REFORMING SECTION 115: ESCAPE FROM THE BYZANTINE WORLD OF MECHANICAL LICENSING

There is one thing upon which every party in the music industry agrees: Section 115[1] of the Copyright Act is outdated.[2]

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1 17 U.S.C. § 115 (2006).

2 *Discussion Draft of the Section 115 Reform Act (SIRA) of 2006: Hearing Before the Subcomm. on Courts, the Internet, and Intellectual Property of the H. Comm. on the Judiciary*, 109th Cong. 30 (2006) [hereinafter *SIRA Hearing*] (testimony of Cary Sherman, President and General Counsel, Recording Industry Association of America) (Section 115 is "antiquated"); *id.* at 55 (statement of the U.S. Copyright Office) ("[T]he existing section 115 does not comport with the realities of the digital environment."); *Music Licensing Reform: Hearing Before the Subcomm. on Courts, the Internet, and Intellectual Property of the H. Comm. on the Judiciary*, 109th Cong. 15 (2005) [hereinafter *2005 House Licensing Reform Hearing*] (statement of Marybeth Peters, Register of Copyrights, U.S. Copyright Office) ("There is no debate that Section 115 needs to be reformed."); *Music Licensing Reform: Hearing Before the Subcomm. on Intellectual Property of the S. Comm. on the Judiciary*, 109th Cong. (2005) [hereinafter *2005 Senate Hearing*] (statement of Rob Glaser, Chairman and Chief Executive Officer, RealNetworks) ("[Section 115 is] so outdated and broken that [it is] backfiring."); *id.* (statement of Rick Carnes, President, Songwriters Guild of America) (characterizing § 115 as antiquated is "an understatement"); *Digital Music Licensing and Section 115 of the Copyright Act: Hearing Before the Subcomm. on Courts, the Internet, and Intellectual Property of the H. Comm. on the Judiciary*, 109th Cong. 1 (2005) [hereinafter *2005 House Digital Music Hearing*] (testimony of Lamar Smith, Member, H. Comm. on the Judiciary) (referring to § 115 as "outdated laws written for the piano roll era"); *see generally*

The one thing on which every party in the music industry disagrees is how § 115 should be fixed. Section 115 established a compulsory license for the reproduction and distribution of nondramatic musical works.[3] The inefficiencies and confusion spawned by the modern application of § 115 have been blamed for the inability of legitimate businesses to combat the widespread proliferation of music piracy, which, over the past two decades, has become the bane of the music industry.[4] Does § 115 still play a useful role? The record companies think so. In 1961 and 1967, record companies fought for the retention of the compulsory license, asserting that in a half-billion-dollar industry, performers need unhampered access to musical material on nondiscriminatory terms.[5] Most copyright owners, on the other hand, disagree. After all, why should songwriters have fewer rights in their creations than literary authors? Many songwriters and music publishers argue that, in fact, § 115 has been harmful to creators. Technological innovation has suffered and songwriters essentially have been removed from the equation altogether.[6] So who is to be believed? What is the best way to reform § 115 that will both "encourage rapid deployment of legal online music services while ensuring the equitable compensation of creators and copyright holders"?[7]

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id. at 19-21 (testimony of Jonathan Potter, Executive Director, Digital Media Association); *id.* at 10-13 (statement of David Israelite, President and Chief Executive Officer, National Music Publishers' Association).

[3] The relevant text of this article of the Copyright Act provides:

> When phonorecords of a nondramatic musical work have been distributed to the public in the United States under the authority of the copyright owner, any other person, including those who make phonorecords or digital phonorecord deliveries, may, by complying with the provisions of this section, obtain a compulsory license to make and distribute phonorecords of the work.

17 U.S.C. § 115(a)(1).

[4] *SIRA Hearing*, *supra* note 2, at 32 (statement of Cary Sherman, President and General Counsel, Recording Industry Association of America) (Section 115 hinders record companies' ability to lure consumers away from piracy with new offerings.); *2005 Senate Hearing*, *supra* note 2 (statement of Marybeth Peters, Register of Copyrights, U.S. Copyright Office) (Section 115 "inhibit[s] the music industry's ability to combat piracy."); *2005 Senate Hearing*, *supra* note 2 (statement of Rob Glaser, Chairman and Chief Executive Officer, RealNetworks) (Section 115 inhibits the ability "to defeat piracy."); *2005 House Digital Music Hearing*, *supra* note 2, at 22 (statement of Jonathan Potter, Executive Director, Digital Media Association) ("Section 115 of the Copyright Act is an enormous roadblock to online music services' success and our ability to defeat piracy in the marketplace."); *2005 House Digital Music Hearing*, *supra* note 2, at 37 (statement of Howard Berman, Member, H. Comm. on the Judiciary) (Section 115 "hinder[s] the development of new services [which] makes theft of music more attractive.").

[5] *See* COMM. ON THE JUDICIARY, COPYRIGHT LAW REVISION, H.R. REP. NO. 83, at 66 (1967); U.S. COPYRIGHT OFFICE, REGISTER'S REPORT ON THE GENERAL REVISION OF THE U.S. COPYRIGHT LAW (1961).

[6] *See* Ernest Miller, *Lessig on the Proposed 17 USC 115 Reform*, CORANTE, June 22, 2005, http://importance.corante.com/archives/2005/06/24/lessig_on_the_proposed_17_usc_115_reform.php.

