change recently submitted to you, Mr. Chairman, by entities representing all aspects of the music industry, the operative question is not whether to reform Section 115, but how to do so. Prior attempts to tinker with Section 115's language to include online transactions have been useful band-aids, but ultimately required Congress to continue to revisit the same issues as technology and business realities have changed the context. It is now time to modernize Section 115 holistically not only to address immediate needs, but also to establish a functional licensing structure for the future.

Section 115 and its predecessor have rarely been used as functioning compulsory licenses. Rather, it has served simply as a ceiling on the royalty rate in privately negotiated licenses. As such, it has placed artificial limits on the free marketplace. Until the digital revolution in the mid-1990's, the system worked well enough, although – as I recounted in my testimony last year – the Copyright Office long ago proposed its elimination. As long as the function of Section 115 was simply to set the rates for licenses between music publishers and record companies that wished to make and distribute sound recordings and to provide a rarely-used backup procedure for obtaining licenses, there was no compelling need to change the system. But with the rise of digital music services that seek to acquire the right to make vast numbers of already-recorded phonorecords available to consumers, Section 115 is not up to the task of meeting the licensing needs of the 21st Century. A new mechanism is needed to make it possible quickly and efficiently to clear the several of the exclusive rights of copyright for large numbers of works.

Our compulsory license in the United States is an anomaly. Virtually all other countries which at one time provided a compulsory license for reproduction and distribution of phonorecords of nondramatic musical works have eliminated that provision in favor of private negotiations and collective licensing administration. Collective administration has proven successful, and in many countries these organizations license both the public performance right and the reproduction and distribution right for a musical composition, thereby creating more efficient "one-stop-shopping" for music licensees and streamlined royalty processing for copyright owners.[6]

The United States also has collective licensing organizations, such as ASCAP, BMI and SESAC. However, consent decrees have limited some of the domestic collective organizations' abilities to license both rights. Similarly, the existing Section 115 limits other licensing entities' negotiating positions with respect to reproduction and distribution rights. The domestic music licensing structure for nondramatic musical works has thus evolved as a two-track system, one for licensing public performance rights and the other for licensing the reproduction and distribution rights. The reality of digital transmissions, though, is that in many situations today it is difficult to determine which rights are implicated and therefore whom a licensee must pay in order to secure the necessary rights. Faced with demands for payment from multiple representatives of the same copyright owner, each purporting to license a different right that is alleged to be involved in the same transmission, licensees end up paying twice for the right to make a digital transmission of a single work. Some have called this "double-dipping." I would not characterize it that way; I

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[6]*See*, David Sinacore-Guinn, Collective Administration of Copyrights and Neighboring Rights: International Practices, Procedures, and Organizations § 17.9.3 (1993) (citing 45 countries which permit collective licensing organizations to license both rights, including Argentina, Brazil, Chile, France, Germany, Greece, Hong Kong, India, Israel, Italy, Japan, Mexico, South Korea and Spain).

recognize that separate rights are involved – or at least alleged to be involved – and that separate licensors exist for each of those rights. But whether or not two or more separate rights are truly implicated and deserving of compensation, it seems inefficient to require a licensee to seek out two separate licenses from two separate sources in order to compensate the same copyright owners for the right to engage in a single transmission of a single work.

The existing Section 115 provides so little guidance for this present problem that the Recording Industry Association of America ("RIAA"), the National Music Publishers' Association, Inc. ("NMPA") and The Harry Fox Agency, Inc. ("HFA") have entered into a licensing agreement for any reproduction and distribution rights implicated in a performance of a musical composition through an on-demand stream, even though it is debatable whether such a transmission even involves a compensable reproduction. Meanwhile, the ambiguities will undoubtedly compound as continuing technological innovations permit online music services to provide offerings never contemplated during the legislative process.

The increased transactional costs (e.g., arguably duplicative demands for royalties and the delays necessitated by negotiating with multiple licensors) also inhibit the music industry's ability to combat piracy. Legal music services can combat piracy only if they can offer what the "pirates" offer. I believe that the majority of consumers would choose to use a legal service if it could offer a comparable product. Right now, illegitimate services clearly offer something that consumers want, lots of music at little or no cost. They can do this because they offer people a means to obtain any music they please without obtaining the appropriate licenses. However, under the complex licensing scheme engendered by the present Section 115, legal music services must engage in numerous negotiations which result in time delays and increased transaction costs.

In cases where they cannot succeed in obtaining all of the rights they need to make a musical composition available, the legal music services simply cannot offer that selection, thereby making them less attractive to the listening public than the pirates. Reforming Section 115 to provide a streamlined process by which legal music services can clear the rights they need to make music available to consumers will enable these services to compete with, and I believe effectively combat, piracy.

The more time I have spent reviewing the positions taken by the music publishers, the record companies, the online music services, the performing rights societies and all the other interested parties, the more I have become convinced that I was right last year when I told you that "As a matter of principle, I believe that the Section 115 license should be repealed and that licensing of rights should be left to the marketplace, most likely by means of collective administration."[7] The Copyright Office has long taken the position that statutory licenses should be enacted only in exceptional cases, when the marketplace is incapable of working. After all, the Constitution speaks of authors' *exclusive* rights.

Compulsory licenses should only be instituted as a last resort, when the marketplace has failed. We cannot say that the marketplace has failed with respect to reproduction and distribution of nondramatic musical works because the marketplace has never been given a chance to succeed. The moment the copyright owner's right to control mechanical reproductions of a nondramatic musical work in the form of phonorecords was created, it was accompanied by the

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[7] *Section 115 of the Copyright Act: In Need of an Update?: Hearing Before the Subcomm. on Courts, the Internet, And Intellectual Property of the House Comm. on the Judiciary*,108th Cong. 13 (2004) (statement of Marybeth Peters, Register of Copyrights).

compulsory license, and at a time when the phonograph industry was in its infancy. Perhaps it is finally time to find out, for the first time, whether the marketplace is up to the challenge.

I believe that the preferable solution is to phase out the compulsory license to allow for truly free market negotiations. Such a course of action would address the two themes that I have already identified as central to the current crisis: the conflicting demands made by copyright owners' agents for the licensing of performance rights and by their agents for the licensing of reproduction and distribution rights, and the contrast between the ability of performing rights societies collectively to license performance rights for virtually all nondramatic musical works and the inability of any organization or combination of organizations to do the same with respect to reproduction and distribution rights.

Legislation is necessary to address these and other problems that hinder the licensing of nondramatic musical works. We have tried the regulatory approach, and it has failed. Perhaps it has failed because of insufficient regulation: if Section 115 were to be expanded to encompass a blanket license for all (or at least many more) uses of nondramatic musical works, at rates to be established by a mechanism similar to that which is employed with the other statutory licenses, record companies and online music services might finally be able to obtain the right to offer what consumers are clamoring for, and to provide appropriate compensation to composers and music publishers for the exercise of those rights. Last year I tried in vain to guide the interested parties to consensus on such a proposal, and I would not be disappointed to see such a proposal be adopted. Unfortunately, I do not believe the various parties will be able to reach a final agreement on such a proposal; if it is to be enacted, it most likely will have to be because you

have concluded that it should be enacted notwithstanding the objections of some or all of the interested parties.

In the world of music licensing itself we have a model that does not involve a compulsory license and that works very well. The performing rights organizations manage to offer licenses to perform publicly virtually all nondramatic musical works that anyone might want to license for public performance. They offer such licenses on a blanket basis for those who wish to have the freedom to perform any work within a performing rights organization's repertoire. Currently, no similar mechanism exists with respect to the reproduction and distribution of phonorecords of nondramatic musical works.

I believe that we can take the model that works so well with respect to performance rights and use it for the licensing of reproduction and distribution rights as well. Existing problems in locating someone who is authorized to license the reproduction and distribution of a particular song presumably would disappear if the performing rights organization that is authorized to license the public performance of that song could also license the reproduction and distribution of that song.

I do not mean to hold out the performing rights organizations as paragons in every way. In fact, the second fundamental problem that I have identified – the demands made by both licensors of performance rights and licensors of reproduction and distribution rights that a music service obtain a license from each licensor for the same transmission – is caused by the often questionable demands of the performing rights organizations as well as those of the publishers' representative for licensing reproduction and distribution rights. But the true cause is what has become an artificial division of the licensing functions for nondramatic musical works. Why do

online music services have less difficulty obtaining licenses for digital transmissions of sound recordings? Because the right of public performance and the rights of reproduction and distribution are now artificially split between two different licensors. For historical reasons (and, in at least one case, because of an antitrust decree), the performing rights organizations have licensed only public performance rights and the Harry Fox Agency has licensed only reproduction and distribution rights. That may have worked in the past, but it in the present – and most likely, even more in the future – it is an impediment that should be removed because it does not serve the interests of the songwriter, the publisher, the record company, the online music service, or the consumer.

As always, my focus is primarily on the author. The author should be fairly compensated for all non-privileged uses of his work. Intermediaries who assist the author in licensing the use of the work serve a useful function. But in determining public policy and legislative change, it is the author – and not the middlemen – whose interests should be protected.

A Legislative Solution

My proposal, tentatively entitled the 21st Century Music Reform Act, addresses many of the above-identified problems and attempts to strike the appropriate balance between the rights of copyright owners and the needs of the users in a digital world. The overarching purpose is to remove the statutory barriers which presently inhibit the music industry's ability to clear rights in order to open the licensing structure to free market competition.

This proposal effectively substitutes a collective licensing structure for the existing Section 115 compulsory license. It accomplishes this by setting forth rights and obligations for the newly-defined music rights organizations ("MRO"). The basic defining characteristic of an MRO is that

it is authorized by a copyright owner to license the public performance of nondramatic musical works. But in fact, the proposed legislation would authorize the MRO to license the reproduction and distribution rights as well. An MRO would be authorized, and required with respect to digital audio transmissions, to license the reproduction and distribution rights of any nondramatic musical work for which it was authorized to license the public performance right. This structure creates an efficient mechanism for copyright owners to license and for potential licensees to obtain all of the necessary rights to make nondramatic musical works available to the listening public, particularly in the context of the Internet and other digital transmission media. It also leaves evolving business terms to the flexibility of marketplace negotiations. The proposed legislative text is attached as Appendix A and a detailed section-by-section analysis is attached as Appendix B. A brief summary follows below.

As indicated by the definitions section, existing performing rights societies ASCAP, BMI and SESAC would automatically become MROs. Other entities may also become MROs if they obtain the necessary authorization from a copyright owner. An MRO that is authorized to license public performance rights in nondramatic musical works would also be authorized to license reproduction and distribution rights for phonorecords of the same works. Moreover, any MRO would have to offer, as part of its license to perform publicly a nondramatic musical work by means of a digital audio transmission (e.g., an on-demand stream), a non-exclusive license to make phonorecords of that work (including server and other transient copies) and to distribute phonorecords of that work (e.g., downloads) to the extent that the exercise of such rights facilitates the public performance of the nondramatic musical work. This "uni-license" type of approach solves one of the major problems affecting the music industry today, namely whether

certain types of digital transmissions (e.g., "pure" streams, on-demand streams, tethered downloads, and "pure" downloads) implicate the public performance right and/or the reproduction and distribution right and if so in what proportions. Because the royalty recipients of both rights are ultimately the same – music publishers and songwriters – this is in essence merely a valuation and accounting issue more appropriately left to market forces rather than legislative fiat.

A copyright owner could not authorize more than one MRO to license the right to a particular nondramatic musical work at any given time. That is essentially what happens today with respect to the public performance right. This provision is necessary for the efficiency this proposal seeks to foster. By having only one MRO authorized at any time to license a particular nondramatic musical work, the prospective licensee can more efficiently identify which MRO it must contact to obtain a license, and the MRO can more easily calculate and account for the royalties owed to the copyright owner and any other applicable parties.

Existing performing rights societies currently provide lists of the works for which they offer licenses. My proposal encourages MROs to continue this practice by predicating the MRO's recovery of statutory damages for the infringement of a work on the MRO having made publicly available a list of the works it was authorized to license; such a list must have included the infringed work at the time infringement commenced.

I recognize that at least one performing rights societies, ASCAP, may be prohibited by current antitrust consent decrees from carrying out the functions of a MRO as contemplated by this proposal. Because it is so important to the efficient operation of the marketplace that a licensee be able to acquire all necessary rights to a nondramatic musical work from a single

source, the proposal effectively abrogates any provisions in existing consent decrees which would not permit a MRO to license public performance, reproduction and distribution rights. However, the legislation would not affect the other provisions of the antitrust consent decrees; for example, the provisions providing for a rate court to resolve impasses over rates for public performances would not be affected. Perhaps the most contentious issue – and one that I do not propose to resolve – is whether the antitrust decrees might be expanded to take into account the new functions of the music rights organizations. I know that publishers and prospective licensees have reacted in very different ways to that statement, and I would like to take the opportunity to clarify that I take no position on whether the existing consent decrees *should* be extended to, for example, the royalty rates offered by a MRO for a reproduction and distribution license to review by a rate court. I assume that the Antitrust Division of the Department of Justice would have a major say in such a decision. Because this is such a contentious issue, it may be that its resolution should be part of any final legislative enactment.

MROs would also be authorized to license downloads and other reproductions made in the course of digital audio transmissions, even when there is no public performance involved. This should lead to "one-stop shopping" for any online music service seeking to license rights to a work.[8]

The remaining portions of the proposal clarify the rights enjoyed by parties other than MROs. Copyright owners of course retain the ability to enter into direct licenses on whatever terms to which they choose to agree, as they always have. Nothing obligates a copyright owner

[8] It would be "one-stop" shopping with respect to all of the necessary rights for all works in an MRO's repertoire. Of course, it would not be "one-stop" for a licensee wishing to obtain rights to all nondramatic musical works. That licensee would need to obtain a blanket license from each of the MROs. But that simply reflects the current state of affairs with respect to public performance rights, and that state of affairs appears to be satisfactory.

to utilize a MRO, but the increased efficiency of that structure provides an incentive for them to do so, just as they have all utilized performing rights organizations. Copyright owners may also authorize as many entities as they wish to license mechanical rights (other than those involved in digital audio transmissions) for their nondramatic musical works.

I recommend that the effective date for this proposal be as soon as is reasonably practicable. Existing performing rights societies appear to have all of the data and resources necessary to be effective and immediate MROs. The music industry needs relief quickly, especially if it is to compete against the popularity of illegal online music services. Although some delay might be necessary to allow the soon-to-be MROs time to implement administrative logistics, the period between the enactment and effective dates should be reasonably short. If it is, then the current system, even with its imperfections, can remain in effect without relatively drastic consequences or disruptions. If the delay is long, though, then new interim provisions would need to be developed. Constructing these interim provisions is likely to create further confusion and disruption in the music industry and should be avoided if at all possible.[9]

If this proposal is enacted, some licenses granted prior to the effective date will be incompatible with the post-enactment law. The final section of the proposal addresses these situations, and provides a sunset period for such licenses. For example, no one can use the statutory license to make phonorecords of nondramatic musical works after the effective date because the statutory license will not exist after that date. However, those who have lawfully

[9] While one might imagine that agreeing upon royalty rates for the "uni-licenses" offered by MROs may take some time, there is no reason why a MRO could not issue a license subject to subsequent agreement on what the rate would be, perhaps with some dispute resolution provision, in order to permit the new system to get off the ground quickly. There is good reason to believe that online music services would be pleased to enter into such license agreements.

made phonorecords before the effective date would receive a one year grace period to distribute their stock pursuant to the statutory terms in effect the day preceding enactment.

I recognize that if the proposal is enacted, some current music industry participants may have to adjust their business practices to maintain their current levels of profitability without the artificial rate ceiling afforded by the statutory license. Not meaning to minimize this practical reality, I wish to emphasize that the overriding goal of any licensing scheme should be to compensate copyright owners properly and provide an efficient and effective means by which licensees can obtain rights to make nondramatic musical works available to the listening public. Ancillary support organizations are important to the process, and will necessarily continue to serve their roles, albeit perhaps with some modifications induced by the increased competition present in a free market.

I also recognize that this proposal does not address some of the issues raised in the proposals that music industry representatives have recently submitted to you. Some of those issues relate to ringtunes, promotional uses, multi-format discs, percentage royalty rates, lyric displays, licensing of music for audiovisual works, locked content and accounting logistics. I consider these to be business or economic issues which are best resolved in the free market place. My proposal creates this market place, and I believe that there is no need for Government to legislate what the parties can negotiate themselves.

I hope that you will give thoughtful consideration to the approach embodied in today's proposal. We have only had the opportunity to discuss the proposal with the interested parties in the past few days, and I recognize that they have many questions and concerns. That is not surprising, given that the proposal represents a major change in the nondramatic musical works

licensing regime. On the other hand, I am encouraged by the informal feedback I have already received from several music industry representatives supporting the basic concept of eliminating the Section 115 compulsory license in favor of an enhanced collective licensing system. I recognize that there may be many details that should be the subject of further discussion and consideration, but I believe the basic framework is sound. I look forward to continuing to work with this Subcommittee and any interested parties to craft a solution that maximizes the benefits for all concerned, whether along the lines suggested in my proposal or along the lines of the other proposals that you have been considering.

Appendix A

109th CONGRESS
1st Session

DISCUSSION DRAFT

To amend chapters 1 and 5 of title 17, United States Code, relating to the licensing of performance and mechanical rights in musical compositions.

IN THE HOUSE OF REPRESENTATIVES

_____, 2005

_____ introduced the following bill; which was referred to the Committee on the Judiciary

A BILL

To amend chapters 1 and 5 of title 17, United States Code, relating to the licensing of performance and mechanical rights in musical compositions.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SECTION 1. SHORT TITLE.

This Act may be cited as the '21st Century Music Licensing Reform Act'.

SEC. 2. DEFINITIONS REVISED.

(a) Section 101 of title 17, United States Code, is amended by:

(i) deleting the definition of "performing rights society", and

(ii) adding the following definition:

'A "music rights organization" is an association, corporation, or other entity that is authorized by a copyright owner to license the public performance of nondramatic musical works.'

(b) Section 114 of Title 17, United States Code, is amended by:

(i) replacing the term "performing rights society" with "music rights organization" in clause (d)(3)(C).

(ii) amending clause (d)(3)(E) to read in its entirety:

'(E) For purposes of this paragraph, a "licensor" shall include the licensing entity and any other entity under any material degree of common ownership, management, or control that owns copyrights in sound recordings.'

(c) Section 513 of Title 17, United States Code, is amended by replacing the term "performing rights society" with "music rights organization".

SEC. 3. REPEAL OF COMPULSORY MECHANICAL COPYRIGHT LICENSE FOR NONDRAMATIC MUSICAL WORKS.

Section 115 of title 17, United States Code, is amended to read as follows:

'Sec. 115. Scope of exclusive rights in nondramatic musical works: Licensing of reproduction, distribution and public performance rights

'In the case of nondramatic musical works, the exclusive rights provided by clauses (1), (3) and (4) of section 106, to make phonorecords of such works, to distribute phonorecords of such works and to perform such works publicly, are subject to the conditions specified by this section.

'(a) Licensing of reproduction and distribution rights by music rights organizations. - (1) A lawful authorization to a music rights organization to license the right to perform a nondramatic musical work includes the authorization to license the non-exclusive right to reproduce the work in phonorecords and the right to distribute phonorecords of the work to the public.

'(2) A license from a music rights organization to perform one or more nondramatic musical works publicly by means of digital audio transmissions includes the non-exclusive right to reproduce the work in phonorecords and the right to distribute phonorecords of the work to the public, to the extent that the exercise of such rights facilitates the public performance of the musical work. A music rights organization that offers a license to perform one or more nondramatic musical works publicly by means of digital audio transmissions shall offer licensees use of all musical works in its repertoire, but the music rights organization and a licensee may agree to a license for less than all of the works in the music rights organization's repertoire.

'(3) No person shall authorize more than one music rights organization at a time to license rights to a particular nondramatic musical work.

'(4) A music rights organization may recover, for itself or on behalf of a copyright owner, statutory damages for copyright infringement only if such music rights organization has made publicly available a list of the nondramatic musical works for which it has been granted the authority to grant licenses, and such list included the infringed work at the time the infringement commenced.

'(5) The rights and obligations of this subsection shall apply notwithstanding the antitrust laws or any judicial order which, in applying the antitrust laws to any entity including a music rights organization, would otherwise prohibit any licensing activity contemplated by this subsection.

'(b) Other Licensing Agents. - Notwithstanding any authorization a music rights organization may have to license nondramatic musical works, a copyright owner of a nondramatic musical work may authorize, on a non-exclusive basis, any other person or entity to license the non-exclusive right to make and distribute phonorecords of such work in a tangible medium of expression but not by means of a digital audio transmission.

'(c) Direct Licensing by a Copyright Owner - Nothing in this section shall prohibit the direct licensing of a nondramatic musical work by its copyright owner on whatever rates and terms to which it agrees.

'(d) Definition. - As used in this section, the following term has the following meaning: A "digital audio transmission" is a digital transmission, as defined in section 101, of a phonorecord or performance of a nondramatic musical work. This term does not include the transmission of a copy or performance of any audiovisual work.'

SEC. 4. EFFECTIVE DATE.

This Act shall become effective on _____.

SEC. 5. EXISTING LICENSES.

(a) Any license existing as of [effective date] between a copyright owner of a nondramatic musical work or its agent and a licensee with respect to the right to make and distribute phonorecords of such work shall expire according to its terms or on [effective date plus 1 year], whichever is earlier.