[7] *2005 Senate Hearing*, *supra* note 2 (statement of Sen. Orrin G. Hatch).

Part I of this Note traces the history of § 115, exploring the initial justification for the legislation and its development in response to changing times and technologies. Part II illustrates the state of today's music licensing, explaining the rights a creator can have in her work and the different entities established to administer those rights. Part III demonstrates that § 115 is patently flawed, due to burdensome and expensive requirements that discourage would-be licensees and a royalty rate that is inadequate to sufficiently support songwriters. Part IV describes the different proposals to mend § 115, focusing particularly on the current Section 115 Reform Act of 2006. Part V discusses the fundamental tenets of copyright, and considers whether the current proposal is faithful to these principles. Part VI argues that the current proposal is an example of practicality trumping idealism, written in deference to those with lobbying power instead of the two most important parties in copyright: the creators and the general public. Part VII concludes that though the current proposal falls short of the wholesale reform § 115 requires, it is nevertheless a step in the right direction.

I. THE HISTORY OF SECTION 115

Article 1, Section 8 of the United States Constitution empowers Congress to "promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries."[8] With this phrase, copyright protection was born in the United States. Since that time, the scope of copyright protection has been the subject of constant controversy; a tug of war between the public policy of allowing access to the arts, and the reservation of exclusive rights to encourage artists to create.

In 1905, one such debate raged. The player piano had been introduced, and copyright owners were concerned about their right to control the reproduction of their works on piano rolls. They began to lobby Congress for a legislative change granting them exclusive rights to authorize the mechanical reproduction of their works.[9] In 1908, the United States Supreme Court held that piano rolls were not "copies" of the works, but were physical parts of the piano itself.[10] According to this decision, manufacturers of player pianos and piano rolls would not have to pay the copyright owner for the use of the copyright owner's composition. Unhappy

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8 U.S. CONST. art. I, § 8, cl. 8.

9 *See* EDWARD SAMUELS, THE ILLUSTRATED STORY OF COPYRIGHT 33-38 (2000), *available at* http://www.edwardsamuels.com/illustratedstory/isc2.htm.

10 *See* White-Smith Music Publ'g Co. v. Apollo Co., 209 U.S. 1 (1908).

with this decision, Congress responded by amending the Copyright Act to create § 115. Section 115 grants copyright owners the right—with certain restrictions—to make and distribute "mechanical reproductions" of their non-dramatic musical works, or compositions.[11] The reproductions were dubbed "mechanical" because the composition was being "mechanically" recorded on such media as a phonograph record or piano roll.[12] Today, these "mechanical reproductions" are referred to as "phonorecords."[13]

Yet the legislature feared the creation of a "great music monopoly" with these newly granted rights.[14] As Professor William Patry explains, "the Aeolian player piano company hit upon an idea that . . . consumers would buy more of its pianos if it sewed up exclusive deals with copyright owners of musical compositions. You want to hear 'Melancholy Baby,' you have to buy Aeolian."[15] Consequently, instead of a system in which copyrighted compositions could only be reproduced or distributed with the copyright owner's consent (such as the system enjoyed by literary authors), the legislature created a *compulsory* licensing system to accompany the new rights.

Under this compulsory licensing system, the copyright owner had the exclusive right to make the first mechanical reproduction of the work.[16] After this copy had been mechanically reproduced, the copyright owner was compelled to license her work to whoever met the requirements of the license,[17] which included paying the copyright owner a royalty set at a statutory rate of two cents per song and satisfying notice and reporting provisions.[18] In order to preserve their rights under the law, copyright owners were required to file a notice of use with the Copyright Office, indicating that their musical work had been mechanically reproduced. Likewise, a potential licensee had to serve the copyright owner with an intent to use the compulsory license and file a copy of that intent with the Copyright Office.[19]

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11 *See* 2 MELVILLE B. NIMMER & DAVID NIMMER, NIMMER ON COPYRIGHT § 8.04(a) (2005).

12 *See* J.T. MCCARTHY, MCCARTHY'S DESK ENCYCLOPEDIA OF INTELLECTUAL PROPERTY 267 (2d ed. 1995).

13 Some familiar, modern day examples of phonorecords are compact discs, cassette tapes, and records. There are also digital phonorecords, such as MP3s.

14 H.R. REP. NO. 2222, at 6 (1909); *see also* SAMUELS, *supra* note 9, at 37.

15 William Patry, Section 115 Amendment, The Patry Copyright Blog, http://williampatry.blogspot.com/2006/05/section-115-amendment.html (May 15, 2006, 06:36 EST).

16 1909 Copyright Act, ch. 320, § 1(e), 35 Stat. 1075, 1076 (1909) (current version at 17 U.S.C. § 115 (2006)) [hereinafter 1909 Copyright Act].

17 *See* H.R. REP. NO. 2222, at 6 (1909).

18 *Id.*

19 1909 Copyright Act, *supra* note 16, at 1076.

In 1927, the National Music Publishers' Association ("NMPA") established the Harry Fox Agency ("HFA" or "Harry Fox") to administer these mechanical licenses on behalf of copyright owners.[20] With the approval of copyright owners, HFA acted as an agent for their mechanical licensing transactions.