(b) Any licensee that has made phonorecords of nondramatic musical works prior to [effective date] pursuant to the compulsory license then set forth in section 115 of this title may

distribute such phonorecords prior to [effective date plus 1 year] according to the terms of the compulsory license existing prior to its repeal.

[Other conforming amendments to address other references in title 17 to section 115 will be necessary.]

Appendix B

21ST CENTURY MUSIC LICENSING REFORM
SECTION-BY-SECTION ANALYSIS

Section 1: Short Title.

This section provides that this Act may be cited as the "21st Century Music Licensing Reform Act."

Section 2: Definitions Revised.

This section replaces the term "performing rights society" with the term "music rights organization" throughout the Copyright Act. This change in terminology reflects a fundamental function of this Act: to permit and require those entities that license the right to perform publicly nondramatic musical works to license as well the rights to make and distribute phonorecords of such works.

Subsection (a) in effect substitutes the new term "music rights organization" for the deleted term "performing rights society" by retaining the substance of the latter term's definition. The change in name reflects the additional functions, beyond the licensing of performance rights, that music rights organizations will perform pursuant to the amended section 115. Although the existing performing rights societies, such as American Society of Composers, Authors and Publishers (ASCAP), Broadcast Music, Inc. (BMI) and SESAC, Inc. will transform into music rights organizations, the definition no longer specifically identifies these entities because additional entities – existing (e.g., the Harry Fox Agency) or new – may also become music rights organizations provided that they perform the functions described in the definition and required in the amended section 115.

Subsection (b) substitutes the term "music rights organization" in place of "performing rights society" in Section 114 of the Copyright Act. This conforming change is intended to have no effect on the substance or operation of Section 114. Subsection (b) also effectively deletes Section 114(d)(3)(E)(ii), the existing definition of "performing rights society" that is being replaced by the definition of general applicability for "music rights organization" set forth in Section 101.

Subsection (c) substitutes the term "music rights organization" in place of "performing rights society" in Section 513 of the Copyright Act. This conforming change is intended to have no effect on the substance or operation of Section 513.

Section 3: Repeal of Compulsory Mechanical Copyright License for Nondramatic Musical Works.

This section effectively repeals the existing Section 115 of the Copyright Act, including the compulsory license for making and distributing phonorecords (including digital phonorecord deliveries) of nondramatic musical works, by replacing the text in its entirety, and establishes the role of a music rights organization. It places certain conditions on the licensing of public performance, reproduction and distribution rights granted by Section 106 of the Copyright Act with respect to nondramatic musical works. These conditions do not apply to other types of works.

Subsection (a) sets forth the rights, obligations and limitations that apply to music rights organizations. The purpose of this subsection is to foster a consolidated licensing structure so that copyright owners of nondramatic musical works can license and users of nondramatic musical works can obtain in an efficient manner all of the necessary rights to make such works available, particularly in the context of the Internet and other digital transmission media.

Paragraph (1) provides that when a music rights organization has been lawfully authorized to license the public performance right in a nondramatic musical work, that music rights organization is also authorized to license the reproduction and the distribution of phonorecords of such work, including by digital audio transmissions. As a result, a music rights organization shall be empowered to license all rights relating to performance of the musical compositions in its repertoire and relating to the making and the distribution of phonorecords of those musical compositions. However, it does not follow that an entity authorized to license the making of phonorecords of a musical composition will necessarily be authorized to license the public performance of that musical composition.

Paragraph (2) obligates a music rights organization to offer, as part of its license to perform publicly a nondramatic musical work by means of a digital audio transmission, a non-exclusive right to reproduce phonorecords of the musical work and to distribute phonorecords of that work by means of a digital audio transmission, to the extent that such reproduction and/or distribution facilitates the public performance. Thus, for example, a music rights organization that licenses the public performance of a musical work by means of "streaming" on the Internet must include within the license the right to make and distribute the incidental intermediate phonorecords created in the process of streaming, and the right to make phonorecords that reside on the licensee's server . A music rights organization may also choose to offer other types of licenses involving the reproduction and distribution rights, such as a traditional mechanical license to make and distribute phonorecords or a license to offer "downloads" of phonorecords of nondramatic musical works. Presumably, a music rights organization would elect at least to license all reproductions by means of digital audio transmissions, especially in light of assertions by the existing performing rights societies that downloading implicates the public performance right. This provision aims to alleviate some of the practical difficulties encountered in the present

music licensing structure, which often finds licensees facing demands for separate licenses for the digital transmission of a musical composition from both a performing rights society and an agent for reproduction and distribution rights such as The Harry Fox Agency, while leaving as many issues as possible to be resolved by the private sector and marketplace negotiations.

Paragraph (3) ensures that no copyright owner of a work may authorize more than one music rights organization at any given time to license the rights to that work. This provision assists in achieving the efficiency this Act seeks to foster. Ideally, only one music rights organization should be authorized at any time to license a particular nondramatic musical work, so that the prospective licensee can more efficiently identify whom it must contact to obtain a license and the music rights organization can more easily calculate and account for the royalties owed to the copyright owner and any other applicable parties. In fact, as is the case with the existing performing rights societies, situations will occur in which more than one music rights organization may license the same musical work (e.g., a work written by two songwriters, one affiliated with ASCAP and one affiliated with BMI), but it is anticipated that those situations will be addressed in the same way they are addressed today.

Paragraph (4) encourages a music rights organization to make publicly available a list of the nondramatic musical works it is authorized to license in order to assist users of musical works in identifying whom they must contact to obtain a license. Most performing rights societies already maintain such a list on the Internet, and it is the intent of this provision that music rights organizations continue this practice. It behooves a music rights organization to update this list regularly, as the recovery of statutory damages is predicated on the list including the work infringed at the commencement of infringement, consistent with the policy embodied in Section 412 of the Copyright Act.

Paragraph (5) recognizes that some existing performing rights societies, which will become music rights organizations, are subject to judicially ordered consent decrees in antitrust actions which may prohibit the these entities from licensing both the public performance and the making and distribution of nondramatic musical works. For example, the current consent decree governing the activities of ASCAP prohibits ASCAP from "[h]olding, acquiring, licensing, enforcing or negotiating concerning any foreign or domestic rights in copyrighted musical compositions other than rights of public performance on a non-exclusive basis." This paragraph abrogates any such provisions, to the extent necessary to permit a music rights organization to license both public performance and making and distribution rights with respect to nondramatic musical works. However, it is anticipated that all other provisions of the existing consent decrees will remain in place, and it is possible that the consent decrees will be modified to take into account the new functions of the music rights organizations. For example, it may be that the music rights organizations' setting of royalty rates for reproduction and distribution will be subject to the same type of review by the ASCAP and BMI "rate courts" as is currently the case with respect to royalty rates for public performances. The legislation does not require that the

consent decrees be modified; whether that occurs would be resolved in the ongoing antitrust proceedings.

Subsection (b) clarifies that even though a music rights organization may have been authorized to license rights to a particular nondramatic musical work, a copyright owner still retains the right to authorize any number of other persons or entities to license the mechanical rights in that work for the purpose of making and distributing tangible phonorecords, such as compact discs or audio tapes, but not for the purpose of digitally delivering a phonorecord to a consumer. In other words, licensing of rights for all digital audio transmissions of nondramatic musical works must be done either by a music rights organization or directly by the copyright owner.

The effect of subsections (a) and (b), when read together, is that a copyright owner may: independently license the rights to its nondramatic musical works whether or not a music rights organization or other entity has also been authorized to license some or all of the rights to such works; utilize one music rights organization to license both the public performance and the reproduction and distribution rights in such works; and utilize one or more agents to license the making and distribution of physical phonorecords of such works. However, a copyright owner who chooses to utilize a music rights organization to license public performance rights in a nondramatic musical work is required to authorize the music rights organization to license the reproduction and distribution rights to such work. A copyright owner may also choose not to license its nondramatic musical works at all, although such a decision presumably would not be an economically rational choice. The Act anticipates that a performing rights organization will become a music rights organization, unless it chooses to cease licensing the public performance of nondramatic musical compositions. Any other person or entity, including a music publisher or a licensing agent such as the Harry Fox Agency, may function as a music rights organization or, alternatively, as a licensing agent for mechanical rights to make and distribute physical phonorecords depending on the authority it receives from the applicable copyright owner.

Subsection (c) clarifies that a copyright owner retains the right to enter into direct license agreements with licensees for its nondramatic musical works on an exclusive or non-exclusive basis. Any authorization received by a music rights organization or other entity to license rights in nondramatic musical works must necessarily be on a non-exclusive basis, and such entity may therefore only grant non-exclusive licenses to its licensees. Nothing in this Act compels a copyright owner to license its work or to utilize a music rights organization or a licensing agent.

Subsection (d) defines a digital audio transmission for purposes of subsections (a) and (b).

Section 4: Effective Date.

Section 4 establishes _____ as the effective date of this Act. The present Section 115, with its compulsory licensing scheme, will remain effective until such date. During the transition period before the effective date, performing rights societies and any other entities desiring to become music rights organizations may establish or expand their licensing capabilities in order to be able to perform the functions set forth in this Act, and copyright owners may take the necessary steps to authorize music rights organizations to perform their new functions and to afford them time to adapt to the demise of the compulsory license.

Section 5: Existing Licenses.

Subsection (a) recognizes that some licenses between copyright owners or their agents and licensees will be in effect on and continue after the effective date of this Act. Because those licenses currently are either compulsory licenses under the existing Section 115 or are voluntary licenses the terms of which are shaped largely by the provisions of the existing compulsory license, such licenses should terminate not long after the compulsory license provision itself has terminated. Subsection (a) provides that such agreements will expire no later than one year after the effective date of this Act, providing a transitional time period for parties to negotiate new terms in light of the new licensing scheme.

Subsection (b) recognizes that some licensees may have made phonorecords of nondramatic musical works pursuant to the statutory license prior to its repeal. This subsection gives such licensees a one year grace period to distribute their stock according to the terms of Section 115 of the Copyright Act as it existed prior to the effective date of this Act. The rates and terms of the statutory license shall throughout this grace period remain what they were on the day immediately preceding the effective date of this Act. It is anticipated that all licensees under existing reproduction and distribution licenses will obtain new licenses either from music rights organizations or directly from publishers or their agents.

Mr. SMITH. I'll recognize myself for some questions, and the first—and maybe I should comment, this is a wonderful turnout on the part of Members, as well. That's how important the subject is and how much we appreciate your testimony.

Ms. Peters, some of the industry groups have recommended or advocated some type of a super-agency instead of your proposal. How efficient would that be or not be, in your opinion?

Ms. PETERS. Well, I would actually oppose that at this point in time. The one thing it does do is it would allow one-stop shopping, but it would impose another layer of administration and perhaps another layer of transaction costs, and I think there would be an antitrust concern. It could reduce competition. So at this point in time, I would not necessarily favor going that way.

Mr. SMITH. Okay. Suppose our goal was to have high revenue and low overhead. What would be the most efficient licensing system that you would recommend, the one—go on.

Ms. PETERS. I would suggest that it's the one that I propose. [Laughter.]

Mr. SMITH. Okay. Why would that increase revenue and reduce overhead?

Ms. PETERS. Because you would be able to license all works, and because all users of digital music would have PROs to go to, or MROs to go to and get what they needed, I think it would enable a lot more legitimate use of music and bring in more revenue.

Mr. SMITH. Okay. Speaking of MROs, under your proposal, how many MROs do you think would exist? Would it be four or would it be 40?

Ms. PETERS. Let's put it this way. It is possible that there could be many MROs, but I would suggest that it would be unlikely. There are expenses in setting up an MRO. In fact, today, other MROs or PROs could have, in fact, developed, but they haven't. In the performing rights area, it went from 1914 until 1939 before a second one showed up in the form of BMI. So I think that it's unlikely.

In the mechanical rights area, technically, there may be several, but there's only one predominant or Collective Licensing Organization, the Harry Fox Agency. So I have no reason to believe that we would have a proliferation of MROs.

Mr. SMITH. Ms. Peters, what do you think we need to learn from what other countries' experiences have been with music licensing? What has worked in other countries, what has not worked, and does that influence your recommendation?

Ms. PETERS. A number of countries actually have—the PROs have combined the reproduction right with, in fact, the performance right. That is a plus. I do have to say that in other countries, they have different problems that they are struggling with. But with regard to administering both rights, there are many who actually do administer both rights.

Mr. SMITH. One further question. This gets into a subject that is still contentious to a lot, and that is royalty rates. If royalty rates cannot be established by private negotiations, I know you favor some form of binding arbitration, but why would that be the recommendation?

Ms. PETERS. Well, actually, I think what we would basically feel is that the marketplace should—that we should attempt to use the marketplace, and if, in fact, it turns out that there's a problem, then maybe you turn to, you know, a consent decree with a rate court. But I don't think that you leap there. And there are alternatives. There's the copyright royalty judge system that you could look at if, in fact, a problem developed. But at this point in time, I would actually favor letting the marketplace try to work.

Mr. SMITH. I was just going to say, when it comes to royalty rates, you still prefer the free market approach, letting that be negotiated rather than imposed by the Government——

Ms. PETERS. Yes.

Mr. SMITH. —or by other entities? Okay.

Last question. You made a curious statement that I thought was a valid statement in your written testimony. You said that you thought the current system, which is to say section 115, quote, "inhibits the music industry's ability to combat piracy." I thought it would be interesting to hear why you thought that was the case.

Ms. PETERS. It actually goes back to my first answer to—the answer to the first question. If it's too difficult to obtain the license, then people might use the works without permission and that actually increases unauthorized distribution of musical compositions. So for me, in order to decrease piracy or to take away the excuse that, well, I couldn't get a license, you need an efficient system in place.

Mr. SMITH. Okay. Thank you, Ms. Peters.

The gentleman from Michigan, Mr. Conyers, is recognized for his questions.

Mr. CONYERS. Thank you, Mr. Chairman, and thank you for being with us today, Ms. Peters.

Where does the—in your view, the concept of remuneration come in and how would it be affected by the proposal in the draft that you have before us for songwriters?

Ms. PETERS. My perspective would be a blanket license that would be negotiated in the marketplace. The piece that we have been very critical of over the years is that the existing section 115 sets a ceiling and people bargain down from the ceiling. I don't like seeing a ceiling. I notice that the songwriters said, well, they would like a floor. You can't go below a particular level. Well, that may be true, but the ceiling, in fact, is a problem.

Mr. CONYERS. You dislike ceilings, but not—you don't feel too bad about floors.

Ms. PETERS. Well, basically, the songwriters were saying, no matter what, we should make sure that we have a decent royalty rate. I care about songwriters. It's the creator that we have to make sure that we take care of, and I thought my proposal was, in fact, increasing the ability of songwriters to get additional money. We know that songwriters make more money through the performance right and from PROs than they do from the administration of the mechanical compulsory license.

Mr. CONYERS. Is the proposal you have a narrower group of changes as opposed to some of the other proposals out? I notice that some of my colleagues on the Committee have weighed in on 115 in earlier times.

Ms. PETERS. If you are not going to abolish the compulsory license and your choice is to reform it, then I strongly recommend reforming it on a blanket license-type basis. I think there was agreement when we were overseeing discussions last summer that the 114 blanket license worked much more efficiently than the title-by-title, music publisher-by-music publisher system.

Mr. CONYERS. I would like to just thank you very much for moving us along in this direction and ask the Chairman, I assume that we are going to have additional hearings and you will be hearing from the ASCAP, BMI, SESACs of the world on this same subject, Mr. Chairman?

Mr. SMITH. Mr. Conyers, if you would yield, we have had two hearings involving the witnesses whom you have just mentioned and I am sure there will not only be additional hearings, but discussions on the subject, as well.

Mr. CONYERS. All right. Thank you very much.

Mr. SMITH. The gentleman from Virginia, Mr. Goodlatte, is recognized for his questions.

Mr. GOODLATTE. Thank you, Mr. Chairman.

Ms. Peters, welcome. Do you believe that providing for courts to resolve disputes over royalty rates for public performances has worked to decide those rates when the private parties cannot agree?

Ms. PETERS. You're talking about the rate courts and the consent decrees?

Mr. GOODLATTE. Right.

Ms. PETERS. Yes.

Mr. GOODLATTE. If Congress adopted your idea to allow MROs to license reproduction and distribution rights for phonorecords, do you believe that applying such a rate dispute mechanism would be useful for those licenses, as well?

Ms. PETERS. It may be. We actually have had a short time to talk to the parties, but if there's one thing that they vehemently disagree about, it's that issue. So I guess for me, I would like to see if, in fact, there was a problem that developed and if, in fact, it did develop and the Antitrust Division of the Department of Justice felt the remedy was, in fact, an expansion of the consent decrees to cover rate courts in this area. Then that would be the way to go.

Mr. GOODLATTE. How would that—would you then have to come back to the Congress for additional legislation——

Ms. PETERS. No——

Mr. GOODLATTE. —or would we be looking at a court expanding its own jurisdiction?

Ms. PETERS. Yes. You would be looking at an expansion of the existing consent decrees if, in fact, it turned out that there was a problem with regard to monopolistic practices.

Mr. GOODLATTE. All right. In order for providers to offer legitimate online music services and new physical music products to compete with illegal services, these providers need certainty that they will be able to license the reproduction and distribution rights to all music with greater ease. What provisions in your plan would create more certainty that these licenses would be more readily available to these legitimate music services and products?

Ms. PETERS. Actually, we chose the PRO model because they serve all comers and you have the license no matter what. You work out the details later. I think that was the model that we wanted. All people who wanted licenses could get them. The details, you know, might come later, but you still could, in fact, use the work.

Mr. GOODLATTE. And you think that would be easy enough, and you testified to the Chairman that you don't envision having too many of these organizations?

Ms. PETERS. Right. That is my anticipation. I will just cite that I was on the website of some of the PROs and they've got licenses for podcasting in many of the new forms of making works available on the Internet, so I have faith that that would be handled.

Mr. GOODLATTE. Do any of the provisions of the consent decrees operating in the performance rights realm help to create this kind of certainty for the licensing of performance rights?

Ms. PETERS. I have to say I'm not an expert on the consent decrees and I'm really—we can look into that answer and get back to you on it, but I don't feel comfortable answering it right now.

Mr. GOODLATTE. Well, that would be fine, Mr. Chairman, if she could be allowed to do that. I would certainly be interested in having your additional thoughts on that subject. Thank you, Mr. Chairman.

Mr. SMITH. Thank you, Mr. Goodlatte.

The gentleman from California, Mr. Berman, is recognized for his questions.

Mr. BERMAN. Well, Ms. Peters, thank you very much for your very bold proposal. I think it's—in a way, I like the idea of starting off with the, almost the revolutionary and then, unlike Iraq, try to see what the consequences are beforehand.

I want to press you. I guess both the Chairman and Mr. Goodlatte raised this issue. But why in the world that you are proposing will the MROs look more like the Performance Rights Organizations, three, using blanket licenses——

Ms. PETERS. Right.

Mr. BERMAN. —than—I mean, nothing in your proposal would require, would put a limit on the number, and nothing in your proposal would require blanket licensing, as I understand it.

Ms. PETERS. That's right.

Mr. BERMAN. Why would it look more like the PROs than like the situation we now have with the mechanical license? What I mean is just—I mean, the PROs developed in a non-digital world.

Ms. PETERS. That is right, but they've adapted to a digital world.

Mr. BERMAN. Yes. Why wouldn't we be more likely to see a proliferation of publishers who decide to be their own MRO, in effect?

Ms. PETERS. Let me start with, yes, they could. Our proposal doesn't necessarily require that in the end there will be a blanket license, but a blanket license must be offered in our proposal. So from my perspective, if you look at what has happened——

Mr. BERMAN. A blanket license——

Ms. PETERS. Must be offered——

Mr. BERMAN. To——

Ms. PETERS. Any——

Mr. BERMAN. —for a licensee to utilize the reproduction——

Ms. PETERS. Yes.

Mr. BERMAN. —performance——

Ms. PETERS. Yes.

Mr. BERMAN. —the whole bundle of rights——

Ms. PETERS. Yes.

Mr. BERMAN. —must be offered——

Ms. PETERS. It must be offered.

Mr. BERMAN. —at a rate determined through negotiations between the license——

Ms. PETERS. Right.

Mr. BERMAN. —between the MRO and the licensee——

Ms. PETERS. Right. And it's possible, just like today——

Mr. BERMAN. —and if they haven't negotiated it, with a dispute resolution mechanism to essentially set the price, the fair price.

Ms. PETERS. Right.

Mr. BERMAN. Okay. Go on now.

Ms. PETERS. What I was actually going to say is based on the experience of the PROs, it is much cheaper to administer a blanket license, and although they are required to do program licenses, those are administratively difficult. So it would seem to me—now, you have to know my entire career is in the Government, so I have never worked in the real live business world, but it would seem that the blanket licensing would be the most efficient way. PROs, and I think even the Harry Fox Agency, try to give the composer and the music publisher as much of the money as they possibly can. The problem with HFA is it's a title by title. So it seems to me not to make much sense to think that a PRO, if they have this, would, in fact, choose not to, in essence, push the blanket license.

Mr. BERMAN. And again on the notion of why, in the context of now having the—why will songwriters and publishers—I guess they think the answer would be they get a better deal this way. That's why they would——

Ms. PETERS. Hopefully, yes, and——

Mr. BERMAN. —rather than become their own MRO——

Ms. PETERS. Right, and in the PRO scenario, there is, in fact, a direct payment to songwriters. It's 50 percent to publishers, 50 percent direct payment to songwriters.

Mr. BERMAN. All right. Now, talk about this issue of the consent decree, that is, if they're still allowed after—no, never mind. [Laughter.]

Every 4 years, we'll be back. Explain a little more slowly for me where the consent decree comes into this as opposed to us legislating an alternative dispute resolution mechanism.

Ms. PETERS. Two of the PROs are currently subject to a consent decree——

Mr. BERMAN. Right.

Ms. PETERS. —with regard to the performance right, and the question is what happens vis-a-vis that consent decree? Should you add these additional rights to what they can do? And we actually tried to start a conversation with the Justice Department, but we only were able to contact the Antitrust Division in the last few days. So we're not sure how all of this would come out, but we think that—or we hope that the Antitrust Division would be persuaded that our proposal does not raise serious antitrust concerns

and there really wouldn't need to be an adjustment at this point in time. But if, in fact, it turned out that, in practice, then you could expand the consent decree to cover the additional rights.

Mr. BERMAN. And what do we do during the transition period?

Ms. PETERS. The transition period——

Mr. BERMAN. From the passage of the legislation to——

Ms. PETERS. Until the point where you realize it's broken? I'm hoping it's not broken. I'm actually——

Mr. BERMAN. Well, the parties don't come together. You get relatively little privately negotiated and now you have to deal with the mechanism for setting a rate. What happens during that interim period?

Mr. SMITH. The gentleman from California is recognized for an additional minute.

Ms. PETERS. I'm not totally sure. Maybe there are dispute resolution clauses that could be put in the contracts, or as this is happening the Antitrust Division could start talking with the parties. I don't have the ultimate answer.

Mr. BERMAN. And actually, you could, if you knew the way it was going to be settled—well, the problem is you don't, but if you knew how this was going to be settled, the obligations could accrue and then the amount of money owed could be determined later. That's done a lot of times——

Ms. PETERS. Well, I was assuming that, that you can always get the license and worry about what you owe later. But for people, that doesn't give much comfort, not knowing what they're going to owe.

Mr. SMITH. Thank you, Mr. Berman.

The gentleman from Florida, Mr. Keller, is recognized for his questions.

Mr. KELLER. Well, thank you, Mr. Chairman, and thank you, Ms. Peters, for being here today. I have read your complete testimony and I've also read various memos and other items from industry members and I'm reminded of the many media reports of identical twins who speak their own language which they understand but nobody else knows what the hell they're talking about. [Laughter.]

Ms. PETERS. I understand that.

Mr. KELLER. So I'm going to simplify things and walk you through. Let me tell you what I do know about children, as someone who has two kids in elementary school. This is what I know about 10-year-olds in fourth grade. They don't want to pay $18 for a CD that has one hit song and 11 crappy songs. They don't want to break the law by illegally downloading because they've heard that you could be sued or even sent to jail. And they kind of like MTV videos.

So with that in mind, the ideal situation for that 10-year-old and fourth grader would be a DVD/CD, one on one side, one on the other, that has the top 12 songs of the current top 40 along with the music videos for their songs. That, I think, may be the future for these kids.

So some creative entrepreneur comes around and he wants to distribute this DVD/CD combination and play by the rules. He wants it in all the record stores and Wal-Marts throughout America. He wants to do it in a way that is legal and quick and that

fairly compensates the copyright owners. Under this scenario, I want to see how he would go about doing that under existing law versus your proposal.

So let's start with the CD side of it. He wants to get the rights to these 12 songs on the CD. Under existing law, I would imagine his first stop would be with the Harry Fox Agency, since you've testified they have 65 to 90 percent of the market share, is that right?

Ms. PETERS. Yes, and if it's the top ten or 12, they probably have it.

Mr. KELLER. Okay. And——

Ms. PETERS. So they would go to Harry Fox to get the reproduction and distribution right, and at that point, if all he's doing is making the CD——

Mr. KELLER. Right.

Ms. PETERS. —the question would be, where is he getting it from? If he's downloading it from an online service, or did he buy the CD, whether the performance right is implicated depends on how he gets——

Mr. KELLER. Okay. Let's say it's just the mechanical licensing rights we're talking about——

Ms. PETERS. Okay, we——

Mr. KELLER. —and let's say that ten of the 12 songs, we can get from Harry Fox under the existing scenario. He has to track down the other two licensors of music publisher rights?

Ms. PETERS. Right.

Mr. KELLER. And that could take a while?

Ms. PETERS. It depends. If they're top songs, I would think that the name of the publisher would be on the album or it would—the data would be available and they could contact the publisher.

Mr. KELLER. Under your proposal, would it make it any easier to track down those licensors other than Harry Fox, or would that essentially stay the same?

Ms. PETERS. Well, if it's a blanket license, there would be several places that you would go to clear for all of the songs. The whole purpose is that in the PROs, if you get the three licenses, you're essentially covered for everything, Even if, in fact, you can't find the copyright owner. The way it is today, you could use the statutory license by coming to the Copyright Office, looking up the records to see whether or not it was registered. If it was registered, then you would serve or you could contact that publisher. But you also have to deal with the record company, for the rights in the sound recordings.

Mr. KELLER. But let me go on because I have got some follow-ups.

Ms. PETERS. Okay.

Mr. KELLER. So we've managed to now track down the appropriate people, the licensors of all these 12 songs. Under existing law, there's a compulsory license. So in other words, as long as I pay the appropriate amount of money, I can use that song.

Ms. PETERS. If you follow the terms and conditions——

Mr. KELLER. Right.

Ms. PETERS. —in the statute or you get a modified license from the publisher.

Mr. KELLER. Now, under your proposal, you are talking about possibly doing away with the compulsory licenses——

Ms. PETERS. Right.

Mr. KELLER. —so the songwriter may say, you know what? I don't want my song listed on that compilation CD, is that right?

Ms. PETERS. If, in fact, it were part of a PRO, no, they couldn't, because it would be required to be offered on a blanket basis.

Mr. KELLER. So as many licenses would still be available?

Ms. PETERS. The truth is, in certain circumstances, maybe the songwriter could say no. But most songwriters want to make money, so most songwriters want to license.

Mr. KELLER. Okay. So tracking down all these people and making sure they're appropriately paid, do you think your proposal would make that process on the CD side any quicker than it exists right now?

Ms. PETERS. Personally, yes.

Mr. KELLER. And that's because of the blanket licensing issue when you——

Ms. PETERS. And going to one place.

Mr. KELLER. Okay. Now let's flip over the CD to the DVD side——

Ms. PETERS. The truth is, if it were a mechanical and Harry Fox did, in fact, represent all those people——

Mr. KELLER. Right.

Ms. PETERS. —it could be one-stop shopping with Harry Fox, too.

Mr. KELLER. Which would be ideal. Now, let me ask, as a follow-up to that, let's say Harry Fox has it all, let's say 100 percent of all these songs, and we do away with the compulsory license. What's to keep them from charging whatever they want to charge?

Ms. PETERS. The marketplace.

Mr. KELLER. But there's no competitor. They have 100 percent of the songs. I mean, what's to keep them from saying, you know what? I'm going to charge you three times that or take a walk.

Ms. PETERS. They could try. I mean, it's really like, as ASCAP and BMI and SESAC negotiate with the broadcasters, they have all the music.

Mr. KELLER. Okay. Just one final question, Mr. Chairman.

Mr. SMITH. Without objection, the gentleman is recognized for an additional minute.

Mr. KELLER. And I'm sorry, this is a harder question, but you flip over that CD. Now we're on the DVD side and you want to get the rights to those corresponding music videos. Tell me how, if any, there would be a difference between existing law and your new proposal.

Ms. PETERS. Actually, we don't address music videos. Those are audio-visual works, not just musical compositions. There are sync rights, synchronization rights, that are involved that—they are handled by music publishers. So there is more licensing involved when you're making a music video, separate licenses.

Mr. KELLER. And whatever those complications are, and I understand there are many, are not going to be affected by what you are suggesting?

Ms. PETERS. No.

Mr. KELLER. Okay. Thank you, Mr. Chairman.

Mr. SMITH. Thank you, Mr. Keller.

The gentleman from Virginia, Mr. Boucher, is recognized for his questions.

Mr. BOUCHER. Mr. Chairman, thank you very much, and I want to commend you for your persistence in holding a series of hearings and giving in-depth consideration to the need for legislation that will remove the barriers that currently inhibit the ability of digital media companies to use the Internet in order to compete very successfully with peer-to-peer file sharing, and I think we all acknowledge that need. And I'm very impressed with the efforts you've undertaken, Mr. Chairman, to help us achieve that goal.

And Ms. Peters, I want to commend you for your longstanding work in this area also and what I think is a very thoughtful report. You've done a first-rate job with this. I want to ask you just a couple of questions about some of your recommendations.

I have listened very carefully to the conversation regarding your preferred alternative, which is that section 115 be repealed and that we basically trust the market in order to agglomerate the various songwriter-publisher interests, and that we also trust the market in order to set a fair rate. And I have some concerns about both of those components. I am a little bit worried that, notwithstanding your projection, that what we would see is a small number of Music Rights Organizations arise in order to agglomerate and license these rights, that what we might end up seeing is dozens of them, and if that were to happen, the digital media companies would be placed at a severe disadvantage in order to have to negotiate separately with dozens of agencies, some of which would have some songs, some of which would have others.

I guess there is no way to know at this juncture whether your projection is right—we would hope that it is—or whether the eventuality might prove that dozens of these rights organizations arise. And so, Mr. Chairman, I would simply note a concern with regard to that and recommend that at some future hearing on the subject, we invite all of the various externally interested parties and get their opinion on how they think that particular part of the market would arise.

The other concern I would note, Ms. Peters, relates to the rate. Mr. Berman engaged you in a very thorough discussion of that subject. I won't reprise that except to note that I really don't share your confidence on several points.

First of all, I have some real doubts that the Department of Justice would, in fact, seek to extend the consent decrees in order to provide a rate backstop. I think it would be better if we considered providing that backstop directly through the legislation and I would be very interested in hearing what other witnesses will have to say at future hearings concerning that possibility, and I know you've acknowledged the potential for doing all of this in your testimony.

So let me depart from section 115 and take just a moment to talk about a few other things also within the general sphere of effective music licensing that will make it easier for the lawful companies to compete with the unlawful. You performed another valuable public service several years ago when in response to section 104 of the Digital Millennium Copyright Act, your office studied a number

of questions. And then you published what I thought was a thoughtful and highly constructive report that made a number of recommendations.

One of those recommendations is that server copies, including buffer copies and other ephemeral copies that are made in very large numbers through the act of streaming online and digital webcasting be declared to be fair use. Your interpretation of the 104 report is that those ephemeral copies, buffer copies, et cetera, are, in fact, fair use, but I think you suggested at the same time that we codify that principle just to make sure that the ultimate interpretation by the courts and others was consistent with your view. Do you still make that recommendation to us?

Ms. PETERS. Actually, we looked at it with respect to 115 and we certainly said that if you are amending section 115, which is the compulsory license, that all of that activity should be encompassed within the compulsory license and in certain areas that when, in fact, what you have is a licensed download and that the performance is simply to accomplish that download, we didn't see any separate economic value. One of the things that——

Mr. BOUCHER. In the ephemeral copy or the buffer——

Ms. PETERS. In the ephemeral copies.

Mr. BOUCHER. Right.

Ms. PETERS. Now, one of the things about our proposal is that we can argue long and hard about the value of those and whether they are implicated and we should pay for them. By putting the rights together, it really takes away that stress. But yes, in general, we stick with our thought that when you have a licensed activity and you have copies that are made or incidental performances—you can argue whether they're public or not—that those should not necessarily be separately compensable events.

Mr. BOUCHER. All right. Thank you very much.

Mr. Chairman, I ask unanimous consent for an additional minute.

Mr. SMITH. Without objection, the gentleman is recognized for an additional minute.

Mr. BOUCHER. And Ms. Peters, I have two other questions. I am going to ask these in a block and you can answer in a block, if you would like. I would hope you would separately address each.

You also suggested in your section 104 report that in order to make the purchase of legal music on the web more attractive to the consumer, that the right of the consumer to back up the music that he has lawfully acquired be recognized as a fair use. I would be very interested in acknowledging that in whatever statute we report from this Committee. Do you continue to make that recommendation to us, also?

Ms. PETERS. When you have, yes, legally purchased material, we basically said that everybody was, in fact, doing it and we might as well acknowledge it.

Mr. BOUCHER. Okay, thank you. I forgot to ask this other question at the same time. I have always thought that we should equate webcasting with the rights and privileges that inure within the record store, within the physical record store, with respect to the ability to sample for 20 seconds or 30 seconds the music before the decision is made to purchase it.

And so you acknowledged also in your 104 report that these samples, it would be appropriate to equalize treatment with regard to these, and so I would ask you if you would recommend to us that we allow the web 20-second or 30-second sample to be given the same license-free status that presently applies to the in-store sales.

Ms. PETERS. You are talking about section 110(7)?

Mr. BOUCHER. That's correct.

Ms. PETERS. We think that certainly there's a reasonable argument that using a snippet for the purpose of selling music, so that people can listen, do I want to buy it or not, is something that we could support. But the question is, how much is the snippet, and there have been talk of 30 seconds and 60 seconds. I am of he view that 60 seconds may be too long.

Mr. BOUCHER. Sixty seconds may be too long?

Ms. PETERS. Right.

Mr. BOUCHER. Well, thank you. Those were very helpful answers, and again, thank you for the good job you have done with this.

Thank you, Mr. Chairman.

Mr. SMITH. Thank you, Mr. Boucher.

The gentleman from Utah, Mr. Cannon, is recognized for his questions.

Mr. CANNON. Thank you, Mr. Chairman.

It's always a pleasure to have you with us, Ms. Peters. To follow up on Mr. Keller's comment, in a world where we have twins or triplets or quadruplets or however many people out there speaking this special language, you've always been very clear with the Committee and very helpful to me.

Following up also on one of the things that Mr. Keller was saying, I take it from where you are headed that you believe that these—that your proposal is going to help legal royalty paying online kinds of services compete against piracy. Is that the case, and if so, how will that work?

Ms. PETERS. I was essentially saying that if, in fact, it is easy to get a license and license all of the things that you need to do, then, in fact, I thought that that would encourage legitimate music services, and the more music services that we have providing product and competing with each other, that is a good thing.

I do think that many people in the United States would prefer to help songwriters and would buy the legitimate version if, in fact, it was a viable option to the free.

Mr. CANNON. Because of the efficiencies your system would have, it would—the system would be cheaper and therefore you could compete at a lower price, I take it, with free.

Ms. PETERS. And the people who had these services were able to acquire the entire music repertoire, not just parts of it.

Mr. CANNON. So is the point of your legislation to combine the system so that the mechanical side of the equation functions like the PROs?

Ms. PETERS. Yes.

Mr. CANNON. Thank you. One reason we have decided to review the issue of music licensing is because today, customers are not able to access all of the new products they want to buy in the marketplace. So it is my understanding that DVD audio disks and other new formats cannot break into the marketplace to meet con-

sumer demand. Under your proposal, would these types of formats automatically be able to be licensed and available to consumers?

Ms. PETERS. If you're talking about DVD audio, it may have an audio-visual component that I haven't addressed.

Mr. CANNON. So——

Ms. PETERS. So I only addressed the music part, so it may not.

Mr. CANNON. So where do we go? I mean, obviously, the world doesn't make the nice distinctions we have historically drawn here. How do we get to the next phase?

Ms. PETERS. In our proposal, we actually looked at what the problems seemed to be, which was the right to get the music. If it's a broader problem and it's true some of the parties have identified broader problems—lyrics, video, synchronization rights—then it's appropriate for the Committee to look at those things and determine what the scope of any activity, remedial activity it wants to make should be made.

Mr. CANNON. Thank you again for your very clear thoughts and I yield back, Mr. Chairman.

Mr. SMITH. Thank you, Mr. Cannon.

The gentleman from Florida, Mr. Wexler, is recognized for his questions.

Mr. WEXLER. Thank you, Mr. Chairman.

I would first like to just associate myself with the remarks of Mr. Boucher regarding the thoughtfulness, obviously, that your plan was prepared.

If I could ask you, just in terms of the theory of where you think you're headed, in previous hearings, we've heard the predictions of the variety, and Mr. Keller spoke to them a bit, about the new type of products that would be offered, the music videos, the concert footage, the lyrics and so forth. Are you confident that the proposed changes that you have associated yourself with, that if we make them, that the licenses to all of these works will be at least as available as they are today? Can you assure us that that will be the case?

Ms. PETERS. There are no assurances.

Mr. WEXLER. In your view?

Ms. PETERS. It's my view that they would be, but it's only my view. I don't have a crystal ball and—I just think that people don't make money unless they license works. I mean, I have never heard a copyright owner—well, there's a few recluse authors, but most of the time, people want their works to be licensed and they want it licensed about the world so that they can be paid.

Mr. WEXLER. Would you agree that the net result of the proposed changes are that the works are less available than they are today, then the changes have not been successful?

Ms. PETERS. That would be bad. Yes, I agree. I mean, the whole goal is more availability, so anything less than more availability is not a good thing.

Mr. WEXLER. I'm done, Mr. Chairman. Thank you very much.

Mr. SMITH. Thank you, Mr. Wexler.

Ms. Peters, thank you very much for your testimony. This has been most helpful and most informative.

If there are no further questions, we stand adjourned. Thank you.

[Whereupon, at 11:03 a.m., the Subcommittee was adjourned.]

APPENDIX

Material Submitted for the Hearing Record

PREPARED STATEMENT OF THE HONORABLE HOWARD BERMAN, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF CALIFORNIA, AND RANKING MEMBER, SUBCOMMITTEE ON COURTS, THE INTERNET, AND INTELLECTUAL PROPERTY

Statement for the Honorable Howard L. Berman

The Subcommittee on Courts, the Internet, and the Intellectual Property

Hearing on

Copyright Office Views on Music Licensing Reform

June 21, 2005

Mr. Chairman,

Thank you for furthering the discussion on music licensing reform by scheduling this hearing. The Copyright Office continues to serve as a valuable resource on many different copyright issues including Section 115 and therefore I am especially interested in hearing their opinions on the ideal construct for a music licensing paradigm.

In anticipation of the Grokster decision, I think it is important to recognize that the problem of rampant piracy over Peer-to-Peer Networks serves as a reminder of the dire need to address digital music licensing reform. Piracy harms an industry that provides jobs in my district and throughout the country – from the recording artist to the sound engineer and all the businesses that support the range of musical talents. In order to

enable legitimate online music distributors compete with the choice and ease of "free" the goal of any music licensing reform should be to enable users to receive their choice of music anytime, and anyplace and in any format while ensuring that the creator receive his/her rightful compensation.

According to reports of the NDP Group, legal online music sources have gained a solid foothold against file sharing networks. The proliferation and success of new digital music services such as the Apple itunes download service, or the recent launch of Rhapsody and Yahoo portable subscription services and the recent success of new physical formats such as dual disc cd/dvd all speak to the innovation of the distribution mechanisms for music content.

However, a quintessential question remains as to whether the current licensing system enables these new music products and services to realistically compete and overcome the "free" alternatives provided by the Peer-to-Peer networks.

Rewards for innovation are hard enough to come by for the songwriters who are often times the first to create but last to be paid. But the

unfettered distribution of music content over file swapping services prevents them from receiving a major source of potential revenue. Our focus must remain on providing rightful compensation to those that provide our music.

The idea of repealing any of the compulsory licenses (114/115) has great appeal and is music to my ears – the idea that the market would be required to yield fair value for a musical work has long been the hope of many copyright owners. We must facilitate legitimate digital online music services in order to combat the pirates and restoring the treasure.

I look forward to hearing from the Register of Copyrights to provide further details of how this draft would address some of the practical issues such as a transition period issues and creation of a fluid marketplace to begin leveling the playing field for music services with those of Grokster/Kazaa.

PREPARED STATEMENT OF THE HONORABLE JOHN CONYERS, JR.

As I have stated before, I have serious reservations with proposals that limit the rights of content creators to negotiate a fair rate for their creativity.

I understand that there are broad proposals to revamp the music licensing system. Many of the proposals, however, appear to impact only the songwriters, the lowest-paid content owners there are. This process should not be thought of by anyone as an opportunity to extract further concessions from creators who already are the most heavily-regulated and restricted in the music industry.

Further, considering that all of the interested parties agree that the administration of the section 115 mechanical license should be streamlined, I believe that is where this Subcommittee should direct its energy. If we do that, we could pass a non-controversial bill very quickly. If, however, we pursue a broad approach that negatively impacts some groups in favor of others, it is likely that nothing will be accomplished except for alienating the actual creators of content.

Finally, we must retain the ability of songwriters to negotiate a far rate for their musical content. While a rate court would appease some parties seeking a quick resolution to royalty disputes, private negotiations would be the most appropriate forum for such conversations.

LETTER FROM JONATHAN POTTER, EXECUTIVE DIRECTOR, DIGITAL MEDIA ASSOCIATION TO THE HONORABLELAMAR SMITH, A REPRESENTATIVE ON CONGRESS FROM THE STATE OF TEXAS, AND CHAIRMAN, SUBCOMMITTEE ON COURTS, THE INTERNET, AND INTELLECTUAL PROPERTY

June 28, 2005

The Honorable Lamar Smith
Chairman, Subcommittee on Courts, the
Internet and Intellectual Property
U.S. House of Representatives
Washington, DC 20515

Dear Mr. Chairman,

Thank you for the opportunity to include comments of the Digital Media Association in the record of the June 21, 2005 Subcommittee hearing regarding music licensing reform. DiMA members appreciate your continuing intent to comprehensively modernize music licensing law, and thereby to make it easier for legitimate royalty-paying online music services to compete against piracy and royalty-free alternatives.