As the years progressed, § 115's compulsory mechanical license was infrequently used; the notice and reporting requirements were time-consuming and costly. Consequently, § 115 served primarily as a ceiling for the amount a copyright owner could receive for the reproduction of her works. In the shadow of the compulsory license, potential licensees would privately negotiate with HFA or copyright owners, typically at three-quarters or less of the statutory rate.[21]

The license enjoyed a period of use in the 1960s, when tape "piracy" was rife.[22] Despite reference to these users as "pirates," this use was not illegal. For example, suppose that in 1968 an individual wanted to make and sell copies of "Rubber Soul," a popular Beatles album released and distributed in 1965. Since the album had already been mechanically reproduced, this individual could legally make and sell copies of "Rubber Soul" once she had satisfied § 115's notice provisions and paid the statutory licensing rate. Sound recordings, i.e., the unique musical performances, were not recognized as a separate copyright until 1971, so they did not require a license.[23] In the 1960s, this type of unauthorized use flourished, and "the 'pirates' inundated the Copyright Office with notices of intention, many of which contained hundreds of song titles."[24] Despite the fact that sound recordings were not yet recognized as a separate copyright, copyright owners believed that reproduction and duplication of the sound recording fell outside the scope of the compulsory license, and thus refused to recognize the notices and tendered royalty payments.[25] In 1971, Congress

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[20] About HFA, http://www.harryfox.com/public/HFAHome.jsp (last visited Dec. 27, 2006).

[21] 2 NIMMER, *supra* note 11, § 8.23(E) ("Over its history, the mechanical compulsory license scheme has tended to function, in practice, as a ceiling—parties can invoke it and pay the statutorily applicable rates; alternatively, they can enter deals with record companies to pay less, customarily three-quarters of the minimum statutory rate."); *see also* Robert P. Merges, *Contracting into Liability Rules: Intellectual Property Rights and Collective Rights Organizations,* 84 CAL. L. REV. 1293, 1309-10 (1996); Recording Indus. Ass'n v. Copyright Royalty Tribunal, 662 F.2d 1, 3-4 (D.C. Cir. 1981).

[22] *See* SAMUELS, *supra* note 9, at 44-45.

[23] Performers of compositions were given their own "sound recording" copyright in Pub. L. No. 92-140, 85 Stat. 391, 392 (1971).

[24] *Section 115 of the Copyright Act: In Need of an Update?: Hearing Before the Subcomm. on Courts, the Internet and Intellectual Property of the H. Comm. on the Judiciary*, 108th Cong. 6 (2004) [hereinafter *2004 House Hearing*] (statement of Marybeth Peters, Register of Copyrights, U. S. Copyright Office).

[25] *Id.*

responded to this widespread unauthorized duplication of sound recordings by creating a limited copyright in sound recordings, thereby prohibiting the reproduction and distribution of a sound recording without the copyright owner's authorization.[26] After this phase passed, use of the compulsory license once again fell by the wayside.[27]

Much to copyright owners' chagrin, the two-cent statutory royalty for use of the mechanical license remained in place for nearly seventy years, until 1978.[28] Though player pianos had long since disappeared, the compulsory license remained.[29] The music industry had become accustomed to the license, and when the Register of Copyrights suggested that it be repealed in 1961, music publishers and record producers sought its retention.[30] Music publishers feared that repealing the license would unnecessarily disrupt their operations.[31] As a result, the focus shifted from whether to *retain* the license to how to *revise* the license to "reduc[e] the burdens on copyright owners, clarify[] ambiguous provisions and set[] an appropriate rate."[32] This perspective was represented in the 1976 legislative debates over § 115 reform.[33] The House Judiciary Committee opined that "'a compulsory licensing system is still warranted as a condition for the rights of reproducing and distributing phonorecords of copyrighted

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26 Pub. L. No. 92-140, 85 Stat. 391, 392 (1971); *see* H.R. REP. NO. 94-1476 (1976); 1 NIMMER, *supra* note 11, § 2.10[A] ("The first Congressional enactment of statutory copyright protection for sound recordings occurred in 1971, as a direct result of the staggering volume of record and tape 'piracy' . . . .'). No right of public performance was granted for sound recordings at this time.

27 *2004 House Hearing*, *supra* note 24, at 6 (statement of Marybeth Peters, Register of Copyrights, U.S. Copyright Office).

28 *Id.*

29 *Id.*

30 U.S. COPYRIGHT OFFICE, REGISTER'S REPORT ON THE GENERAL REVISION OF THE U.S. COPYRIGHT LAW (1961) ("It is recommended that this 'compulsory license' be eliminated."). The Register went on to describe the licenses as

> rather severe in their effect upon the copyright owner. . . . [T]he fundamental principle of copyright [is] that the author should have the exclusive right to exploit the market for his work, except where this would conflict with the public interest. . . . The compulsory license is no longer needed for [an antimonopolistic] purpose, and we see no other public interest that now requires its retention. For these reasons we favor complete elimination of the compulsory license provisions.

Id. See also U.S. COPYRIGHT OFFICE, SUPPLEMENTARY REGISTER'S REPORT ON THE GENERAL REVISION OF THE U.S. COPYRIGHT LAW 53 (1965) ("[R]ecord producers, small and large alike, regard the compulsory license as too important to their industry to accept its outright elimination.").