With regard to online music distribution and specifically Section 115 of the Copyright Act, legislation should clarify precisely what rights are needed by online music services and should ensure that the rights are reasonably easy to secure on fair terms so that services can offer consumers all the content that is otherwise available for free on pirate networks. Unfortunately, as detailed below, the Copyright Office legislative proposal – although well intended – does not accomplish this goal, and so DiMA opposes its enactment and asks the Subcommittee to instead consider enacting a statutory blanket license as the most effective means of modernizing music licensing laws.

As you know, DiMA believes that legislation should also address Section 114 of the Copyright Act, as you suggested in your opening statement at the March 5, 2005 Subcommittee hearing. With regard to Internet radio, legislation should promote innovation and reduce litigation by clarifying that consumer-influenced programming falls within the statutory license, and should equalize the royalty-setting standard so that all digital radio services – which of course compete with one another – pay royalties on the same basis.

In prior testimony before this Subcommittee both DiMA and the Copyright Office have noted two extraordinary flaws in current Section 115: (1) its limited and ambiguous scope, and (2) its administrative burdens. However, the Copyright Office proposal resolves only the scope issue. While we recognize and appreciate the measures this proposal takes to address the "double-dipping" problem for which we have long sought relief, DiMA companies believe that other aspects of this proposal are likely to impede, rather than assist, their ability to license the broad catalog of musical works necessary to compete with pirate services.

We are deeply concerned that Music Rights Organizations would not likely develop as the Copyright Office testimony suggests. DiMA agrees that in theory a free market should be the most efficient means of developing pricing equilibrium between creators, distributors and law-abiding consumers. We also agree that the performance rights licensing system works reasonably

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well today for distributors and online music services and could in theory be efficiently extended to reproduction and distribution rights. However, in the current business environment a free market cannot form and compete with the perfect market that is piracy. Moreover, the Copyright Office proposal does not ensure that the smoothly-operating ASCAP and BMI licensing processes would extend to reproduction and distribution rights; instead it guarantees turbulence and uncertainty and increased risk for law-abiding services, which is precisely what the legitimate online music market does not need.

As last week's hearing evidenced, there are many uncertainties as to how the Copyright Office proposal would be implemented, particularly by ASCAP and BMI (collectively "the PROs"). It seems reasonably clear that the consent decrees governing the operations of ASCAP and BMI (collectively "the PROs") pertain only to those organizations' management of performance rights, and would not extend to the process of licensing reproduction and distribution rights. Moreover, the federal district "rate courts" which today oversee PROs' performance rights licensing and act as a backstop against anticompetitive conduct, would have no jurisdiction over the PROs' management of reproduction and distribution rights.

Though it is of course possible that the PROs would voluntarily extend to distribution and reproduction rights their existing operational procedures (i.e., blanket licensing on request and then negotiating price), it seems unlikely that publishers and songwriters would approve, and that in fact this possibility would incentivize the creation of many more MROs than the Copyright Office predicts. Absent the rate court backstop discussed above, nothing would inhibit the PROs (or any newly formed MRO) from preventing legitimate online services' access to blanket licenses that are necessary to build a music service that is competitive against black market networks.

As a result of the changed PROs and an unlimited number of new MROs, the Copyright Office proposal would not resolve online services' administrative burden associated with current Section 115, but instead would substitute new, and likely much greater burdens. Rather than today's known impossibility – song-by-song licensing – the Copyright Office proposal could spawn dozens or hundreds of Music Rights Organizations, and DiMA members would have to obtain licenses from each and every one. Moreover, there is nothing in the proposal to limit MROs from licensing all works on a song-by-song, format-by-format basis as the Harry Fox Agency and the 115 license require today. And perhaps worst, even if MROs offer blanket licenses, DiMA services would be forced to match individual composition licenses obtained from myriad publishers and MROs with individual sound recording licenses obtained from record companies in order to ensure that each individual work's license is complete, an extraordinarily complex requirement that even the Harry Fox Agency has not effectively accomplished after decades in business.

DiMA believes that the best and only practical legislation is that which we proposed in our March 5 testimony, and which Register Peters proffered as her second choice: convert the song-by-song mechanical compulsory license into a statutory blanket license that operates similarly to the statutory sound recording performing right license in Section 114 of the Copyright Act. A statutory blanket license accomplishes all the goals identified by Chairman Smith and

Representative Berman at the March 5, 2005 hearing, including fair royalties for creators, clear rights and responsibilities for licensees, straightforward processes to resolve disputes about license scope or royalty rates, and the empowerment of royalty-paying music services to compete effectively against the reality of rampant piracy. Moreover, the statutory blanket license structure has been embraced by all stakeholders in the private sector's music licensing legislative discussions – including songwriters and music publishers and their representatives, recording companies, online services, and retailers.

Finally, Mr. Chairman, DiMA notes that the Copyright Office proposal addressed only music licensing problems associated with composition rights, and particularly with Sections 115 and 112 of the Copyright Act. In concert with the Recording Artists Coalition, DiMA continues to urge your consideration of reforms that will modernize Section 114 of the Act, relating to performance rights in sound recordings and ways that current law inhibits the success of Internet radio services.

Internet radio is an important legal music experience, and one which promotes consumer spending on recorded music. Ensuring that "interactive services" are defined in a balanced way that benefits creators and consumers, and that royalties are equivalent across all digital radio platforms, will promote growth of royalty-paying Internet radio and provide another opportunity for consumers to enjoy lawful innovative online music.

Thank you for the opportunity to express DiMA's views for the record.

Sincerely,

Jonathan Potter
Executive Director

cc: The Honorable Howard Berman

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LETTER FROM STEVEN M. MARKS, RECORDING INDUSTRY ASSOCIATION OF AMERICA TO THE HONORABLE LAMAR SMITH, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF TEXAS, AND CHAIRMAN, SUBCOMMITTEE ON COURTS, THE INTERNET, AND INTELLECTUAL PROPERTY

June 29, 2005

Chairman Lamar Smith
Subcommittee on Courts, the Internet,
and Intellectual Property
Committee on the Judiciary
U.S. House of Representatives
2138 Rayburn House Office Building
Washington, D.C. 20515

Dear Chairman Smith:

Thank you for the time and attention you have devoted to badly needed reform of the mechanical compulsory license. We appreciate the leadership you have provided in this effort to make it possible to bring consumers exciting new types of musical product and service offerings. We also appreciate this opportunity to provide for the record the comments of the Recording Industry Association of America ("RIAA") on the testimony of the Register of Copyrights at the June 21, 2005 oversight hearing concerning "Copyright Office Views on Music Licensing Reform."

In her testimony, the Register articulated a proposal to reform the process of licensing musical works by abolishing the mechanical compulsory license of Section 115 of the Copyright Act and authorizing "Music Rights Organizations" ("MROs") to license collectively performances, and certain reproductions and distributions, of musical works. The Register's proposal is fundamentally good to the extent it seeks to move toward blanket licensing of all uses similar to how ASCAP and BMI operate today, and to end the bifurcation of performance and mechanical rights licensing. Achieving those objectives would simplify mechanical license clearance and administration for both licensors and licensees, avoid uncertainty as to which licenses are required for which activities, and avoid possible duplicative payments.

However, any change so fundamental as abolition of the compulsory license would only make sense if copyright owners and users alike could be assured that a workable music licensing system would replace it. We are concerned that without modifications the Register's proposal would not be workable:

- The proposal may decentralize music licensing. The current system of collective performance rights licensing works well because there are only a few performing

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rights organizations ("PROs") and they represent virtually all commercially significant musical works. By linking mechanical licensing to performance licensing, the Register's proposal could discourage membership in an MRO and motivate publishers to find other means to handle licensing of their works. At the same time, the proposal provides a structure for the formation of new MROs, which could seek to attract members by not licensing certain mechanical uses or by holding out for unreasonable royalties because they are not subject to consent decrees like ASCAP and BMI. We are concerned that these factors would lead to a multiplication of MROs, or publishers' withdrawing from collective licensing. Either way, it may be necessary for users to negotiate licenses with dozens or hundreds of MROs and publishers to obtain rights to a critical mass of content. Thus, both performance and mechanical licensing could be much less centralized, and hence transaction costs may make works less available, than they are today.

- The proposal does not generally require that MRO licensing will work as ASCAP and BMI do today. ASCAP and BMI represent virtually all commercially significant works; license every kind of performance represented in the marketplace; offer both blanket and per-program licenses; make licenses available immediately, on a nondiscriminatory basis; and have the backstop of rate court to ensure that the market power of collective licensing is not used to demand more than a reasonable royalty (even if rate court proceedings are time-consuming and expensive). If MROs worked that way, they would be a significant improvement over the current system, which has impeded the launch of offerings such as DVD-Audio, DualDisc, subscription services and ringtunes. However, the Register's proposal does not require MROs to work that way. MROs would have considerable flexibility in determining what they license, their process for granting licenses and the royalties they demand. There likely would be significant variation among MROs (not to mention publishers who withdraw from MROs). It is likely that the transaction costs of clearance and royalty administration would increase, and not clear that appropriate licenses would be available on a timely basis for every kind of offering.

- The proposal may permit anticompetitive activity without any offsetting protection for music users. We applaud collective licensing of musical works, and recognize that promoting collective licensing may require providing a limited antitrust exemption. However, in the past significant collective licensing has always been subject to a backstop – such as the possibility of a rate court proceeding in the case of most performance licensing, and of a Copyright Royalty Board proceeding in the case of mechanical licensing. The proposal arguably exempts MROs from the antitrust laws altogether, and does not even extend the existing PRO consent decrees to cover mechanical licensing activities. Competitor licensors should not be permitted to set prices collectively unless there is a backstop to ensure that rates are reasonable or other means to protect licensees from the licensors' collective market power.

- The proposal may not remedy, and may exacerbate, licensing problems for some types of offerings. While the goal of the Register's proposal is to merge mechanical licensing into the current performance license system, it only does that decisively in

the case of digital audio transmissions that are performances (and only then to the extent that the works are in the repertoire of an MRO). Thus, MROs would be required to license reproductions incidental to streaming transmissions. However, it is uncertain whether any or all MROs would license physical product distribution or other activities involving digital transmissions – such as downloads and distribution through kiosks. Thus, the proposal offers no assurance that it will improve licensing of the physical products that represent some 97% of sales, and the very real risk that it will make such licensing much more difficult.

- The proposal does not address the current generation of new product and service offerings. Today's PROs respond to marketplace developments by licensing every form of performance, whether audio or audiovisual and whether a traditional use or a use employing the latest technology. The Register's proposal would treat reproduction and distribution licensing in a way that is much narrower and less flexible. The current mechanical licensing system is frustrating the introduction of a wide range of exciting new product and service offerings that would give consumers more enjoyable and more convenient ways to access music. Because the Register's proposal is limited to the distribution of phonorecords, and focuses on digital transmissions, it does nothing to facilitate new uses such as the inclusion of incidental audiovisual material and lyrics on products such as DVD-Audio discs and DualDiscs or the distribution of music videos by means of the Internet or cellular networks.

- The proposal would be staggeringly disruptive. Among other things, the Register's proposal would abrogate private licenses of the right to make and distribute phonorecords of musical works. The proposal appears to target mechanical licenses, but it is important to understand that there are millions, or perhaps tens of millions, of subsisting mechanical license agreements, many of them at rates different than the statutory rate. Moreover, this provision might invalidate many other types of agreements – including writer agreements, sub-publishing agreements, recording contracts and licenses to services. The economic dislocation of this unprecedented action would be staggering. Just from the perspective of record companies, huge investments have been made over the course of decades in the production and promotion of hundreds of thousands of sound recordings based on settled financial expectations under these agreements. The Register's proposal would throw open the economic underpinnings of record companies' entire catalogs. Practically every agreement a company had ever entered into would have to be renegotiated. If the transaction costs of renegotiating all those deals did not extract every last cent of profit in the recording business, the increased royalties that could be commanded for allowing continued exploitation of popular albums surely would.

We suggest the following modifications to the Register's proposal:

- Create a super-MRO. This entity would issue licenses, collect license fees, and distribute royalties to MROs (similar to the Joint NMPA/HFA-ASCAP-BMI Unilicense Proposal). Alternatively, limit total MROs to a small number and minimize the risk of opt-outs. This will ensure that users do not need to deal with

dozens or hundreds of MROs and individual copyright owners. To the extent that there is not "one-stop shopping," clarify that MROs license works in their entirety and permit sublicensing of MRO licenses to maximize the availability of works and minimize the burden of work-by-work clearance.

- Provide one fair licensing process for all MROs. This process should include an efficient process for setting rates if negotiations fail – such as an expedited private arbitration, rate court or Copyright Royalty Board proceeding. This will ensure the availability of licenses and protect licensees from duplicative negotiations and rate proceedings, and from unfair practices that might otherwise be possible under a system of collective licensing.

- Address a broader range of product and service offerings. Congress has a unique opportunity to fix the music licensing system. It should not fail to address the complexity and enormous transaction costs of clearing even traditional offerings, or the pressing problems in the licensing of new types of product and service offerings.

- Do not disturb privately negotiated agreements. Any changes should be prospective only, and, it should be clear that other disruption to the affected industries is likely to be justified by the economic results and by better consumer access to new products and services.

Once again, we appreciate the opportunity to provide these comments on the Register's proposal and look forward to working with the Committee and the Copyright Office to make much-needed improvements to the music licensing process.

Sincerely,

Steven M. Marks

RESPONSE FROM THE NATIONAL MUSIC PUBLISHERS' ASSOCIATION, INC. IN RESPONSE TO THE TESTIMONY OF MARYBETH PETERS, REGISTER OF COPYRIGHTS, SUBMITTED JUNE 28, 2005

National Music Publishers Association ("NMPA") respectfully submits its testimony in response to the legislative proposal drafted by the Copyright Office. We thank the Chairman, Ranking Member, and the Subcommittee for their attention to matters instrumental to the livelihood of songwriters and music publishers. We also appreciate the time and effort invested in drafting the draft legislation; however we are unable to support this proposal.

First, we believe the Copyright Office proposal is fatally flawed and would be harmful to songwriters and music publishers. Second, we believe the unilicense proposal submitted by NMPA, the American Society of Composers, Authors, and Publishers ("ASCAP"), Broadcast Music, Inc. ("BMI"), Nashville Songwriters Association

International, and the Songwriters Guild of America is a superior proposal and would better address the needs of the marketplace while protecting the owners of copyrights. And third, we strongly believe if Congress chooses to change the laws regarding music licensing, it should embrace a free market approach rather than the more intrusive government role proposed by the Copyright Office

Initially, we believe the Copyright Office proposal would impose more government control over the music industry and would not result in a free marketplace system. At the Courts, the Internet, and Intellectual Property Subcommittee hearing on June 21, 2005, the Register of Copyrights, stated in her written testimony, "I believe that the preferable solution is to phase out the compulsory license to allow for truly free market negotiations." The Copyright Office proposal would indeed eliminate Section 115 of the Copyright Act; however, the Copyright Office proposal does not allow for free market negotiations. Instead, the Copyright Office proposal forces new Music Rights Organizations ("MROs") to be subjected to rate courts, unlike record labels, which have no rate setting mechanism and are allowed to operate in a free market. A true marketplace system would allow all parties to negotiate on the same level without any "backstop." By mandating that Performing Rights Organizations ("PROs") become MROs and tasking these new MROs with administering both performance and mechanical rights, the Copyright Office proposal may subject mechanical rights to the same rate courts outlined in consent decrees, which govern some PROs. The Copyright Office proposal does not clearly address whether the rate courts that currently apply to some performing rights rate negotiations would apply to mechanical rate negotiations. More than likely, mechanical rate negotiations would be subjected to these same rate courts, resulting in more government control over negotiations rather than less. Merging mechanical and performance rights into one rate proceeding will reduce the small amount of bargaining power that the songwriters have. Record companies currently do not have a rate court imposed on them, so they are free to negotiate as they please without regulation. This proposal does nothing to level the playing field.

Additionally, the Copyright Office proposal would put the Harry Fox Agency ("HFA"), the primary mechanical licensing agency, at a severe competitive disadvantage since it would take away a substantial section of its business, administering mechanical royalties in the digital world, and forcibly give it to PROs by statute. For HFA to compete, it would have to convince writers and publishers to grant expressly both mechanical and performance rights to HFA and then build a performance right infrastructure, which would take a considerable and potentially prohibitive amount of effort and expense. The most likely result of the Copyright Office proposal is that HFA will be left with only licensing mechanical rights in the physical world, threatening its viability all together.

The Copyright Office proposal would have major financial repercussions on the industry as well. The PROs would be forced to build a mechanical rights licensing, collection and distribution infrastructure, which would involve a large capital cost and additional operational overhead, thereby reducing royalty payments to writers and publishers. Likewise, as stated earlier, for HFA to continue to function, it would have to build a performance rights infrastructure which would be almost impossible. There are many other complications, such as splits that can differ between performance and mechanical royalties. The proposal also devalues mechanical rights by combining them with performance rights, thereby reducing royalty payments to writers and publishers.

The Copyright Office proposal would create more confusion than the current system. It was the Copyright Office's intent to create one (or three) stop shopping for the digital media companies who sell the property of songwriters and artists. However, it is entirely conceivable that several MROs could emerge and complicate things even more. The publishers, especially large multinational publishers, may decide it is more economical to create their own MROs and license directly.

We are also concerned that the Copyright Office proposal does not address the transition from the current system to this new MRO system. When asked about the transition at the subcommittee hearing on June 21, 2005, the Register confessed that the Copyright Office proposal does not provide for such a transition.

Second, we believe our unilicense proposal is a superior solution to the Copyright Office proposal that would balance the needs of the marketplace with the interests of copyright owners. The goal sought by the Copyright Office—to have one place to obtain the performance and mechanical rights needed for a single price - is achieved in the unilicense proposal.

The unilicense addresses the areas of most critical need raised by digital media providers—access. The unilicense would create a Super Agency. Digital companies would go to the Super Agency and obtain a blanket license covering both performing and mechanical rights and pay a percentage of their revenue. The digital companies

would then have a license for all recorded songs, and it would be the responsibility of the mechanical designated agent and performance designated agents to administer the royalties and distribute them to the appropriate writers/publishers.

Finally, we believe any Congressional action regarding music licensing should move toward a free market.

NMPA supports eliminating Section 115 of the Copyright Act and truly allowing the marketplace to govern the music industry. We support eliminating controlled compositions, which is not addressed in the Copyright Office proposal even though there has been receptivity to this in some congressional quarters. We support ending 96 years of compulsory licensing of songwriter effort. We support ending the government choosing the rates at which songwriters are compensated. We support keeping the government out of dictating the amounts songwriters and publishers are paid. If Congress acts, we respectfully request it act consistently with free market principles.

Again, we appreciate the opportunity to respond to the Copyright Office draft legislation and testimony. We will continue to meet with other parties in the industry and are hopeful that the marketplace can address many of these concerns without government intervention.

STATEMENT OF MAJOR SONGWRITING ORGANIZATIONS, THE SONGWRITERS GUILD OF AMERICA AND THE NASHVILLE SONGWRITERS ASSOCIATION INTERNATIONAL IN RESPONSE TO THE TESTIMONY OF THE HONORABLE MARYBETH PETERS, REGISTER OF COPYRIGHTS

STATEMENT OF MAJOR SONGWRITING ORGANIZATIONS

ON

COPYRIGHT OFFICE VIEWS ON MUSIC LICENSING REFORM

Subcommittee on Courts, the Internet and Intellectual Property
House Committee on the Judiciary

June 28, 2005

Mr. Chairman, Mr. Berman and distinguished Members of the Subcommittee. Thank you for allowing The Songwriters Guild of America and the Nashville Songwriters Association International the opportunity to submit a written statement in response to the June 21, 2005 testimony before the Subcommittee of Register of Copyrights Marybeth Peters regarding reforms to Section 115 of the Copyright Act.

During a music licensing hearing before the Subcommittee on March 8, 2005, songwriter Wood Newton of Nashville, Tennessee testified about the a bleak situation of the American songwriter. Over the last decade America has lost more than half of its professional songwriters due to the de-regulation of radio, corporate mergers and piracy. The average annual royalty income for American songwriters is somewhere around $5,000, well below the national poverty level.

Songwriters know better than anyone that our system of licensing music and compensating "authors" is antiquated and dysfunctional. Register Peters is correct when she says, "At its inception, the compulsory license facilitated the availability of music to the listening public. However, the evolution of technology and business practices has eroded the effectiveness of this provision." Critically, Register Peters is also correct when she emphasizes that "...in determining public policy and legislative change, it is the author--and **not** the middlemen--whose interests should be protected."

Sometime between the enactment of the compulsory license and the evolution of today's modern music industry, the authors who are granted "exclusive" rights to their respective writings have lost virtually every right--any real marketplace power to negotiate how much they are paid, rights to their payment histories, rights to audit and many others. As Congress considers reforms to Section 115, songwriters hope that changes will give power back to the creators

Many of the assessments of Register Peters about the current problems inherent in Section 115 of the Copyright Act are correct. However, the Nashville Songwriters Association International, The Songwriters Guild of America, ASCAP, BMI and the National Music Publishers Association have put forth a "uni-license" proposal that we believe better achieves the reforms to the licensing process that are necessary while simultaneously providing greater essential marketplace protections for songwriters.

Our songwriting organizations are particularly concerned about a number of aspects of the Copyright Office proposal. First, under the proposal a "music rights organization" ("MRO") would distribute both mechanical and performance rights. At least in the case of ASCAP or BMI—assuming those performing rights organizations choose to convert themselves to MROs--the mechanical rate would apparently be subject to a rate court. (We assume other MROs could be subject to Copyright Royalty Judge determinations or binding arbitration if negotiations failed.) This is fundamentally unfair to songwriters and publishers since it would eliminate the small amount of bargaining power in the marketplace that we currently have. We would note that, because the record labels are not subject to a rate court or other backstop, this provision creates an uneven playing field since the record companies can negotiate freely with respect to sound recordings.

Second, in our view it is likely that under the Copyright Office proposal multiple MROs will emerge, which will undermine the goal of one-stop shopping for licenses for the digital services. For example, the Harry Fox Agency and any number of large publishing companies could reconstitute themselves as MROs, joining the current PROs in providing that service. Such an outcome would hardly simplify the licensing process. Another scenario could find those performing rights societies subject to a rate court forced out of the marketplace, leaving only private companies or corporations to administer the rights.

Songwriter organizations are also concerned that the Copyright Office proposal could further erode the value of mechanical royalties by combining them with performance rights. While we agree that combining the performance and mechanical rights is a good idea where both rights are implied-- as in the case of music subscription services-- this combination should not 'thin slice' the value of both rights and recombine them in such a way that the distributors profit at the expense of creators. This is precisely why the negotiations have stalled over rates. Our contention is, and always has been, that the songwriters are the "first to work, and last to get paid".

Songwriters and music publishers took a substantial leap of faith a few months ago and allowed digital companies to operate while the music industry tried to determine a fair split for the royalties. Royalty payments for the licenses issued by music publishers/songwriters are being held in abeyance while record companies have negotiated licenses for up to 70% of available royalties—leaving nothing on the table for the creators.

Under the SGA, NSAI, NMPA/HFA, ASCAP, BMI "uni-license" proposal we are seeking a fair rate of 16 2/3 % of gross service revenues, with a minimum flat dollar fee as a floor. The songwriters will, in the end, receive roughly half of this percentage. There can be no public policy justification for giving the creators of the songs--on whose labors the entire music industry depends-- anything less than this figure while the 'middlemen' take the giant share of the money.

Throughout the Section 115 reform process the stated goals have been to protect creators, simplify the licensing process and achieve "one-stop licensing" for digital services. Our proposal would meet these goals and can also be instituted quickly and with minimal overhead costs. Our proposal will also get legitimate online music services into the marketplace in the near term, hopefully helping to deter piracy.

The super agency contemplated by our proposal would allow digital companies to obtain a blanket license for all performing and mechanical rights in exchange for payment of a percentage of the companies'gross revenues to the agency. The designated mechanical and performance rights agents would then distribute the royalties to the appropriate writer/publisher.

Our uni-license proposal is limited to the subscription world for very important reasons. First, the subscription world provides blended performance and mechanical rights. Second, subscription services are the format that currently has the most trouble with licensing, since such services are now operating in a business environment without a rate and sometimes without a license.

Our songwriter organizations agree with the Copyright Office that collective licensing "can and does succeed in this country." But collective licensing has potential drawbacks that need to be addressed in any proposal to ensure we protect the authors' rights.

Among them:

- Costs--The costs of 'sorting out' these blanket distributions should not be shifted onto the creators since we are not the direct beneficiaries of the new 'efficiency' in the licensing process. In fact, distribution costs under a blanket license will be significantly higher for creators than the old mechanical license when a sale could be directly tied to a songwriter.

- Transparency and songwriter participation--One of the most critical issues for song-songwriters and recording artists is transparency in the payment process. Songwriters must receive unlimited access to any payment data. To assure this and to guarantee fairness in the process generally, songwriters want a major role in the governing structure of any superagency.

- Current contracts--Will most current songwriting contracts have to be re-negotiated due to the restructuring of rights assignments? If a songwriter's music publisher decides to become an MRO, will songwriters lose the right to choose their own separate performance collection agent since their music publisher/MRO would now 'own' that right?

- Basement Rate--Congress should ensure that the "free market," does not result in a situation where songwriters are actually paid substantially less than the present compulsory rate.

- The need to retain Section 115(a)(2)--Any revisions to Section 115 should not eliminate the language that states that licensed arrangements "shall not change the basic melody or fundamental character of the work, and shall not be subject to protection as a derivative work under this title, except with the express consent of the copyright owner." This provision protects songwriters from the inappropriate exploitation of their creations..

- The need to address controlled compositions--The Copyright Office proposal says nothing about eliminating the practice of controlled composition rates in licensing of recordings by the record labels, which costs songwriters and our publisher partners millions and millions of dollars every year. This is money that belongs to creators by statute but has been taken away by unfair recording contracts. Congress should remember that songwriters did not receive a pay raise for our mechanical rights from 1909 until 1978. As soon as Congress increased the mechanical rate for songwriters, record labels invented the practice of "controlled composition," which effectively gives authors only a 3/4 rate for their songs.

On behalf of our songwriter-members and all those who create the greatest music in the world, NSAI and SGA want to thank the Subcommittee for the opportunity to share our views on these vital issues.

Thank you.

Rick Carnes
President
The Songwriters Guild of America

Barton Herbison
Executive Director
Nashville Songwriters Association International

PREPARED STATEMENT OF THE LOCAL RADIO INTERNET COALITION IN RESPONSE TO THE TESTIMONY OF THE HONORABLE MARYBETH PETERS, REGISTER OF COPYRIGHTS

Statement of the Local Radio Internet Coalition
Oversight Hearing on Music Licensing
Before the Subcommittee on Courts, the Internet, and Intellectual Property
Judiciary Committee
United States House of Representatives
Submitted, June 28, 2005

The Local Radio Internet Coalition appreciates this opportunity to submit its views on the Copyright Office's discussion draft music licensing reform bill and on more general issues that are interfering with the development of a vibrant market for music on the Internet. The Coalition comprises major radio broadcasting companies that have a vital interest in the development of the Internet as a means to serve their local audiences with convenient access to their broadcast programming and with innovative new programming alternatives.[1] These efforts have been hindered significantly by unreasonable licensing requirements and an antiquated legal framework.

The Coalition commends the Copyright Office for its recognition that section 115 is broken, and that legislation is necessary to fix it and "other problems that hinder the licensing of nondramatic musical works." Written Statement of Marybeth Peters, June 21, 2005, at 13 (the "Peters Statement"). We also commend the Copyright Office for its bold approach and its effort to unify musical work performance and reproduction rights to eliminate "inefficient" and "questionable" demands for multiple payments for the same transmission of the same work. *Id.* at 11, 14. We view the effort as a positive step, albeit one that does not go far enough. The questionable demands recognized by the Copyright Office are, in fact, a form of double-dipping based entirely on the artificial separation of rights rather than on meaningful economic value.

Moreover, the Coalition has substantial concerns that the Copyright Office's reliance on the model of performance rights licensing fails to recognize the critical importance of the consent decrees. Absent the decrees, the performance rights market would fall under the weight of the performance rights organizations' (PRO's) market power resulting from the aggregation of rights and the manner in which those rights are defined. Indeed, the favorable characteristics of the performance rights market cited by the Copyright Office testimony, particularly the PROs' licensing of all comers and the success of industry negotiations, depend entirely upon the existence of the consent decrees. The Subcommittee has already been provided with substantial testimony about the problems created by the one PRO that is not subject to a consent decree.[2] Any legislation that provides for collective administration of licenses should include a provision for judicial or arbitral oversight of fees and terms and additional provisions to ensure the availability of reasonable licenses to all users.

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[1] The members of the Coalition are Bonneville International Corp., Clear Channel Communications Inc., Cox Radio, Inc., Entercom Communications Corp., Salem Communications Corp., and Susquehanna Radio Corp.

[2] Oversight Hearing on Music Performing Rights, May 11, 2005. *See* Testimony of the Television Music License Committee; Statement of Russell R. Hauth on behalf the NRBMLC (May 19, 2005).

Finally, and perhaps most importantly, the Coalition is concerned that the Copyright Office discussion draft bill seeks to address only one facet of the legal problems limiting the availability of legitimate music services on the Internet. The Office has, in the past, identified problems with the ephemeral recording exemption of section 112. Moreover, defects in the sound recording performance statutory license in section 114 are keeping thousands of radio stations off of the Internet and depriving radio audiences, and the audio market as a whole, of a new, more convenient and more creative way to hear their favorite radio stations. Any legislative effort to address the problems of music on the Internet should address these problems as well as those that exist with section 115.

The Coalition stands ready to devote its resources and experience to assist the Subcommittee to develop legislation that can make the Internet the home of diverse, exciting, consumer-friendly legitimate music offerings that provide fair compensation to copyright owners, fair returns to music services, and fair value to the public. The issues are complex but not insoluble. We would appreciate the opportunity to participate fully in any process that follows.

I. Any Reliance on the PRO Model Must Take Account of the Critical Importance of the Consent Decrees in Reducing the Market Power Created by Collective Administration.

The Copyright Office discussion draft credits the collective administration of performing rights model as one "that works very well." Peters Statement at 14. In response to questions, the Register cited the fact that the PROs offer licenses to any user that wants them and the fact that the PROs have been able to negotiate successfully with users. However, the Copyright Office testimony suggests that protections for users comparable to those contained in the ASCAP and BMI consent decrees are not necessary.

In fact, the very characteristics that the Register cites to justify reliance on the collective administration model owe their existence to the consent decrees that govern ASCAP and BMI. The decrees require ASCAP and BMI to grant licenses, automatically, to all users, subject to later determination of the applicable fee. ASCAP Decree, section 9. BMI Decree section 14. They also provide significant discipline over rates by establishing recourse to the respective Rate Courts if the parties are not able to negotiate a satisfactory agreement. These protections, and others contained in the consent decrees,[3] are critical to protect users from the extraordinary market power that is created by the aggregation of rights and horizontal power to fix prices established by collective administration, and the fact that the rights regime is skewed to require users to clear each work individually, regardless of the administrative burdens that might

[3] For example, per program or per segment licenses that permit users to have access to the entire repertory but pay on the basis of use, provide additional protection against anticompetitive conduct by creating the possibility of competition from other license sources. Per program and per segment licenses are also critical to foster equity for users whose programming contains limited amounts of copyrighted music. Such users should not pay the same fee as those that provide music intensive programming.

impose.[4] In other words, the Copyright Office's reliance on the PRO model confirms the importance of protections equivalent to those provided by the ASCAP and BMI consent decrees.

This Subcommittee has before it a record demonstrating the competitive threat of collective administration without any means to discipline fees and terms and without suitable use-based licensing such as the per program license. The record developed in conjunction with the music performance rights oversight hearing held on May 11 demonstrates that a licensing collective without a consent decree or the equivalent of a consent decree functions as a monopolist, with whom all radio stations must deal and is capable of extracting supra-competitive fees, far in excess of the relative value of its repertory.[5] Radio stations simply are not able to control the selection of all of the music played during the broadcast day. Many programs and all commercials are created by third parties. The entire value of the program and the commercial should not be held hostage to the claims of the owner of a single composition contained in the program or commercial. The draft bill creates the possibility that a number of such licensing collectives will form, exacerbating existing problems.

Any legislation to reform music licensing must include legislative protections against such abuse. Congress cannot rely on the possibility that existing decrees will be amended or new decrees with be entered. Entry of a consent decree first requires a decision to bring an antitrust suit by the Justice Department, an Executive Branch agency with extensive demands upon its limited resources. Moreover, a consent decree—even the modification of a consent decree—requires the *consent* of the party subject to the decree. If the party does not consent, the Justice Department must be committed to pursuing a costly and burdensome action against that party. Reliance on such a process for each of the potentially many MROs that could be created would place an unreasonable burden upon the Justice Department, the parties and the courts, all to accomplish the result desired by the Copyright Office and easily established by legislation.

II. Congress Should Eliminate the Double-Dip Licensing that Results from Artificial Bifurcation of Rights Related to a Single Transaction.

The Copyright Office has correctly determined that multiple demands from multiple licensors for multiple rights are interfering with the ability of services to provide innovative lawful music offerings on the Internet. Peters Statement at 11. Moreover, despite the Office's hesitancy to name these demands double-dipping, that is precisely what they are. Such demands make neither economic nor legal sense. Any legislative solution to the problems of music on the Internet should establish a system under which a single transaction requires only one license from a given copyright owner or owners.

In its Report under Section 104 of the DMCA, the Copyright Office made clear that neither (i) temporary copies incidental to a licensed performance or (ii) public performances incidental to licensed downloads should require separate license. Section 104 Report at 142-148. The Office recommended legislation to clarify the former and has said that "it does not endorse

[4] The ability to save these administrative burdens is sometimes confused with the value of the underlying works and the underlying rights. It should not be. It is an artifact of the legislative regime.

[5] *See, e.g.*, Statement of Russell R. Hauth, *supra* note 1 at 1-2.

the proposition that a digital download constitutes a public performance even when no contemporaneous performance takes place." *Id.* at xxvii. Nevertheless the licensors of reproduction rights continue to assert claims over transactions in the nature of performances and the licensors of performance rights continue to assert claims over transactions in the nature of downloads. These claims are unreasonable.

The copyright rights contained in section 106 were created in1976 to approximate discrete means by which a work is exploited in light of then-existing technology. Each different type of exploitation (performance, reproduction, distribution) typically implicated a different right, leading to one and only one payment for that transaction. Where multiple rights were implicated (e.g., publication by the reproduction and distribution of copies) there was no history of discrete exploitation and multiple licensing. Nor did Congress envision digital transmissions implicating different rights licensed by different licensors. The law has simply failed to keep pace with technology.

As the Copyright Office recognized in the Section 104 Report, discussing copies incidental to a real-time performance: "this is not a case where an additional use is being made of a work beyond the use that has been compensated. The making of buffer copies is part of the same use. It is integral to the performance and would not take place but for the performance." Section 104 Report at 145. Conversely, the Office recognized that, even if a download can be considered a public performance, "the performance is merely a by-product of the transmission process that has no value separate from the value of the download." *Id.* at 147.

Congress should amend the Act to make clear that such double-dip licensing is not permitted. The law should be clear about which activities implicate the public performance right and which implicate the reproduction right. Only one license should be needed from a copyright owner for a given activity.

III. Congress Should Resolve Problems Affecting Other Internet Music Services, Including Simulcast Streaming, at the Same Time it Addresses Section 115.

Section 115 is only part of the problem. The patchwork of more recent amendments to a law written for 1976 technology simply will not foster the growth of competitive Internet music services. Among other issues, the ephemeral recording exemption of section 112 should be modernized to accommodate today's realities and the sound recording performance statutory license contained in section 114 needs substantial reform to foster the performance of music on the Internet and to allow consumers to have access to the radio broadcasts that they want to hear when they are away from a radio.

The Coalition is particularly concerned about the difficulties presented by the law to radio broadcasters interested in streaming their broadcast programming over the Internet ("simulcast streaming"). Although the Internet was once believed to offer an important new means by which radio stations could reach their listening audience and serve the public, the medium is vastly underused; its promise wasted.

Radio simulcasting has unique needs that must be accommodated in the law, if the public is to have access to this service. Unfortunately, the rules in section 114 largely were developed

by the record companies and Internet-only webcasters to meet programming and business models that differ dramatically from those of radio.

The Coalition's concerns relate to four distinct sets of issues—(i) the sound recording performance fee for Internet streaming, including the amount of the fee, the fact that it is imposed on broadcasters for listeners who are within the broadcaster's local service area, and the standard by which that fee is determined, (ii) the conditions under which the necessary statutory licenses are available, (iii) the law governing the making of copies used solely to facilitate lawful performances, and (iv) the threat of impossible and unnecessary reporting and record keeping requirements.

A. Simulcast Streaming to Listeners within a Station's Local Service Area Should Be Exempt.

Congress should make clear that Internet streaming of a radio broadcast to members of a radio station's local over-the-air audience is not subject to the sound recording performance right, just as the over-the-air performance is not. Internet transmissions to those local audiences are indistinguishable from over-the-air performances. They are provided as a service to the public that is ancillary to the over-the-air transmission, to facilitate access. Transmissions to these local audiences provide the same public service benefits to the community as over the air transmissions.

Further, the enormous promotional benefit provided by radio airplay to record companies and recording artists is beyond dispute. Congress has long recognized the value and importance of that promotion to record companies and performing artists. Internet transmissions to a radio station's local audience provide the same enormous promotional benefits to the record companies as the station's over-the-air broadcasts. As the 2002 CARP Panel concluded, "[t]o the extent that internet simulcasting of over-the-air broadcasts reaches the same local audience with the same songs and the same DJ support, there is no record basis to conclude that the promotional impact is any less."[6] RIAA's own CARP witness agreed that "[p]er capita per listener minute, the promotional benefit to Sony of someone listening to a radio signal over-the-air and someone in the same geographical area listening to the same signal over their computer is going to be very similar."[7]

The Copyright Act recognizes that transmissions within a radio station's local service area are special, and specifically exempts from the sound recording performance right retransmissions of radio broadcasts that remain within a 150-mile radius of the transmitter.[8] This exemption is not available if the broadcast is "willfully or repeatedly retransmitted more than a

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[6] Final Report of the Copyright Arbitration Royalty Panel in Docket No. 2000-9 CARP DTRA 1 & 2 (February 20, 2002) (hereinafter "Panel Report") at 75.

[7] Transcript of CARP Proceedings at 12861-62 (McDermott).

[8] § 114(d)(1)(B).

radius of 150 miles."[9] The Copyright Office has held that this exemption does not apply to Internet retransmissions, as Internet transmissions are not so limited.

Of course, in 1995, when this exemption was enacted, Congress was not focused on the fact that Internet retransmissions could not be limited to 150 miles. There is no reason to limit this exemption to retransmission services that prevent retransmissions beyond the station's local service area. Transmissions beyond 150 miles may be subject to the right and charged a fee. Transmissions to local listeners should not be, regardless of the fact that other listeners may be outside the local service area.

B. The Sound Recording Performance Fee, and the Standard By Which it Is Set, Should Be Reformed.

The DMCA gave rise to a profound change in the standard by which the sound recording performance fee is set. In 1995, after a fully inclusive process, Congress determined that the fee should be based on a consideration of four policy factors that previously governed rate setting set forth in section 801(b) of the Copyright Act. These factors include affording the copyright owner a fair return and the user a fair income, recognizing the contribution of both the copyright owner and the service, including the contribution in opening new media for communication, and minimizing the disruptive impact on the structure of the industries involved and on generally prevailing industry practices.

The closed 1998 negotiations gave rise to a new standard—"the rates and terms that would have been negotiated in the marketplace between a willing buyer and a willing seller,"[10] a standard that has given rise to a presumption in favor of agreements negotiated by the cartel of record companies, acting under the antitrust exemption contained in the Copyright Act.[11] The standard, and the RIAA's use of that standard, led to an unreasonably high fee in the 2002 CARP that set sound recording fees.

In the 1998-2002 proceeding, RIAA relied on 26 agreements its "Negotiating Committee" had reached with webcasters that had specific needs and a willingness to pay a fee far above the fee that would prevail in a competitive free market. As the arbitration panel found:

> [b]efore negotiating its first agreement, RIAA developed a strategy to negotiate deals for the purpose of establishing a high benchmark for later use as precedent, in the event a CARP proceeding were necessary. The RIAA Negotiating Committee reached a determination as to what it viewed as the "sweet spot" for the Section 114(f)(2) royalty. It then proceeded to close only those

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[9] § 114(d)(1)(B)(i).

[10] § 114(f)(2)(B).

[11] § 114(e)(1).

> deals (with the exception of Yahoo!) that would be in substantial conformity with that "sweet spot."[12]

The "sweet spot" was not based on any calculation of a reasonable rate of return or any economic study, but "simply reflected on the Negotiating Committee's instinct of what price the marketplace would bear." Report 48 n. 28. The Panel found a "consistent RIAA strategy" to develop evidence to present to the CARP.[13]

The RIAA Committee adopted a "take-it-or leave-it" approach, entering into agreements with services willing to agree to its terms for numerous reasons that did not reflect the value of the sound recording performance right.[14] *In fact, not a single radio broadcaster was willing to pay the fees sought by RIAA.* For this, and a host of other reasons—including the fact that many of RIAA's licensees never paid any fees under their agreements, or never commenced operations—the Panel concluded that 25 of the agreements "do not establish a reliable benchmark."[15] The Librarian confirmed the Panel's rejection of these agreements.

Nevertheless, the Panel ultimately relied entirely on the twenty-sixth agreement—the agreement between the RIAA Negotiating Committee and Yahoo!—despite the fact that this agreement resulted from the same common plan by the Committee to create CARP evidence.

Incredibly, the Panel had before it Yahoo's own testimony that it made the deal not because it believed the sound recording fee was competitive, but because it wanted to avoid the cost of participating in the CARP, estimated to exceed $2,000,000. Not by coincidence, this amount was approximately the total amount Yahoo paid under its agreement. In short, the deal did not reflect the value of the sound recording performance right; it reflected the cost of avoiding participation in the CARP litigation.