31 *2005 Senate Hearing*, *supra* note 2 (statement of Marybeth Peters, Register of Copyrights, U.S. Copyright Office) ("Music publishers and composers had grown accustomed to the license and were concerned that the elimination of the license would cause unnecessary disruptions in the music industry.").

32 *Id.*

33 *See* 1976 Copyright Act, Pub. L. No. 94-553, 90 Stat. 2560-61 [hereinafter 1976 Copyright Act]; *see also* H.R. REP. NO. 94-1733 (1976) (Conf. Rep.).

music,' but 'that the present system is unfair and unnecessarily burdensome on copyright owners, and that the present statutory rate is too low.'"[34]

In 1976, Congress responded to these criticisms, adopting a number of new clarifications and revisions to § 115. Most notably, the revisions:

- Created § 114, which expanded the sound recording copyright to include exclusive rights of reproduction, distribution, and derivative works, and added exemptions for some educational radio and television programs;[35]
- Required that a phonorecord be distributed to the American public, instead of just mechanically reproduced, before a compulsory license could be issued;[36]
- Established the Copyright Royalty Tribunal ("CRT"), an independent body charged with adjusting royalty rates;[37] and
- Stipulated that a composition could only be rearranged "to the extent necessary to conform it to the style or manner of the interpretation of the performance involved," provided that the rearrangement "does not change the basic melody or fundamental character of the work."[38]

The 1976 revisions successfully smoothed the major problems with § 115, at least enough for the system to work fairly well for a couple of decades. The statutory rate was raised for the first time since it was set in 1909, from two cents to two and three-quarters cents.[39] Under the CRT, the statutory rate was raised to six and one-quarter cents by 1993.[40] As had been the case in previous years, the statutory rate acted primarily as a ceiling for privately

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34 H.R. REP. NO. 94-1476, at 107 (1976) (quoting H.R. REP. NO. 83, at 66-67 (1967)), *available at* http://uscode.house.gov/download/pls/17C1.txt.

35 1976 Copyright Act, *supra* note 33, § 114; *see also* H.R. REP. NO. 94-1476 (1976); H.R. REP. NO. 94-1733 (1976) (Conf. Rep.).

36 1976 Copyright Act, *supra* note 33, § 114(a)(1).

37 *Id.* §§ 111, 118. The Copyright Royalty Tribunal ("CRT") was an independent agency consisting of five, and later three, Commissioners responsible for setting mechanical license rates, among other things. It was replaced by the Copyright Arbitration Royalty Panels ("CARP") in 1993. *See* 2 NIMMER, *supra* note 11, § 7.27[A]; William Patry, Why There Is No Copyright Royalty Tribunal, The Patry Copyright Blog, http://williampatry.blogspot.com/2005/05/why-there-is-no-copyright-royalty.html (May 26, 2005, 10:10 EST).

38 1976 Copyright Act, *supra* note 33, § 115(a)(2).

39 Effective January 1, 1978, the statutory rate was raised to two and three-quarters cents or one-half cent per minute of playing time, whichever is greater. Copyright Office Mechanical License Royalty Rates, http://www.copyright.gov/carp/m200a.pdf (last visited Dec. 27, 2006).

40 *Id.*

negotiated agreements. However, problems began to reemerge in the 1990s, when digital technology began its ascendancy. Music became available in digital formats highly superior to the quality of analog programming. Further, the digital formats were very inexpensive to reproduce. Services were developed to offer consumers the opportunity to hear any sound recording on an on-demand basis, or by delivering the digital file directly to the consumer's computer via downloads.[41] It became clear that the availability of the digital formats could threaten or even replace the demand for the physical formats on which the music industry had depended.

The music industry, particularly record companies, was concerned that the superior quality, ease, and low cost of copying in digital formats would encourage piracy of music, replacing the sales of compact discs and other traditional physical formats. In response to this "digital threat," Congress enacted the Digital Performance Right in Sound Recordings Act of 1995 (the "DPRA").[42] Congress amended § 115 to codify reproduction and distribution rights of copyright owners for certain digital uses of their works. As Marybeth Peters, Register of Copyrights, explained in her July 2005 Statement to the Senate Subcommittee on Intellectual Property, "Congress wanted to reaffirm the mechanical rights of songwriters and music publishers in the new world of digital technology."[43]

To effectuate this end, Congress expanded the scope of § 115 to encompass digital transmissions of phonorecords, adopting the term "digital phonorecord delivery" ("DPD"). A DPD is defined as an "individual delivery of a phonorecord by digital transmission of a sound recording which results in a specifically identifiable reproduction by or for any transmission recipient . . . regardless of whether the digital transmission is also a public performance of the sound recording or any nondramatic musical work embodied therein."[44] Essentially, it is the delivery of a phonorecord to a

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[41] A download is a transfer of data from a host machine to another "client" machine. There are different types of downloads. A "tethered download" is a "song file downloaded from a music subscription service that can be played only on computers registered to the account." CNET Glossary, http://reviews.cnet.com/4520-6029_7-6447112-1.html?tag=txt (last visited Dec. 27, 2006). A "limited download" is a downloaded song file "that is only available for listening for (i) a definite period of time . . . or (ii) a specified number of times." Copyright Modernization Act of 2006, H.R. 6052, 109th Cong. § 102 (2006) [hereinafter CMA]. Conversely, a "pure" or "full" download is unencumbered by any restrictions.