Yahoo also testified that it could not pass along to broadcasters even the .05 cent per performance fee set forth in its agreement for radio retransmissions. Yahoo's representative told the panel:

> [W]e've not passed any of these fees along to the radio stations because we have every interest in keeping those stations signed up with us. So we've made the business decision that it made more sense for us to actually stomach these fees than to try to pass them on to our radio station partners because we're afraid that if we tried to do that, they would terminate their agreements with us.[16]

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[12] Panel Report at 48.

[13] *Id.* at 49. The Panel found that RIAA's denials "lack[ed] credibility" in light of extensive record evidence. *Id.* 49-51.

[14] *Id.* at 51.

[15] *Id.* at 51-60.

[16] Transcript of CARP Proceedings at 11,429 (Mandelbrot).

> Upon further questioning, Yahoo's representative confirmed that "Yahoo!'s judgment is that if it passed along to the radio stations the radio station retransmission rate that it has negotiated, a lot of those stations would just pull the plug."[17]

Moreover, Yahoo terminated the deal at the end of 2001, before the Panel issued its report recommending a fee. Then, within one week after the Librarian announced his decision affirming the Panel's proposed fee, Yahoo announced that it was shutting down its radio retransmission business.

Later, after the Librarian's decision was rendered, other evidence emerged, further confirming just how unreliable the Yahoo deal was as an indicator of a competitive fair market fee. Mark Cuban, the founder and President of Broadcast.com, the company that became Yahoo's broadcast retransmission business, wrote in June 2002 to the industry newsletter "Radio and Internet News" to say that "the deal with RIAA was designed with rates that would drive others out of the business so there would be less competition."[18]

Why did the arbitration panel rely on this agreement under these circumstances? Simply put, the Panel concluded that an effort "to derive rates which would have been negotiated in the hypothetical willing buyer/willing seller marketplace is best based on a review of actual marketplace agreements."[19] In short, the Panel essentially created a presumption in favor of the RIAA agreements, despite the overwhelming evidence that those agreements did not represent the relevant, hypothetical, competitive free market.

The radio industry, of course, believes this decision was grossly incorrect. The D.C. Circuit declared the question to be "a close one" but affirmed because of the "extremely deferential" standard of review that existed under the law at the time.[20] In the meantime, we now face the need to litigate the matter all over again, under the same misguided standard.

The sound recording performance fees adopted by the CARP under the current standard are exorbitant. The same standard should not be allowed to govern fees for 2006-2010. Rather, Congress should return to the four-factor standard of section 801(b).

C. The Statutory Performance License Conditions Must Be Reformed To Accommodate Longstanding Industry Practice.

The statutory performance license applicable to Internet streaming contains several conditions that are incompatible with the traditional way radio stations are programmed and administered. These conditions impose untenable choices on radio broadcasters which must

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17 *Id.* at 11,430.

18 *See* Attachment B, hereto.

19 Panel Report, 43.

20 *Beethoven.com LLC v. Librarian*, 394 F.3d 939, 953 (D.C. Cir. 2005). This standard of review was abolished by the Copyright Royalty and Distribution Reform Act of 2004.

either (i) change their basic programming and business practices to permit an ancillary Internet service; (ii) obtain direct licenses from each and every record company whose music they play (an absurd concept, considering the impracticability and Congress' longstanding desire to keep record companies and radio broadcasters from direct dealings over what gets played on the radio); (iii) not stream; or (iv) face the prospect of having to defend uncertain and hugely costly copyright infringement litigation if any claims are made that the statutory license is not available.

The statutory sound recording performance license for streaming contains nine eligibility conditions. Three of these conditions are so inconsistent with longstanding broadcasting that the parties who negotiated the DMCA conditions recognized that they could not be complied with. Thus, while the statute exempts third-parties that retransmit radio broadcasts from these conditions, it requires broadcasters who want to stream their own programming to comply with them.[21] The situation is unfair, unstable, not in the public interest, and must be changed.

The specific conditions that cause problems for broadcasters are:

- Condition (i), which prohibits the play of sound recordings that exceed the so-called "sound recording performance complement" during any 3-hour period, of 3 selections from any one album (no more than 2 consecutively), 4 selections by any one artist (no more than 3 consecutively), or 4 selections from a boxed set of albums (no more than 3 consecutively);[22]

- Condition (ii), which calls into question the ability of a disc jockey to announce the songs that will be played in advance;[23] and

- Condition (ix), which requires the transmitting entity to use a player that displays in textual data the name of the sound recording, the featured artist and the name of the source phonorecords as it is being performed.[24]

1. The Sound Recording Performance Complement Is Discriminatory and Inconsistent with Broadcasting Practice.

Radio stations often play blocks of recordings by the same artist or play entire album sides. These features, such as Breakfast with the Beatles, or Seven Sides at Seven, are popular among listeners and remind audiences of great music that is available to buy. Tribute shows (or entire tribute days) are also common on the death of an artist, an artist's birthday, or the anniversary of a major event in music. Thus, many radio stations played numerous George Harrison songs throughout the day after he died. Radio stations similarly played many Beatles

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[21] *See, e.g.*, § 114(d)(2)(C)(i), (ii) and (ix).

[22] § 114(d)(2)(C)(i).

[23] § 114(d)(2)(C)(ii).

[24] § 114(d)(2)(C)(ix).

songs on the fortieth anniversary of their first arrival in New York. All of these practices could be deemed to violate the statutory license if the station were streaming.

2. The Prohibition on Pre-Announcements Is Discriminatory and Inconsistent with Broadcasting Practice.

Condition (ii) prohibits "prior announcement" of "the specific sound recordings to be transmitted" or, even, "the names of featured performing artists" other than "for illustrative purposes." This could be interpreted to mean that every time a DJ says "Next up, the latest hit by Beyoncé," or even, "in the next half hour, more Led Zeppelin," the DJ is violating the license and putting the station at risk for being sued for copyright infringement.

These, and the naming of songs to be played in the near future, are all common broadcasting practices. Ironically, record companies have often encouraged radio stations to make such announcements, as they help keep the listener tuned in and waiting to hear the latest song. Identifying songs should not trigger copyright liability.

3. The Obligation To Provide the Internet Player with a Simultaneous Display of Title, Artist and Album Information Is Discriminatory and Beyond the Capabilities of Many Radio Stations.

Condition (ix) requires broadcasters to transmit a visual statement of the title, artist, and album of the current song playing. This requirement simply does not recognize the realities of the radio business, which has developed over the years to meet the needs of its over-the-air business model. For example, the condition requires a transmitting entity to have a digital automation system to control its broadcasts and to have title, artist and phonorecord information loaded into that system. Many stations do use such a system. But many smaller radio stations, and some of the largest, still run their broadcasts the old-fashioned way – production staff place a CD manually into the player, hit the play button, and turn dials to fade out one song and start the next.

Further, the great majority of recordings played by radio stations are received directly from the record companies, in the form of advance promotional singles and albums, or from third party services. Although these discs often include a phonorecord title, many do not. Moreover, radio stations often do not load that title into their music information databases, because it is not relevant to their primary over-the-air activity. These stations should not be disqualified from Internet streaming.

It makes no sense, and serves no one's interests, to require radio stations to alter their programming practices, which have served both them and the record industry well for decades. Nor is it fair or practical to require broadcasters to incur substantial costs to change the way they do business in order to stream their broadcasts over the Internet. This would be worse than the tail wagging the dog, as Internet streaming today isn't even a hair on the tail, compared to radio's core business. There has never been a showing that these three conditions offer any benefit to anyone. They should be eliminated.

D. Congress Should Provide an Exemption for Reproductions of Sound Recordings and Underlying Musical Works Used Solely To Facilitate Licensed or Exempt Performances, and Should Ensure That the Conditions Applicable to Those Exemptions Are Consistent with Modern Technology.

Section 112 of the Copyright Act provides the right to make certain royalty-free temporary copies of musical works and sound recordings from which transmissions are made and that have no purpose other than to facilitate licensed or exempt public performances. These provisions need to be expanded and adapted to accommodate modern realities.

The ephemeral recording exemption of Section 112(a) of the Copyright Act allows an entity entitled to make a public performance of a work to make one copy of the material it is performing in order to facilitate the transmission of that performance, subject to certain restrictions. This exemption is based in large measure on the premise that if a transmitting entity had paid for the right to perform the work, it would be unreasonable (and a form of double dipping) to make the entity pay a second time for the right to make a copy that had no other role than facilitating that performance.[25] The exemption was created during the 1976 revision of the Copyright Act and was crafted to reflect the technology of the time, namely, the use of program tapes by radio and television stations to facilitate their performances.[26]

Of course, program tapes are no longer the staple of broadcasters. Now, radio stations often use digital compact discs and digital music servers to make their performances. However, stations still have the practical need to make recordings in order to make licensed performances. In fact, broadcasters may need to create multiple copies in order to engage in Internet streaming, and the transmission technology itself may cause additional copies to be made.

The DMCA recognized this practical reality when it created the statutory license in Section 112(e) for multiple ephemeral recordings of sound recordings performed under the new sound recording performance license. However, by creating a statutory license instead of expanding the Section 112(a) exemption, the law created an artificial opportunity for record companies to double dip and earn added fees based on the technology used by the transmitting entity rather than on the economic value of the sound recording.

The Copyright Office opposed this statutory license in 1998 and has recently restated its opposition and its belief that an exemption should be enacted. In the report ordered under Section 104 of the DMCA, the Copyright Office commented that the Section 112(e) ephemeral recording license "can best be viewed as an aberration."[27] The Office went on to say that it did not "see any justification for the imposition of a royalty obligation under a statutory license to make copies that have no independent economic value and are made solely to enable another use

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[25] Likewise, if public policy interests decreed that the performance should be exempt, there was no rationale for charging a fee to make a copy used solely to facilitate the exempt performance.

[26] *See* H.R. Rep. No. 94-1476, at 101 (1976) (noting that "the need for a limited exemption [for ephemeral recordings] because of the practical exigencies of broadcasting has been generally recognized.").

[27] *See* U.S. Copyright Office, DMCA Section 104 Report at 144 n.434 (Aug. 2001).

that is permitted under a separate compulsory license. . . . Our views have not changed in the interim, and we would favor repeal of section 112(e) and the adoption of an appropriately-crafted ephemeral recording exemption." *Id.*

Further, the DMCA left a significant gap in the law that has created further risk and uncertainty for all transmitting organizations, even those paying the double-dip ephemeral recording royalty to the record companies. The Section 112(e) statutory license applies to the sound recording, but does not apply to the musical or other works embodied in those sound recordings. It makes no sense to differentiate between the sound recording and the underlying work that is the subject of the recording. Such copies should be exempt for the same reason that multiple ephemeral recordings of sound recordings made solely to facilitate a licensed performance should be exempt.[28]

Moreover, three conditions applicable to the existing ephemeral recording exemption (two of which also apply to the Section 112(e) statutory license) discriminate against broadcasters and ignore the realities of today's technology. First, the exemption in Section 112(a) applies only to copies made to facilitate performances made in the transmitting organization's "local service area." The legislative history of the DMCA made clear that, where the Internet was involved, the "local service area" was congruent with the reach of the Internet.[29] However, in its December 11, 2000 rulemaking holding radio subject to the sound recording performance right, the Copyright Office attempted to support its conclusion by taking the position that broadcasters, but not Internet-only webcasters, were subject to a narrower "local service area" (their primary broadcasting area) and that the Section 112(a) exemption was not available when broadcasters streamed their programs on the Internet.[30] Unfortunately, in making these comments, the Copyright Office was focused on sound recordings, which are subject to the Section 112(e) statutory license; it failed to consider the impact of its position with respect to musical works, which are not covered by Section 112(e). Radio broadcasters do not believe that the Copyright Office's dictum is correct; if it were, radio stations that stream their broadcasts would face uncertainty and risk with respect to ephemeral recordings of the musical works they broadcast. Congress could not have intended this result. Any ephemeral recording exemption should extend beyond transmissions within a "local service area."

Second, the exemption provides that "no further copies or phonorecords" may be made from the exempt or licensed ephemeral recording. While that limitation worked for program tapes, it does not work with today's transmission technologies. The Internet operates by making intermediate copies. Cache and other intermediate copies are essential to any transmission.[31]

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[28] Further, there is no known licensing mechanism available to license the ephemeral recording of all works embodied in performed sound recordings.

[29] *See Digital Millennium Copyright Act*, H.R. Conf. Rep. No. 105-796, at 80 (Oct. 8, 1998) (clarifying that Section 114(f)-licensed "webcasters," whose local service area is the Internet, "are entitled to the benefits of section 112(a)").

[30] *See* 65 Fed. Reg. at 77,300.

[31] *See* H.R. Rep. No. 105-551, Part 2, at 50-51 (July 22, 1998).

Digital receivers also typically make partial buffer copies of the works being performed. The "no further copies" condition should be amended so that it does not apply to copies or phonorecords made solely to facilitate the transmission of a performance.[32]

Third, music users more and more are using digital music servers to make licensed performances. Music from compact discs may now be loaded onto computers, from which the performances are transmitted. These server copies have no use other than to facilitate the performance. It serves no purpose, and creates a dead-weight economic loss, to require transmitting organizations to purge these servers every six months.

The ephemeral recording exemption is designed to ensure that transmitting entities that are providing performances to the public can operate efficiently and without uncertainty and risk. These performances are already fully compensated or have been deemed exempt from copyright liability. There should be no further payment needed to make copies used only to facilitate the permitted performance.

E. Congress Should Ensure that Reporting Requirements Do Not Preclude Broadcasters from Engaging in Simulcast Streaming.

The Copyright Act directs the Copyright Office to "establish requirements by which copyright owners may receive reasonable notice of the use of their sound recordings" under the statutory license and "under which records of use shall be kept."[33] The Copyright Royalty and Distribution Reform Act has transferred this duty to the Copyright Royalty Judges. The Office has, on an interim basis, required these reports for two weeks each calendar quarter.

To the Copyright Office's credit, the interim regulation is far more manageable than that sought by SoundExchange. That wish list sought census reporting of a multitude of data points for each and every performance, and would have eliminated virtually all broadcasters from the Internet.

Unfortunately, the interim regulation is still inconsistent with the way many broadcasters—particularly smaller stations—do business. Thus, it all but assures that many stations will be kept from streaming their programming on the Internet. Moreover, the threat of added burdens in the future weighs heavily on the decision to stream or not.

It is important to keep in mind that broadcasters have developed their internal systems to run their primary over-the-air business, not an ancillary Internet service that generates few listeners. Sound recordings played by radio stations often are provided to those stations by the

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[32] For the same reason, the law should deal clearly with those cache and buffer copies, which may or may not qualify within the scope of the existing Section 112(e) license. The Copyright Office, in its Section 104 Report, supports this recommendation, after extensive study of the issue, the Copyright Office recommended "that Congress enact legislation amending the Copyright Act 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 of a public performance of a sound recording and any underlying musical work." *See* DMCA Section 104 Report at 142-43.

[33] § 114(f)(4)(A).

record companies themselves. These sound recordings often are provided on special promotional disks, not the retail album sold to consumers. The precise nature of these promotional recordings varies. In some cases, they are in slickly produced special promotional singles. At other times, the recordings are on "homemade" CD-Recordables, or "CD-Rs," not unlike the discs consumers would burn using their home computers, that contain one or more songs and are identified by nothing more than a handwritten or typed label. Some stations get their music by direct electronic download into the broadcast group's servers, or are sent MP3 files. Smaller labels provide music with even less formality. There is only one constant—*the music provided by the record labels to radio Broadcasters commonly do not contain all of the information required even by the interim rule, much less the information that would be required by the rules sought by SoundExchange*. For example, record companies routinely send radio stations songs with only title and artist information.

In addition, almost all radio stations broadcast third-party content at some point during their broadcast day. These syndicated and other third-party programs, provided for over-the-air use, are often accompanied by little, if any, information about the music they include. Nevertheless, the Copyright Office has concluded that it does not have "authority" in the Act to exempt such programs from any reporting obligation, despite the fact that the Act required only "reasonable" notice and recordkeeping.[34]

The type of census reporting sought by SoundExchange is not necessary in order to permit reasonable accuracy in royalty payments. Indeed, the large music performing rights organizations (PROs), ASCAP and BMI, use sampling for their distribution, and require a smaller sample than the Copyright Office has included in its interim rules—typically one or two weeks per year. The PROs even shoulder most of the burden of gathering data themselves by listening to radio stations and are able to identify performances using title and artist information alone.

Congress should either clarify the law or make clear that the "reasonable" reporting obligation it imposed contemplates reasonable sample periods, permits the exclusion of information a station lacks, and would be satisfied by the reporting of sound recording title and artist name.

Conclusion

We appreciate the Subcommittee's interest in these matters of great concern for radio broadcasters. Congress should act promptly to repair the law applicable to the mechanical license and to ephemeral recordings and Internet simulcast streaming. Among other things, Congress should address excessive sound recording performance fees and the methodology for setting those fees

Excessive rights fees, double-dip royalty claims and legal uncertainties are keeping legitimate music services off of the Internet, hampering those legitimate services that do offer Internet music, and fostering the demand for unlawful downloads. The webcasting provisions of the DMCA were not written with radio broadcasters in mind. The Subcommittee should act

[34] 69 Fed. Reg. at 11,521.

promptly and decisively to begin the process of fixing the law in a manner that properly accounts for longstanding radio programming and business practices and recognizes the ancillary nature of Internet streaming to radio broadcasters. The Coalition stands ready to work with the Subcommittee to reform the system so that radio broadcasters will not continue to be inhibited from placing their programming on the Internet by excessive fees and unrealistic and overly burdensome statutory license conditions and reporting requirements.

The current state of affairs harms both radio broadcasters and the listening public, who often are unable to listen to their favorite stations in places where over-the-air reception is hampered. It also harms the copyright owners of musical works, who are deprived of their public performance revenues, and performing artists, who are deprived of this additional avenue of exposure and promotion for their music by an industry that for decades has worked hand-in-hand with the recording industry to create demand for those sound recordings through the airplay they receive through radio.

STATEMENT OF THE RECORDING ARTISTS' COALITION IN RESPONSE TO THE TESTIMONY OF THE HONORABLE MARYBETH PETERS, REGISTER OF COPYRIGHTS, SUBMITTED JUNE 28, 2005

Mr. Chairman, Mr. Berman, and distinguished Members of the Subcommittee,

Thank you for the opportunity to present our views to the Subcommittee on the proposed 21st Century Music Licensing Reform Act, and the Statement of Marybeth Peters, Register of Copyrights, before this Subcommittee on June 21, 2005.

The Recording Artist Coalition is a non-profit recording artist advocacy group comprised of numerous well-known featured recording artists, including Don Henley, Sheryl Crow, Jimmy Buffet, Natalie Maines, Billy Joel, Stevie Nicks, Bonnie Raitt and Bruce Springsteen.

In her testimony, Register Peters identified numerous problems relating to music licensing on the Internet. A number of her suggestions have merit and should be considered. However, her proposal to abolish the Section 115 compulsory license for all "physical" delivery of mechanical reproductions of sound recordings ("phonorecords") is not desirable. RAC favors some reform of the licensing system for "digital" delivery of phonorecords, but strongly urges caution when applying this solution to "physical" phonorecords.

Contrary to the assertions made by the Register, the Section 115 compulsory license for "physical" product remains vital to the business model used by the vast majority of the recording industry. Repeal of the compulsory license will most assuredly bring greater uncertainty, unintended consequences, increased transactional costs and, most likely, a decrease in royalties for most songwriters.

The Register states in her testimony that ". . .the use of the Section 115 compulsory license has steadily declined to an almost non-existent level. It primarily serves today as merely a ceiling for the royalty rate in privately negotiated licenses."

In our estimation, when applied to the sale of physical phonorecords, the compulsory license does much more than that. Recording artists, record labels, songwriters, and publishers have embraced the compulsory license system as a "backdrop." For example, while it is true few record labels or recording artists seek a Copyright Office compulsory license, the copyright owners and prospective licensees understand that, if direct negotiations fail, a license may be secured from the Copyright Office. This is why the rate offered by the Harry Fox Agency is almost invariably set at "a full statutory rate," and controlled composition clauses of the vast majority of recording artist/songwriter contracts provide for a "full statutory rate," "seventy-five percent statutory rate," or something in between. The industry has accepted the compulsory license rate, which increases every few years, and other terms of the compulsory license as a benchmark.

The compulsory license was originally intended to prevent or stifle monopolistic practices. Abolishing the compulsory license for physical phonorecords, however, will adversely affect many parties and will create the exact monopolistic, anti-competitive tendencies in the music industry the compulsory license was created to prevent.

In a totally unregulated free market, the major labels could pay highly coveted songwriters advances and/or a rate well above the present statutory rate. Mid-level or new songwriters (the vast majority of the songwriter community) will most likely have to settle for a fraction of the compulsory rate. They will be unable to compete with established songwriters. Those surviving will earn less, and those unable to survive may stop writing. Major labels may even seek exclusive licenses over highly coveted songs, thus preventing their competition from recording a "cover version" of the same song - a practice impossible to impose under the present system.

Major record labels will also have a distinct advantage over independent and start-up record labels. They will be able to exert unprecedented control over the top songwriters and songs. They could offer songwriters advances and other benefits on particular songs - a practice which independent and start-up labels could not afford. Independents and start-ups would be cut off from the best songwriters and songs.