[42] Digital Performance Right in Sound Recordings Act of 1995, Pub. L. No. 104-39, 109 Stat. 336 [hereinafter DPRA].

[43] *2005 Senate Hearing*, *supra* note 2 (statement of Marybeth Peters, Register of Copyrights, U.S. Copyright Office).

[44] DPRA, *supra* note 42, § 4. The complete definition of a DPD is:

> [E]ach individual delivery of a phonorecord by digital transmission of a sound

consumer via a digital transmission. A familiar example is a download purchased from iTunes.

As Register Peters noted,[45] the important aspect of the DPD definition is the inclusion of public performance, reproduction, *and* distribution rights, coupled with a failure to stipulate which right is implicated by the transfer: "delivery . . . which results in a . . . reproduction . . . *regardless of whether* the digital transmission is also a public performance . . . ."[46] Further, the definition encompasses both the sound recording and the musical composition: "delivery of a *phonorecord* by digital transmission of a *sound recording*."[47] Consequently, if a subscription service[48] wished to offer consumers certain types of DPDs, then that service is forced to speculate about whether it needs to seek: 1) a compulsory license, 2) licenses for the public performance of the composition, *and* 3) the reproduction, distribution, and public performance of the sound recording. Not surprisingly, this has created frustration and anxiety for online music providers. If they guess wrong about which licenses they need, the services risk infringement actions; however, purchasing every license is an expensive solution. Some online music providers, discouraged with the § 115 process may simply use the desired composition

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> recording which results in a specifically identifiable reproduction by or for any transmission recipient of a phonorecord of that sound recording, regardless of whether the digital transmission is also a public performance of the sound recording or any nondramatic musical work embodied therein. A digital phonorecord delivery does not result from a real-time, non-interactive subscription transmission of a sound recording where no reproduction of the sound recording or the musical work embodied therein is made from the inception of the transmission through to its receipt by the transmission recipient in order to make the sound recording audible.

Id.

45 *2005 Senate Hearing*, *supra* note 2 (statement of Marybeth Peters, Register of Copyrights, U.S. Copyright Office).

46 DPRA, *supra* note 42, § 4 (emphasis added).

47 *Id.*

48 Subscription services provide subscribers with the opportunity to either stream, download, or burn music for a set fee for a set period of time. Harry Fox Agency Definitions, http://www.harryfox.com/public/infoFAQDefinitions.jsp (last visited Dec. 27, 2006). Some examples of subscription services include Yahoo! Music Unlimited ($5.99 per month), Listen.com's Rhapsody ($14.99 per month), and Napster ($14.95 per month). Yahoo! Music Unlimited, http://music.yahoo.com/ymu/default.asp? (last visited Dec. 27, 2006); Rhapsody, http://www.real.com/rhapsody (last visited Dec. 27, 2006); Napster, http://www.napster.com/index.html (last visited Dec. 27, 2006). With these services, the downloads are all "tethered" or "limited."

There are also online music providers who do not require a subscription, such as iTunes, BuyMusic.com, and Rhapsody Online, which sell songs that a buyer can download for between seventy-nine and ninety-nine cents apiece. Buy Music at Buy.com, http://www.buy.com/buymusic/18250.html (last visited Dec. 27, 2006); iTunes Store, http://www.apple.com/itunes/store/ (last visited Dec. 27, 2006); Rhapsody Online, http://www.rhapsody.com/welcome.html (last visited Dec. 27, 2006); *see also Where to Listen to & Download Music: Tips & Recommendations. Part 1,* ROCKDRIFT.COM, Sept. 15, 2006, http://www.rockdrift.com/wordpress/2006/09/15/293.html.

without securing proper licensing and hope to avoid detection.

To further complicate matters, online music providers have been unable to agree with music publishers and songwriters on the appropriate royalty rates for certain digital uses of their works,[49] particularly regarding on-demand streaming[50] and limited downloads.[51] To help promote the legal online marketplace, NMPA and HFA made an agreement with the Recording Industry Association of America ("RIAA") to provide licenses in return for a rate that would be negotiated at a future date.[52] The RIAA, on behalf of its members, agreed to pay an advance royalty to HFA and NMPA, which would not be distributed to copyright owners until a final rate was set.[53] Since a final rate has not yet been set, copyright owners have not received any of these funds.[54]

The DPRA also amended the ability of sound recording copyright owners to license mechanical rights[55] and to include controlled composition clauses in their contracts. Controlled composition clauses are commonly used by record companies to require a singer/songwriter to accept a mechanical royalty lower than the statutory rate when the record company makes and distributes a recording that includes songs written by that artist.[56] Record companies contend that the use of controlled composition clauses keeps their costs reasonable.[57]

Hypothetically, this is how a controlled composition clause would be used. An emerging singer/songwriter named Joe is

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49 Gary Churgin, *Ongoing Subscription Service Rate Negotiation*, SOUNDCHECK, Sept.-Oct. 1995, http://www.harryfox.com/docs/viewSoundCheck1005.pdf.