Repeal of the compulsory license would also adversely affect the recording process. Without the certainty of the compulsory license, recording artists would opt for recording more of their own songs because they would not know how the inclusion of a third party "cover song" would affect their controlled composition rate. This would certainly result in fewer recordings of "cover songs." For recording artists dependent on third party songs, the situation will be even more dire. The cost associated with "cover songs" will most likely skyrocket.

Furthermore, since almost every recording contract references the compulsory license to the controlled composition clause, the repeal of the compulsory license will result in contractual chaos, even if the repeal was prospective only. Most recording artists enter into long term recording agreements.

Repeal of the compulsory license will also increase transactional costs. Record labels, recording artists, managers, publishers, and songwriters will all have to devote more time and incur greater cost to clear the songs for release. Music licensing reform was not supposed to result in increased transactional costs.

Register Peters suggests that collective licensing, perhaps based on a European model, would work better. We believe there is merit in considering a system keying the rate to a percentage of the wholesale or retail price of the product. However, beyond that change, there is little the European system offers. RAC is not opposed to consideration of a collective licensing system so long as the rate is uniform, it applies to all equally, and there is no opportunity to reject the request for a license. Only under these conditions will the process benefit all.

The European licensing system, however, does have one provision that should be adopted immediately. In Europe, and most of the world, performers receive a royalty for analog-based, public performances (i.e., radio). Performing artists enjoy such a right for digital transmissions in the United States, but not for analog use. Equity and comity demand an extension of that right in the United States to cover analog performances.

Regarding the proposed changes to the digital delivery of music, RAC is in favor of the principle of streamlining the licensing procedure and much of what Register Peters suggests is worthy of consideration and debate. However, the proposal to create multiple, unlimited music rights organizations (MRO) should be reconsidered. Creation of a new collection agency receiving notices and paying songwriters directly would be preferable.

As previously mentioned by Register Peters, the compulsory license system is rarely used in its present form. We believe that is because the accounting and payment system is monthly instead of quarterly, and mechanicals must be paid on all phonorecords manufactured and distributed, not merely sold. These are two of the most important differences between the Harry Fox Agency licensing system and the compulsory license system offered by the Copyright Office. If the compulsory license provision were amended to include quarterly payments and an allowance for "free goods," most likely the Copyright Office system would become very appealing.

We thank you again for this opportunity to provide the Subcommittee with our comments.

STATEMENT OF THE TELEVISION MUSIC LICENSE COMMITTEE AND THE RADIO MUSIC LICENSE COMMITTEE IN RESPONSE TO THE TESTIMONY OF THE HONORABLE MARYBETH PETERS, REGISTER OF COPYRIGHTS

Statement of
The Television Music License Committee and
The Radio Music License Committee
On
Music Licensing Reform and Section 115, Compulsory License

Before the Subcommittee on Courts, the Internet, and Intellectual Property
Judiciary Committee
United States House of Representatives
June 21, 2005

Mr. Chairman, Thank you for the opportunity to submit the views of the Television Music License Committee (TMLC) and the Radio Music License Committee (RMLC), on the Copyright Office's proposed revisions to Section 115 of the Copyright Act. The TMLC represents approximately 1200 local commercial television stations and the RMLC represents the interests of the vast majority of local commercial radio stations relative to music performance licensing negotiations with ASCAP, BMI and SESAC.

The Copyright Office's proposal would eliminate the Section 115 compulsory mechanical license. The TMLC and RMLC address a single aspect of this proposal relevant to the creation of Music Rights Organizations (MROs) to license reproduction, distribution and public performance rights. The Subcommittee has already been provided with extensive testimony about the anticompetitive problems faced by users of copyrighted music in relation to the one current performing rights organization, SESAC, that is not subject to a consent decree. Vesting collective licensing authority in MROs, without providing music users with protection against the anticompetitive behavior of such collectives would only exacerbate these problems.

In its written testimony submitted as part of this hearing, the Local Radio Internet Coalition identifies a number of ways in which the legal framework of the Copyright Act has "hindered" the development of the market for music on the Internet. The RMLC agrees that any legislative efforts to address the problems of music on the Internet need to address these issues as well.

As the TMLC testified before the Subcommittee on May 11, 2005, the two largest PROs in the U.S., the American Society of Composers, Authors and Publishers (ASCAP) and Broadcast Music, Inc. (BMI), are governed by antitrust consent decrees that contain a number of provisions designed to limit their ability to extract unreasonable license fees from music users. The most significant of these provisions are: (1) a prohibition on

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exclusive affiliation agreements so that members are free to engage in direct licensing with individual music users; (2) an obligation to offer a license in which the user pays fees only for the PRO's music actually used; and (3) a formal process for resolving disputes over reasonable license fees during which copyright infringement liabilities are suspended. The TMLC and RMLC rely heavily on these safeguards to enable us to negotiate music performing rights licenses containing reasonable terms and royalties. As explained in the TMLC testimony, the harm caused by SESAC's unregulated operation is evidence of the indispensable role such safeguards play in maintaining a competitive marketplace for music performance rights.

Should Congress consider legislation that would permit MROs to aggregate music copyrights, the TMLC and RMLC believe it is critical that such legislation provide protections against anticompetitive MRO conduct. We stress the need to create a mutually available independent forum to determine reasonable licensing provisions and rates where the parties cannot reach a negotiated settlement. There is also a need to protect the ability of music users to enter into direct and source licenses with individual copyright holders. We believe that the interests of economy and efficiency would be best served by assigning *one* independent body the exclusive authority to determine the reasonable value of the copyrights represented by individual MROs where users are represented by industry associations.

The TMLC and RMLC strongly object to reforming Section 115 as proposed by the Copyright Office in the absence of the protections described herein for music users. We urge you to include such protections in any final legislative enactment of the Copyright Office's proposal.

Keith Meehan
Executive Director
Radio Music License Committee

Will Hoyt
Executive Director
Television Music License Committee

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LETTER TO THE HONORABLE LAMAR SMITH, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF TEXAS, AND CHAIRMAN, SUBCOMMITTEE ON COURTS, THE INTERNET, AND INTELLECTUAL PROPERTY AND TO THE HONORABLE HOWARD BERMAN, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF CALIFORNIA, AND RANKING MEMBER, SUBCOMMITTEE ON COURTS, THE INTERNET, AND INTELLECTUAL PROPERTY FROM DEL R. BRYANT, BROADCAST MUSIC INC.

June 28, 2005

The Honorable Lamar Smith
Chairman, Subcommittee on Courts,
The Internet and Intellectual Property
Committee on the Judiciary
B352 Rayburn H.O.B.
United States House of Representatives
Washington, DC 20515

The Honorable Howard Berman
Ranking Minority Member
Subcommittee on Courts, the Internet and
Intellectual Property
Committee on the Judiciary
B336 Rayburn H.O.B.
Washington, DC 20515

Re: Testimony of Marybeth Peters on Section 115 Reform

Dear Mr. Chairman and Ranking Minority Member:

The emergence of a viable business in the digital distribution of music over the past several years has focused the attention of the industry and members of Congress on difficult issues having to do with licensing of the mechanical right when music is digitally delivered. Digital music services have complained that the current compulsory license for mechanical rights codified in Section 115 of the Copyright Act is cumbersome and requires reform. In an attempt to develop a legislative solution, early this spring under the Chairman's leadership the Subcommittee initiated a series of hearings and meetings focusing on marketplace solutions and the possible reform of Section 115.

While the issue of mechanical licenses has not historically impacted BMI, the digital transmission of music often involves both the mechanical right and the public performing right. Consequently, BMI has attempted to meet our licensees' needs to provide licensing solutions where both rights are required. Over the past several years BMI has actively represented the public performing right interests of our affiliated songwriters, composers and music publishers in the marketplace as well as in Washington, DC, to protect the performing right which is vital to

songwriters' and publishers' livelihoods.[1] We have fought against legislative and regulatory efforts that would unfairly eliminate or truncate the public performing right as it applies to digital transmissions.

As you know, BMI operates on a non-profit making basis, distributing all income (less overhead and reasonable reserves) to our affiliated songwriters and publishers. The PRO model has proven over the decades to be highly beneficial to the songwriting community as well as to the businesses that require timely and efficient clearance of music copyrighting. BMI currently represents over 300,000 affiliated songwriters and publishers and oversees a repertory of over 6.5 million musical works.

In the hearing held before the Subcommittee last week, the United States Register of Copyrights, Marybeth Peters, proposed legislation entitled "The 21st Century Music Reform Act," which would repeal the current mechanical compulsory license provision of the Copyright Act (Section 115), in favor of an entirely new structure. Her proposal would redefine the current performing right organizations BMI, ASCAP and SESAC ("PROs") as music rights organizations (or "MROs"). According to the proposal, an "MRO would be authorized, and required with respect to digital audio transmissions, to license the reproduction and distribution rights of any non-dramatic musical work for which it was authorized to license the public performance right."

As we understand it, the Copyright Office's proposal would require PROs (when becoming MROs) to offer a blanket license to digital music services that combines both the public performing right and the mechanical rights needed for making the various kinds of digital audio transmissions of music to consumers. Her proposal would facilitate this by automatically amending every public performing right grant to a PRO to include mechanical rights. The licensing contemplated by her proposal addresses all digital audio transmissions, including pure downloads of recorded music made available by online service "e-tailers" as well as "conditional (or tethered) downloads" and "interactive streams" offered by music subscription services. The proposal addresses transmissions of audio works only. In this scenario, the licensee would negotiate for one blanket license from each MRO covering both the performance right and mechanical right. Although her proposal provides for an unlimited number of MROs, Ms. Peters testified that she anticipates few MROs will actually be created, and that MROs will function similarly to how the three PROs operate in the U.S. today. In the course of her testimony Ms. Peters observed that combining the performing right and mechanical right is how musical rights licenses are currently being administered in many territories outside the United States. The proposal may cause devaluation of the mechanical and performing rights by combining them, thereby reducing royalty payments to writers and publishers.

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[1] For example, in October 2001 BMI joined ASCAP and the National Music Publishers Association ("NMPA") in a Joint Statement addressing these Internet licensing issues to meet licensees' needs.

The Copyright Office proposal is a reaction to years of legislative and regulatory discussions affecting key parties in the music industry, including but not limited to music publishers through the NMPA and the Harry Fox Agency ("HFA"), the PROs, songwriter organizations, the record companies through the RIAA, and businesses seeking to license music for digital distribution, many of which are represented by the Digital Media Association ("DiMA"). Under the Chairman's leadership, BMI has been party to industry-wide discussions which have resulted in the creation of various proposals to address the issues with mechanical licensing.

As I testified at the recent PRO oversight hearings before your Subcommittee, the performing rights business model of blanket licensing and marketplace negotiations works for licensees and creators alike and should not require legislative intervention. The proposal from the Copyright Office to essentially adopt the PRO model for mechanical rights licensing is a strong endorsement of the way we do business and we at BMI are proud to be recognized as part of a potential solution to the problems identified by the Chairman.

The Copyright Office proposal, however, represents a far-reaching change in the way music publishing rights are licensed in the United States that transcends the immediate issues at hand. At this time, while we appreciate Ms. Peters' attempt to offer a comprehensive overhaul of the mechanical licensing system, BMI believes that there are significant areas that need to be fleshed out in order for it to be fully evaluated.

Before addressing those areas, I would like to point out that BMI continues to believe that the working proposal by NMPA-HFA, BMI and ASCAP for a "Unilicense" continues to be a preferable solution to the immediate problems at hand. The "Unilicense" proposal is more narrow in scope and does not involve a repeal of the Section 115 compulsory license, which for decades has set the backdrop for licensing of mechanical rights in physical CDs (and LPs and cassettes). Also, it does not involve reconstitution of existing music industry licensing institutions with attendant unsettling marketplace repercussions. Rather, it entails an antitrust exemption allowing the existing music industry leaders, BMI, ASCAP and HFA, to pool the licensing of the necessary rights through a joint agency which would be in a position to license all the necessary rights to digital music services on their behalf for certain types of digital audio transmissions.

I believe that the "Unilicense" proposal directly targets the two types of digital audio transmissions currently being offered by digital music services, namely conditional downloads and interactive streams, for which DiMA and others have claimed that they are unable (or perhaps unwilling) to obtain the necessary performing right and mechanical licenses. Mr. Chairman and Ranking Minority Member, Marybeth Peters herself has testified on many occasions that compulsory licenses ought to be an exception to the copyright law and adopted only in extreme circumstances. That is why we proposed a targeted solution that is narrowly

tailored to fit the problem. Although we question whether or not the digital music services have adequately demonstrated that they cannot obtain the necessary licenses for these services in the market, BMI has nevertheless joined ASCAP and NMPA-HFA to offer a compromise "Unilicense" solution that has a suitably narrow scope and would involve as little disruption to the music industry as possible. We would be happy to continue to explore this solution with you.

Concerning Ms. Peters' legislative proposal, this letter will identify just a few areas that BMI believes would require further analysis. For example, under the Copyright Office proposal, the definition of MRO should be examined carefully. It appears as drafted to enable any music publisher and potentially any copyright owner or aggregator to become an MRO. We do not believe that creating a world of dozens (or hundreds) of MROs necessarily would be an improvement over the current landscape. Also, we question whether the Department of Justice will support the Copyright Office's "MRO" concept. Even if the DOJ does support the concept, there are issues that may arise with respect to the current consent decrees of BMI and ASCAP. The fundamental question is whether the public will be best served in terms of having timely access to repertoire by having a vast multitude of MROs? If not, the piracy problem as discussed by many members of the Subcommittee will continue unabated.

BMI and the other PROs have become acknowledged leaders in licensing the new technologies and developing marketplace solutions to the evolving business structures of the digital age. BMI processes billions of licensed digital transmissions each year and services nearly 3,500 different digital media properties. Our success in licensing new technologies is certainly one of the reasons for the Register of Copyrights and leading members of Congress to regard BMI as a model for how music licensing should work in the 21st century. Our performing right licensing model has also been acknowledged by the Digital Media Association in their testimony before Congress. We hope that your efforts to address mechanical licensing problems do not inadvertently serve as a vehicle to impose undue regulatory burdens on PROs.

In passing, we note that Ms. Peters has listed a number of different possible actions that Congress may take to address the problems. We believe Congress should not lose sight of the possibility of more modest attempts to address the digital music services' problems, including the "Unilicense".

As the industry's discussions proceed, our primary objective will be to safeguard the full value of our affiliated songwriters' and publishers' copyrights and create an efficient and fair licensing system for digital music services. We echo the sentiments of Ms. Peters when she testified that the development of competitive licensed digital music services can help ease the piracy epidemic that is currently sweeping the country (and the world) through unauthorized peer to peer file sharing.

We look forward to continued conversations with you and your staff and other members of the Subcommittee, and will under Chairman Smith's leadership continue to work closely with all sectors of the music industry in order to develop solutions to the problems you have identified.

Respectfully submitted,

Del R. Bryant

PREPARED STATEMENT OF SESAC, INC.

SESAC appreciates the opportunity to present this statement in light of the written and oral testimony presented by MaryBeth Peters, the Register of Copyrights, at the June 21, 2005 hearing in connection with the proposed revision of Section 115 of the Copyright Act and the draft of her proposed "21st Century Music Licensing Reform Act" and related comments. SESAC also appreciates the efforts of the Register of Copyrights to update the statutory framework for the licensing of nondramatic musical works.

The Register's proposal would transform the performing rights organizations ("PROs") into, and perhaps have other entities become, Musical Rights Organizations ("MROs"). Of the four entities that presently license musical rights on a collective basis - SESAC, ASCAP, BMI, and the Harry Fox Agency ("HFA"), only SESAC has any experience in licensing both performance and mechanical rights, as the proposed MROs would be authorized to do. Although SESAC historically has engaged in a limited amount of mechanical licensing as an accommodation to some of its affiliates, SESAC has not decided at this time whether it wants to engage more extensively in that marketplace. Given its on-going struggle to compete effectively in the highly competitive performing rights marketplace against two dominant competitors (one of which, ASCAP, contrary to its recent testimony, has raised ever greater hurdles for songwriters wishing to leave and, in any event, requires their compositions to stay in the ASCAP repertory), SESAC is opposed to being required by legislation to undertake a substantial new business function that it might choose to forgo.

Unlike ASCAP and BMI, SESAC is not subject to Department of Justice Consent Decrees or their specific remedial restrictions, such as rate court proceedings. Those provisions are not free marketplace mechanisms but, rather, are punitive and remedial requirements placed upon ASCAP and BMI. In any proposed legislative reworking of the musical rights licensing marketplace, including the Register's proposal concerning MROs, SESAC strongly believes that the corrective measures imposed upon ASCAP and BMI by the Department of Justice should not be foisted by legislative fiat upon other MROs whose marketplace behavior does not otherwise require Department of Justice sanctions.

Although SESAC generally finds the Register's proposal concerning the creation of MROs interesting and worthy of further discussion, SESAC has the following comments and concerns regarding the Register's testimony and the specific provisions of her draft legislation and accompanying commentary:

A. The Testimony

1. SESAC agrees with the Register's position (a) that the free marketplace and private negotiations should be permitted to dictate the economics of music licensing (at least for those entities who do not exercise undue market power in an anticompetitive way), (b) that ever more efficiency and effectiveness should be brought to the process of music licensing (but not as an excuse for de facto devaluation of copyright owners' property rights), and (c) that the present collective licensing system utilized by the PROs is working (subject to continued Department of Justice antitrust oversight of ASCAP and BMI).
2. The Register, however, appears to further indicate that, if Section 115 were expanded to encompass a blanket license, she "would not be disappointed to see" rates for such a license "established by a mechanism similar to that which is employed with the other statutory licenses." To the extent that the Register appears to be endorsing Copyright Office arbitration proceedings for fee disputes between music users and MROs concerning Section 115 blanket licenses, such statutorily imposed third party arbitration would be contrary to, and effectively would trump, free market negotiations. SESAC is opposed to being subjected to such a punitive mechanism for its performance and mechanical licensing as an MRO. Although such statutory Copyright Office arbitration proceedings are mandated for fee-setting under certain compulsory statutory licenses (as for cable and satellite retransmissions under Sections 111 and 119, respectively), statutorily mandated arbitration has never been the rule in musical performing rights licensing; it would be an expansion, not a reduction, of regulatory oversight in place of a free market negotiations, (particularly as to SESAC, which represents only approximately five percent of the performance rights marketplace).

By the same token, to the extent that any other form of "rate court" or other third-party fee-setting oversight is contemplated, SESAC is strongly opposed. Rate court proceedings are a Consent Decree remedy imposed by

the Department of Justice upon ASCAP and BMI, and SESAC or any other potential MRO should not be statutorily and automatically hobbled with such mechanisms. Any rate court, arbitration, or other third-party oversight of fee-setting imposed upon SESAC, or upon any other MRO representing a small proportion of copyrights, would be "free market" in name only; in fact, it would be the antithesis of a free marketplace and a "fix" for a "problem" that has not been found to exist.

3. SESAC does not accept the proposition that there is any "double-dipping" in the licensing of musical rights for digital transmissions. SESAC takes the position that all such transmissions implicate the public performance right, regardless of what other rights might be implicated. *See* U.S.C. § 101.("To perform . . . a work 'publicly' means . . . to transmit or otherwise communicate a performance . . . of a work . . . to the public, by means of any device or process, whether the members of the public capable of receiving the performance . . . receive it in the same place or in separate places and at the same time or at different times.").

Moreover, although SESAC is generally in favor of legislative efforts to seek greater efficiencies in the present system of music licensing, it does not agree that the existence of PROs to license public performance rights, on the one hand, and the licensing by others of the mechanical rights, on the other hand, necessarily constitutes "an impediment that should be removed because it does not serve the interests" of music owners and users. SESAC does not believe that the performing rights side of music licensing, as opposed to mechanical licensing, as it presently functions needs to be legislatively "fixed" in any way. The mechanism to encourage a mechanical rights organization (be it the HFA or some other entity) to embrace more efficient licensing practices can be achieved by eliminating the compulsory license and statutory rate under the present Section 115 and permitting that entity to operate freely in the marketplace, perhaps by issuing blanket licenses.

4. SESAC is particularly troubled by the Register's suggestion that "there is no reason why an MRO could not issue a license subject to subsequent agreement on what the rate would be, perhaps with some dispute resolution provision." Beyond SESAC's concerns about having "dispute resolution" mechanisms imposed upon itself or any other entity representing a small proportion of copyrights, this suggestion of "automatic" licensing subject to later fee-setting again is based upon provisions of the ASCAP and BMI Consent Decrees, to which SESAC has never been subject because its business practices would not warrant such a requirement. The imposition of this provision upon SESAC or any other small MRO would be "free market" in name only. By the same token, SESAC would not expect any record company or digital music provider, not otherwise subject to Department of Justice Consent Decrees, to accept the "automatic" sale of CDs or instant provision of on-line music services upon consumer request, with the prices of such transactions to be set sometime in the future.

As SESAC has stated in previous testimony before this Subcommittee, such a provision would be injurious to SESAC's business. Taken to its logical extreme, a music user could obtain an "automatic" license and dispute even the most reasonable fee, thus avoiding payment indefinitely while "negotiating," while already having obtained the benefit of the bargain. In that event, SESAC's only practical recourse would appear to be (a) avoiding the expense of further negotiation or litigation by essentially permitting a "free" license, or (b) submitting to a fee dictated by some third party after having already been compelled to permit the use of its affiliates' intellectual property. Such "automatic" licensing might be an effective tool under the ASCAP and BMI Consent Decrees, but it should not be imposed across-the-board upon SESAC or any other MROs under the banner of efficiency.