50 "Streams" or "streaming" can generally be defined as a transmission of media that allows for the user to begin displaying, or listening to, the data before the entire file has been downloaded. "Interactive" streams, also known as "on-demand" streams, are transmissions of a program that are specially created for the recipient, or a transmission of a particular song which is selected by or on behalf of the recipient. *See* CMA, *supra* note 41, § 102. Conversely, non-interactive streams, like webcasts, are pre-programmed streams where the user cannot manipulate the content.

51 Limited downloads are downloaded song files "that [are] only available for listening for (i) a definite period of time . . . or (ii) a specified number of times." CMA, *supra* note 41, § 102. For an explanation of other types of downloads, see *supra* note 41.

52 Churgin, *supra* note 49.

53 *See* Agreement between the Recording Industry Association of America, the Harry Fox Agency, and the National Music Publishers' Association (Oct. 5, 2001), *available at* http://www.harryfox.com/docs/FinalRIAAAgreement.pdf.

54 *U.S. Rep. Lamar Smith Holds a Markup of H.R. 5552, The Section 115 Reform Act of 2006: Hearing Before the Subcomm. on Courts, the Internet, and Intellectual Property of the H. Comm. on the Judiciary*, 109th Cong. (2006) [hereinafter *SIRA Markup Hearing*] (testimony of Rep. Lamar Smith, Member, H. Comm. on the Judiciary).

55 The DPRA amended § 115 to enable sound recording copyright owners to license the right to make DPDs of both sound recordings and the underlying compositions to third parties, so long as they themselves have obtained the license to make DPDs of the composition. As the primary owners of sound recording copyrights, record companies were particularly delighted with this development. Now, they were able to be a one-stop-shop for all sound recording and composition rights. 17 U.S.C. § 115(c)(3)(I) (2006).

56 *See* 2 NIMMER, *supra* note 11, § 8.23[E].

57 *See infra* note 130 and accompanying text.

signed by a record company. Joe writes his own songs, which are "controlled compositions," since the songs are owned and controlled by Joe. In his new record deal, the record company limits the amount of mechanical royalties Joe will receive for each reproduction and distribution of his upcoming CD, say at seventy-five percent of the statutory rate. Further, the record company limits the number of songs for which it will pay a mechanical royalty at ten songs. Given Joe's limited bargaining power (and perhaps his lack of business sophistication), he agrees to these terms. If Joe releases an album with ten songs on it, he is paid 6.825 cents (seventy-five percent of the current statutory rate of 9.1 cents) per song, or 68.25 cents per album. However, because of Joe's ten-song limit, if Joe releases an album with twelve songs on it, he receives the 6.825 cents for the first ten songs, but nothing for the remaining two songs.

Under § 115, sound recording copyright owners (typically record companies) can acquire mechanical rights and then sublicense those rights to a third party.[58] So here, the record company can acquire the mechanical rights for Joe's album. Then, the record company can sublicense their distribution rights to a CD wholesaler at the full statutory rate. The CD wholesaler will pay the record company the full 9.1 cents per song, but the record company is only obligated to pay Joe 6.825 cents of that, and can keep the surplus. The controlled composition clause can be a great deal more complicated than it is in this simple example, but for the purposes of exploring § 115 reform, a rudimentary understanding is sufficient.[59] Needless to say, the record companies covet the controlled composition clause, while the NMPA would like to see it abolished.

The DPRA impaired the ability of record companies to utilize a controlled composition clause for DPDs.[60] It stated that, insofar as a DPD is concerned, a privately negotiated contract between a songwriter/performer and a record company may not include a rate for the making and distributing of a musical work below that established for the compulsory license, unless the songwriter/performer is effectively acting as her own music publisher.[61] However, any contracts containing controlled

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58 *See* 17 U.S.C. § 115(c)(3)(B) (2006) ("[C]opyright owners of nondramatic musical works . . . may designate common agents to pay or receive . . . royalty payments.").

59 For other illustrations of the controlled composition clause, see 2 NIMMER, *supra* note 11, § 8.23[E]; DONALD S. PASSMAN, ALL YOU NEED TO KNOW ABOUT THE MUSIC BUSINESS 209-19 (Free Press 5th ed. 2003) (1991); Wallace Collins, *Songwriters & Publishers Beware the Controlled Composition Clause*, OUTER SOUND UNIV. (1999), http://www.outersound.com/osu/contracts/composition.html.

60 DPRA, *supra* note 42, § 4 (codified at 17 U.S.C. § 115(c)(3)).

61 *Id.*

composition clauses executed prior to June 22, 1995, were preserved.[62]

For the purposes of understanding § 115, the other notable element of the DPRA was the replacement of the CRT with Copyright Arbitration Royalty Panels ("CARP"), ad hoc panels that set DPD mechanical licensing rates when voluntary negotiations between parties failed.[63] CARP consisted of three arbitrators who qualified under the statutory requirements and were chosen by the Librarian of Congress.[64] The panels submitted proposals to change or distribute royalty rates to the Librarian of Congress, who had ninety days to accept, reject, or modify them.[65]

With CARP, the mechanical statutory rate increased to eight cents by 2003.[66] However, complaints surfaced that CARP decisions were inconsistent, unpredictable, overly expensive, and that the arbitrators lacked experience and were biased.[67] Thus, in the Copyright Royalty and Distribution Reform Act of 2004, Congress decided to replace CARP with three full-time, government-paid Copyright Royalty Judges, effective May 30, 2005.[68] The CRJs are responsible for establishing rates that "distinguish between (i) digital phonorecord deliveries where the reproduction or distribution of a phonorecord is incidental to the transmission which constitutes the digital phonorecord delivery, and (ii) digital phonorecord deliveries in general."[69] For example,

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62 *See* 2 NIMMER, *supra* note 11, § 8.23[E].

63 DPRA, *supra* note 42, § 4. William Patry reported that the original name for CARP was the "Copyright Royalty Arbitration Panel," but that "the acronym didn't seem right." Patry, Why There Is No Copyright Royalty Tribunal, *supra* note 37.

64 Copyright Royalty and Distribution Reform Act, Pub. L. No. 108-419, 118 Stat. 2341 (2004); *see also* 17 U.S.C. § 115(c)(3)(d) (2006). Due to a workload insufficient to justify a full-time Commissioner and complaints that the Commissioners were unqualified, the CRT was replaced by CARP in the Copyright Royalty Tribunal Reform Act of 1993. *See* 2 NIMMER, *supra* note 11, § 7.27[B]-[C]; Patry, Why There Is No Copyright Royalty Tribunal, *supra* note 37 ("[T]he CRT was a dumping ground for unqualified people to whom the President owed a small favor. . . . In 1993 . . . the CRT simply imploded. It was a soap opera worthy of prime-time television, but for the substantial amounts of money that were involved. We didn't set out to abolish the CRT, the CRT invited it.").

65 *See* 2 NIMMER, *supra* note 11, § 7.27[B].

66 Copyright Office Mechanical License Royalty Rates, http://www.copyright.gov/carp/m200a.pdf (last visited Dec. 27, 2006).

67 DPRA, *supra* note 42, § 5; s*ee also* 2 NIMMER, *supra* note 11, § 7.27[C].

68 *See* 2 NIMMER, *supra* note 11, § 7.27[C]. The CRJs serve six year terms. The first CRJs were appointed in January 2006. The Library of Congress, Copyright Royalty Board: Appointment of Copyright Royalty Judges, Jan. 4, 2006, http://www.loc.gov/crb/background/crb-judges.html.

69 17 U.S.C. § 115(c)(3)(C). When parties are unable to agree on a rate in private negotiations, the CRJs determine the royalty rate based on four guiding principles:

> [(1)] To maximize the availability of creative works to the public[;] [(2)] To afford the copyright owner a fair return for his or her creative work and the copyright user a fair income under existing economic conditions[;] [(3)] To reflect the relative roles of the copyright owner and the copyright user in the product made available to the public with respect to relative creative contribution, technological contribution, capital investment, cost, risk, and

a webcast[70] creates a temporary copy of streaming media on the hard drive of the receiving machine, which is automatically deleted as the webcast progresses. When playback is canceled or completed, the webcast is entirely deleted; no further playback is possible without restarting the webcast. Assuming for the purposes of this example that a webcast is a DPD,[71] the CRJs might decide that though there is a reproduction, this "reproduction" is purely incidental and necessary to the transmission. Thus, the CRJs will decrease the cost of the license accordingly. The difficulty, as identified by Register Peters, is "identifying those reproductions that are subject to compensation under the statutory license."[72]

So where does that leave us? Another hypothetical scenario will help to encapsulate the current scenario. Suppose Lola, a potential licensee, wishes to acquire the rights to reproduce and distribute a particular composition. Assuming the composition has already been mechanically reproduced and distributed to the American public (a requirement of the 1976 amendments),[73] Lola can utilize § 115's compulsory license. To acquire a compulsory license, Lola must abide by the 1909 rules, as supplemented by the 1976 amendments. Simply put, she must file a notice of intent with the copyright owner,[74] pay the statutory rate,[75] and refrain from changing the fundamental character of the work.[76] As of May 2006, the statutory rate for compulsory mechanical licenses is

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> contribution to the opening of new markets for creative expression and media for their communication[; and] [(4)] To minimize any disruptive impact on the structure of the industries involved and on generally prevailing industry practices.

Id. § 801(b)(1). The CRJs also distribute fees that are not subject to controversy, and adjudicate contested allocations. 2 NIMMER, *supra* note 11, § 7.27[C]. Nimmer explains:

> After initiation of proceedings, those judges reach their decisions by majority vote following statutorily mandated procedures. Hearsay may be admitted for these purposes, and limited discovery is contemplated. The CRJs may certify novel questions to the Register of Copyrights. Appeal from the CRJs' ruling lies to the United States Court of Appeals for the District of Columbia Circuit.

Id.

70 "Webcasts" are a type of non-interactive stream which use the Internet to broadcast live or delayed audio and/or video transmissions, much like traditional television and radio broadcasts. *See* TechWeb Encyclopedia, http://www.techweb.com/encyclopedia (last visited Dec. 27, 2006); NetLingo.com, http://www.netlingo.com (last visited Dec. 27, 2006).

71 This example assumes that a webcast is a DPD for the purposes of illustrating the role of the CRJs. However, this is far from clear. Presently, the characterization of a webcast or other stream as a DPD is the focus of a great deal of controversy. *See infra* notes 262-68 and accompanying text; *SIRA Hearing*, *supra* note 2, at 59-60 (statement of the Copyright Office).