B. Draft Legislation and Comments

1. In the Register's comments to her draft legislation (the "Bill") concerning the proposed revision of Section 101 discussing the definition of an MRO, she indicates that SESAC, ASCAP and BMI, and perhaps the HFA, would transform into MROs. Although the Register indicates that other entities might also become MROs (or, presumably, simply opt out and conduct their own music licensing), in her oral testimony she has further indicated that she does not find a proliferation of MROs likely under her proposal. To the extent, however, that the perceived impediment of prohibitory start up costs is less substantial than suggested, the Bill cer-

tainly provides for the possibility of a large number of MROs each representing a relatively small proportion of copyrights, an outcome that might be viewed as no more efficient - and perhaps less efficient - than the present system, at least from the perspective of music users.

2. Proposed Section 115(a)(2) would require that a license from an MRO to publicly perform a musical work by means of a digital audio transmission also include a non-exclusive mechanical license in the work, "to the extent that the exercise of such rights facilitates the public performance of the musical work." SESAC would propose that, in order to narrow the ambit of this provision to its purported purpose, the language be changed to read "to the extent that the exercise of such rights *is necessary to facilitate* the public performance of the musical work." (Emphasis added.)
3. Proposed Section 115(a)(4) would provide that, in order for an MRO to recover statutory damages for copyright infringement of a musical work, that work must have been included on a publicly available list "at the time the infringement commenced." Because, under the current Copyright Act, an infringer of a single work can only be liable for a single award of statutory damages no matter how many separate acts of infringement, over a period of time, are involved in the action, *see* U.S.C. § 504(c)(1), this proposed language could permit a scenario under which the work is included on the list at some point after the infringement "commenced" but long before it concluded, in which event the later unauthorized uses might nevertheless be immune from liability because the infringement began before the listing. (For example, a radio station's repeated unauthorized performance of a given popular song could be legally considered only one infringement for purposes of statutory damages.)

SESAC would propose that the language be changed to clearly indicate that, once the work is listed, any later acts of unauthorized use would be subject to infringement liability, regardless of whether the infringement of that work legally "commenced" before the listing. Again, the Register's "safe harbor" proposal is rooted in the provisions of the ASCAP and BMI Consent Decrees imposed by the Department of Justice, and is a provision that has never been judicially or statutorily imposed upon SESAC, nor would SESAC's market power or behavior warrant such a sanction. SESAC's proposed change to the language more closely comports with the general principle of copyright law that it behooves the copyright user to obtain authorization before exploiting the owner's intellectual property, and that it is not the copyright owner's duty, in the first instance, to seek out potential users to notify them of copyright requirements. In this regard, SESAC believes that the citation to Section 412, concerning the requirement of copyright registration as a prerequisite to statutory damages, is inapposite.

4. The comments to proposed Section 115(a)(5) recognize that ASCAP and BMI are presently subject to Department of Justice Consent Decrees, which may prohibit their licensing of both performance and mechanical rights, and state that the proposed statutory language would abrogate those restrictions without abrogating the other provisions of the ASCAP and BMI Consent Decrees, such as the rate court provisions. SESAC is concerned, however, that the language of proposed Section 115(a)(5) is ambiguous and could easily be read to suggest that, once ASCAP and BMI become MROs, they are no longer subject to "the antitrust laws or any judicial order" presently restricting their activities in public performance licensing. SESAC proposes that this language be changed to simply and clearly state that ASCAP and BMI would no longer be prohibited from mechanical licensing by virtue of the antitrust laws or any judicial order then in effect. The language of the comment itself could be the source of revised statutory language. Additionally, as the Register of Copyrights anticipates in her comments to this proposed subsection, SESAC believes that, if the provision in the ASCAP Consent Decree which prohibits it from mechanical licensing were abrogated, all of the other provisions of that Consent Decree (and of the BMI Consent Decree) should remain in place. On the issue of whether the Consent Decrees should be modified to cover ASCAP's and BMI's new mechanical licensing activities as MROs, SESAC presumes that a careful review by the Department of Justice would be in order.

As a general matter, the creation of MROs presents substantial logistical issues that would have to be addressed. For example, any MRO other than a music publisher would be required to negotiate and execute a massive number of new agreements with their affiliated copyright owners (hundreds of thousands, in the case of ASCAP, BMI, and HFA), which could result in a total realignment of the music licensing system which, at least from the perspective of performing rights, does not appear to be malfunctioning. In reality, ASCAP, BMI, and the HFA are not knowledgeable or experienced in licensing rights that they currently do not represent. The concern is that, by entrusting such valuable rights to unproven, inexperienced, and ill-prepared organizations could create a less efficient marketplace that would lower the value of music licensing fees.

Additionally, each of the present PROs has reciprocal agreements with numerous foreign performing rights organizations under which the foreign entities monitor and collect and remit payment for foreign performances of U.S. works, while the U.S. entities likewise monitor and collect and remit payment for domestic performances of foreign works. The creation of MROs that also license mechanical rights would necessarily require significant contract revision among the many parties to address whether , and how, those mechanical rights would be administered reciprocally for both U.S. and non-U.S. works. Moreover, as acknowledged in the commentary to the Bill, in the case of a so-called "split copyrights" co-written by songwriters who are not affiliated with the same MRO, true "one stop" licensing for that musical work simply would not be possible because more than one MRO would be licensing the right to use that work.

SESAC would note that it has presented an alternative proposal to amend Section 115 - to the extent any amendment is necessary - that also would eliminate the compulsory license in favor of a so-called "unilicense" under an enhanced collective licensing system, as suggested by the Register. Although SESAC's proposal is in line with a similar unilicense proposal submitted jointly by ASCAP, BMI, and the HFA, SESAC cannot agree to their further proposal that such a unilicense be administered by a SoundExchange-like "superagency" in which SESAC would be inexplicably excluded from having an equal voice in its administration. If, as suggested by those entities, such a superagency would be merely a "lockbox" mechanism for collecting and disbursing licensing fees, then they should have no objection to SESAC's equal participation. If, on the other hand, such a superagency would, in the guise of merely clerical decisions, be making substantive determinations concerning the rights involved, (such as determining what constitutes a "pure" download or stream, setting or adjusting the price and terms of licenses, setting the reporting requirements of licensees, determining what proportion of a unilicense fee is attributable to performance rights, determining what proportion of performance fees are attributable to SESAC, the terms and conditions of licenses, and the amount of overhead charges and administrative fees), then SESAC should have, and in fact deserves, equal participation in the administration for at least two reasons.

First, it is a simply illogical and unfair that, of the four principal entities that collectively license rights in musical works, only one of them - SESAC - would be excluded. Second, SESAC's presence, more than that of any of the other entities - would provide the expertise and efficiency to see that such a superagency run efficiently and effectively. In this regard, SESAC alone has experience in the licensing of both performance and mechanical rights. Moreover, unlike the other three, SESAC, as a for-profit entity is required to constantly create and employ marketplace efficiencies to operate successfully. For example, as the only for-profit entity among the four, SESAC assuredly has a keener regard for minimizing overhead in the operation of such a superagency. In this light, SESAC has at least an equally valid claim to full and equal participation in such a superagency.

In particular, the arrogance of ASCAP and BMI in proposing that SESAC be "specifically excluded" from administration of such a superagency, and their proposal that they alone control the purse strings for license fees attributable to (their smaller competitor) SESAC, are striking but not unexpected. Just as ASCAP and BMI dominate the performing rights industry, they now propose without hesitation that they alone control the functioning of this superagency's musical rights licensing - a dominance that they would exercise throughout the entire musical rights licensing industry. Clearly, although these entities' anticompetitive tendencies have been circumscribed, they have not been fully cured by the intervention of the Department of Justice. Expanding the field to include mechanical licensing would not be in the best interests of competition or of the economic development of a free marketplace for musical rights in new and developing media.

In the end, it is no more fair or logical to prohibit SESAC's equal participation in a superagency than to propose, for example, that ASCAP be excluded, given its anticompetitive nature and lack of experience in mechanical licensing. It is no more

fair or logical to propose, alternatively, that ASCAP and BMI share or alternate one "seat at the table" designated to represent the dominant not-for-profit PROs, given the fact that they both lack mechanical licensing experience and both are in agreement concerning the superagency's functioning, as evidenced by their joint proposal. In fact, it would be no less fair or logical to propose that SESAC - the only PRO that is not under Department of Justice oversight and the only PRO with mechanical licensing experience - be the entity designated to represent all PROs in this superagency.

Despite all of these possible scenarios which would be at least as fair and logical as the ASCAP/BMI/HFA proposed domination of a superagency, SESAC has merely proposed that either the Copyright Office administer such a unilicense for digital audio transmissions, along the lines of its administration of cable, satellite and DART compulsory licenses or, alternatively, that SESAC - for reasons of fairness and expertise - have at least an equal voice in the administration of any proposed superagency to administer such a unilicense

In conclusion, any legislative reworking of the music licensing system, through the creation of MROs, a unilicense, a superagency, or some other means, should recognize SESAC's unique and beneficial role in this marketplace; it cannot support any proposal that it determines would lead (in the course of correcting problems created by others) to the imposition of punitive, remedial, or exclusionary constraints upon it. SESAC stands ready to work with all interested parties in exploring any legislative initiative to improve the efficiency and effectiveness of music licensing, so long as the interests of fairness to all parties are preserved.

COMMENTS OF THE AMERICAN SOCIETY OF COMPOSERS, AUTHORS AND PUBLISHERS

SUMMARY

ASCAP submits these comments in response to the testimony of the Register of Copyrights and accompanying draft legislation submitted to the Subcommittee on June 21, 2005. ASCAP applauds the efforts of the Subcommittee, the Chairman and Ranking Member, in addressing issues vital to the well-being of songwriters and music publishers. ASCAP also applauds the goals of the Copyright Office's effort, as stated by the Register in her testimony. Unfortunately, the legislative proposal offered by the Copyright Office with the best of intentions does not further these laudable goals. The Copyright Office proposal, well-intentioned though it is, is fatally flawed throughout and will likely harm, rather than help, songwriters and music publishers. Our unilicense proposal, however, achieves the same goals as the Copyright Office proposal, without any of the attendant dislocations and concerns.

COMMENTS

The American Society of Composers, Authors and Publishers (ASCAP) submits these comments in response to the testimony of the Register of Copyrights and accompanying draft legislation submitted to the Subcommittee on June 21, 2005. As the Subcommittee is familiar with ASCAP, we simply attach a brief description of the Society and its operations for the record.

ASCAP applauds the efforts of the Subcommittee, the Chairman and Ranking Member, in addressing issues vital to the well-being of songwriters and music publishers.

ASCAP applauds the goals of the Copyright Office's effort, as stated by the Register in her testimony. The Register made several points in her testimony that bear repeating, and which we fully endorse:

1) The Register advocated a solution to the pending issues "that comports with the Copyright Office's longstanding policy preference against statutory licensing for copyrighted works and our preference that licensing be determined in the marketplace where copyright owners exercise their exclusive rights." (Written test., 6.) We agree.
2) The Register said that the time had come to phase out the mechanical compulsory license and allow for truly free market negotiations. We agree.
3) The Register said that Section 115 should be modernized to deal with licensing of copyrighted works in the digital age. We agree.
4) The Register advocated collective administration as a means of achieving that end. We agree.
5) The Register recognized that separate rights in copyrighted musical compositions - the mechanical right and the performing right - were involved in digital uses, and that payment to creators and copyright owners for both rights was proper and was *not* "double dipping." We agree.
6) The Register advocated enabling a single licensing regime which would encompass both rights, and thus benefit users administratively. We agree.
7) The Register noted that facilitating legal uses, for which creators and copyright owners were paid, was necessary to combat piracy. We agree.
8) The Register noted that our model of licensing the performing right "works very well." (Written test., 14.) We, of course, agree.
9) Most importantly, the Register said that, "As always, my focus is primarily on the author. The author should be fairly compensated for all non-privileged uses of his work. Intermediaries who assist the author in licensing the use of the work serve a useful function. But in determining public policy and legislative change, it is the author - and not the middlemen - whose interests should be protected." (Written test., 15.) As a membership association owned and run by and for composers, authors and music publishers - in which the interests of songwriters and music publishers coincide fully - we agree.

Unfortunately, the legislative proposal offered by the Copyright Office with the best of intentions does not further these laudable goals. Here are some reasons why:

The Copyright Office's proposal to unify mechanical and performing rights licensing in Music Licensing Organizations (MROs) would defeat the very purpose it ostensibly seeks to achieve.

First, instead of the "one-stop shop" advocated by the Register, the proposal would result in a proliferation of MROs. Instead of dealing with one, or even three, licensing organizations, digital users would have to deal with far more than they now do.

Second, the proposal would severely *harm,* rather than help, authors. The efficiency of collective licensing through the existing performing rights organizations (ASCAP, BMI and SESAC), which was so lauded by the Register, would be destroyed, as members or affiliates of the organizations could well withdraw (by resignation) from the organizations and put their rights into smaller MROs, fragmenting the market and exacerbating the unequal bargaining power the PROs now face in dealing with huge user entities. The result could be the destruction of the PROs' efficiency. And those fragmented MROs might not be run by and for songwriters in partnership with their music publishers, as ASCAP is.

Third, ASCAP and BMI, transformed into MROs, would still be subject to the strictures of the consent decrees which, for example, make their rates subject to court determination. While we have lived comfortably under the consent decree in the licensing of performing rights for over fifty years, the Copyright Office proposal is unfair for several reasons: It would impose court rate determination on mechanical rights, where it has never been before. It flies in the face of the stated goal of freeing mechanical rights from compulsory licensing and allowing the free marketplace to work, and would reduce the bargaining power that songwriters and their publishers have. And, if MROs other than ASCAP and BMI arise (which we believe is a virtual certainty), there would be an unequal playing field - they would not be subject to *any* rate determination mechanism, while our writer and publisher members and BMI's affiliates would be for *both* performing and mechanical rights. That is patently unfair.

Fourth, ASCAP and BMI do not have any administrative structure in place to deal with mechanical rights. The proposal thus would penalize songwriters and publishers, who would have to pay the costs of creating and administering such a structure.

Fifth, our experience has shown that when the rights of reproduction, distribution and performance are combined on a compulsory basis - which would be the case with the Copyright Office's proposal - the license fees received by songwriters, composers and their publishers go down, and not just because administrative cost savings (if any) are passed along to users. Such was the result when, fifty years ago, the synchronization and performing rights were compulsorily "merged" for theatrical exhibitions of motion pictures in the United States - our writers and publishers receive far less than do their colleagues in other countries where those rights are not compulsorily merged.

Sixth, there are many concerns regarding both digital and physical goods mechanical licensing. ASCAP does not license and has never licensed these rights - indeed, our consent decree forbids us from doing so - and hence defers to the expertise of the National Music Publishers Association and the Harry Fox Agency on these matters.

In sum, the Copyright Office proposal, well-intentioned though it is, is fatally flawed throughout.

Our unilicense proposal, however, achieves the same goals as the Copyright Office proposal, without any of the attendant dislocations and concerns.

Our unilicense proposal works because: 1) it provides digital users with a true "one-stop shop" where they can get all the rights in musical compositions that they need; 2) it keeps existing licensing structures, thus eliminating any additional administrative expenses of any significance, while reaping the benefits of many decades of licensing experience and expertise; 3) it prevents the utter chaos in the music industry that would result from the Copyright Office proposal; and 4) it does not impose any compulsory licensing regime, and allows the marketplace to function without governmental interference.

We greatly appreciate the leadership shown by the Chairman and Ranking Member in dealing with this issue, and also commend the Register for the laudable goals she set forth in her testimony. We pledge our full efforts to achieve a workable solution which is beneficial for songwriters, for the music publishers who invest in and facilitate their creativity for the benefit of the public, and for the users of music as well.

ABOUT ASCAP

The American Society of Composers, Authors and Publishers is the United States' oldest and largest performing rights licensing organization. ASCAP was founded in 1914 by songwriters including Victor Herbert and John Phillip Sousa, for the pur-

pose of licensing the right of nondramatic public performance in the copyrighted musical works they created.

ASCAP is the only true American performing rights *society* - it is an unincorporated membership association, whose members (now numbering over 210,000 active writers and publishers) are exclusively composers, lyricists and music publishers. ASCAP is run by a 24-person Board of Directors consisting of 12 writers and 12 publishers; the writer Directors are elected by the writer members of ASCAP and the publisher Directors by the publisher members. The current Chairman of the Board is the noted, multiple award-winning lyricist Marilyn Bergman.

The ASCAP repertory consists of millions upon millions of musical works in all genres and types - pop, rock, alternative, country, R&B, rap, hip-hop, Latin, film and television music, folk, roots, blues, jazz, reggae, gospel, contemporary Christian, new age, theater, cabaret, dance, electronic, symphonic, chamber, choral, band, concert, educational and children's music - the entire musical spectrum.

ASCAP is home to the greatest names in American music, past and present, as well as thousands of writers in the early stages of their careers. ASCAP members include Cole Porter, Aaron Copland, Stevie Wonder, Bruce Springsteen, Leonard Bernstein, Madonna, Wynton Marsalis, Stephen Sondheim, Dr. Dre, Mary J. Blige, Duke Ellington, Rogers and Hammerstein, Garth Brooks, Tito Puente, Dave Matthews, Destiny's Child, and Henry Mancini, just to name a few. In addition, through affiliation agreements with foreign performing rights societies, ASCAP licenses the music of hundreds of thousands of their members in the USA.

ASCAP's licenses allow music users to perform any and every work in the ASCAP repertory, upon payment of one license fee. ASCAP's hundreds of thousands of licensees include Internet sites and wireless services, restaurants, nightclubs, hotels and motels, cable and television networks, radio and television stations, conventions and expositions, background/foreground music services, shopping malls, dance schools, concert promoters, and retail businesses. Those who perform music find ASCAP's licensing model highly efficient, for, with one transaction, they are able to perform whatever they want in the enormous ASCAP repertory.

ASCAP deducts only its operating expenses from the licensing fees it receives (in 2004, operating expenses were 13.5% - lower than any other American performing rights organization, and among the lowest in the world). The remainder is split 50-50 between writers and publishers. Each member's royalty distribution is based on a survey of what is actually performed in the various licensed media. ASCAP royalty distributions make up the largest single source of income for songwriters, enabling them to make a living, pay their rent and feed their families. ASCAP thus fulfills the Constitutional purpose of copyright, allowing songwriters - who are the smallest of small businessmen and women - to earn a fair return on the use of their property and so use their creativity to enrich America's culture.

LETTER FROM THE HONORABLE MARYBETH PETERS, REGISTER OF COPYRIGHTS TO THE HONORABLE LAMAR SMITH, CHAIRMAN, SUBCOMMITTEE ON COURTS, THE INTERNET, AND INTELLECTUAL PROPERTY, SUBMITTED JULY 19, 2005

The Register of Copyrights of the United States of America
United States Copyright Office · 101 Independence Avenue SE · Washington, DC 20559-6000 · (202) 707-8350

July 19, 2005

Dear Mr. Chairman:

I write to provide further information as requested by Representative Goodlatte during my oral testimony for the June 21, 2005 oversight hearing on "Copyright Office Views on Music Licensing Reform." In discussing the hypothetical music rights organizations that I had described in my written testimony, Representative Goodlatte stated:

> In order for providers to offer legitimate online music services and new physical music products to compete with illegal services, these providers need certainty that they will be able to license the reproduction and distribution rights to all music with greater ease. (lines 492-97).

He then asked:

> "Do any of the provisions of the consent decrees operating in the performance rights realm help to create this kind of certainty for the licensing of performance rights?" (lines 514-17.)

Because the consent decrees are within the jurisdiction of the Antitrust Division of the Department of Justice, I did not feel comfortable answering that question without some input from that Division. I have now had an opportunity to seek informal guidance from the Division, and am pleased to share with you the information I received.

It is my understanding that Section VI of the consent decree that governs the American Society of Composers, Authors and Publishers ("ASCAP") requires that ASCAP grant to any music user who makes a written request a non-exclusive license to perform all of the works in the ASCAP repertory, and that Sections V and VII also include some additional mandatory versions of full-repertory licenses for certain classes of music users.

It is my understanding that Article XIV(A) of the consent decree that governs Broadcast Music, Inc. ("BMI") has been construed to establish a similar requirement. *See, United States v.*

BMI (Application of Muzak LLC), 275 F.3d 168, 177 (2d Cir. 2001) ("although the blanket license is not specifically mentioned elsewhere in the BMI decree, all parties agree it is required to be issued on request under Section XIV(A) and subject to the rate setting provision.") It is also my understanding that Articles VIII and IX of the BMI decree also mandate specific licenses for different classes of music users, although these licenses differ in significant respects from those required by the ASCAP decree.

Should the Subcommittee require any additional information regarding these decrees, I would be pleased to facilitate a meeting between any interested Representatives and the Antitrust Division attorneys most familiar with the decrees.

I request that this letter be included in the record of the hearing in order to complement my oral testimony.

Sincerely,

Marybeth Peters

Marybeth Peters
Register of Copyrights

The Honorable Lamar Smith
Subcommittee on Courts, the Internet,
and Intellectual Property
B-351A Rayburn House Office Building
Washington, DC 20515

cc: The Honorable Robert W. Goodlatte

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