72 *2005 Senate Hearing*, *supra* note 2 (statement of Marybeth Peters, Register of Copyrights, U.S. Copyright Office).

73 1971 Copyright Act § 115(a)(1), 85 Stat. 391 (1971).

74 *Id.* § 115(b)(1).

75 *Id.* § 115(c)(6).

76 *Id.* § 115(a)(2).

9.1 cents per composition or 1.75 cents per minute of playing time, whichever is greater, for each use.[77] Most likely, Lola will simply enter into private negotiations for the rights, with the statutory rate acting as a ceiling. If Lola wishes to offer DPDs or other digital transmissions, she may also need to acquire the rights for public performance of the composition, plus reproduction, distribution, or public performance rights for the sound recording. If Lola and the licensor cannot agree on which rights are implicated by the DPD, or on an appropriate royalty, Lola may appeal to the CRJs.

This, in a nutshell, is the present state of mechanical licensing under § 115. Before delving into the myriad of problems with today's § 115, it is important to have a clear understanding of the current music licensing structure.

II. TODAY'S MUSIC LICENSING

Current music licensing requirements can be very complicated. To clarify, here is a description of the rights that exist for songwriters and performers and those who generally administer those rights.

Songwriters have the exclusive right to publicly perform their compositions. Traditionally, this right was primarily implicated by broadcast analog radio and television, but today, it is also implicated by digital broadcasting, webcasting, satellite radio, and some online music services. Entities known as "Performance Rights Organizations" ("PROs") were established to administer these rights on behalf of the songwriters. There are currently three PROs: the American Society of Composers, Authors, and Publishers ("ASCAP"), Broadcast Music, Inc. ("BMI"), and the Society of European Stage Authors and Composers ("SESAC"). ASCAP and BMI are the largest of the PROs, together encompassing roughly ninety-seven percent of all American compositions.[78] Together, ASCAP and BMI represent over 525,000 authors and composers, with SESAC representing approximately 9,000.[79] The PROs offer blanket licenses to the broadcast radio stations; that is, for a set fee, the stations can use any composition

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[77] Copyright Office Mechanical License Royalty Rates, http://www.copyright.gov/carp/m200a.pdf (last visited Dec. 27, 2006).

[78] Michael A. Einhorn, *Intellectual Property and Antitrust—Music Performing Rights in Broadcasting*, MUSIC DISH, July 9, 2001, http://www.musicdish.com/mag/index.php3?id=3823.

[79] BMI Publications and Links, http://www.bmi.com/about/backgrounder.asp (last visited Dec. 27, 2006); About ASCAP, http://www.ascap.com/about/ (last visited Dec. 27, 2006); JAGKid Edge Productions, http://www.wadequinton.com/publishing.html (last visited Dec. 27, 2006).

represented by the PRO. The PROs, after deducting overhead costs, then distribute the royalties to the songwriters.[80]

Songwriters also have the exclusive right to make and distribute the *first* phonorecord of their composition, but that right is subject to a compulsory license. Once they have made and distributed the phonorecord to the American public, anyone else may license the right to make and distribute the composition via the § 115 compulsory license, so long as they serve notice upon the copyright owner and pay the statutory rate. This right is primarily implicated by performers recording "covers" of songs they did not compose, and DPDs, such as downloads. Typically, a songwriter will assign her reproduction and distribution rights to a music publisher, who accepts certain obligations such as marketing the composition and policing the licensing (known as "administration rights"), in return for fifty percent of the revenues.[81] NMPA (The National Music Publishers' Association) was founded in 1917 to represent the interests of music publishers and songwriters, and today is the largest music publishing trade association in the United States.[82] As previously explained, NMPA's subsidiary, Harry Fox, acts as a clearinghouse and monitoring service for licensing reproduction and distribution copyrights on behalf of American music publishers.[83] While HFA does not represent nearly the market share of compositions that ASCAP and BMI do, HFA is the largest service of its kind.

Copyright owners of sound recordings retain the exclusive

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[80] However, today, some PROs have additional obligations. The oligopoly of ASCAP and BMI drew the attention of the Antitrust Division of the United States Department of Justice, which issued consent decrees in 1941 and 1964, respectively. *See* United States v. Am. Soc'y of Composers, Authors & Publishers (ASCAP), No. 41-1395, 2001 WL 1589999 (S.D.N.Y. June 11, 2001) [hereinafter *ASCAP Consent Decree*]; United States v. Broadcast Music, Inc. (BMI), No. 64 Civ. 3787, 1994 U.S. Dist. LEXIS 21476 (S.D.N.Y. Nov. 18, 1994) [hereinafter *BMI Consent Decree*]. The decrees imposed a variety of restrictions and obligations on ASCAP and BMI related to the collective licensing of their members' works, as well as their relationships with their members. The salient points of the *ASCAP Consent Decree* and the *BMI Consent Decree* are very similar. They include: ASCAP/BMI may not negotiate or license any rights for copyrighted musical compositions except non-exclusive public performance rights. *ASCAP Consent Decree* IV(A); *BMI Consent Decree* IV(B). Nor can ASCAP or BMI discriminate in license fees between similarly situated licensees, fix prices, or withhold licenses in order to exact additional fees from the licensee. *ASCAP Consent Decree* IV(C), (F); *BMI Consent Decree* VIII(A), X(A). If ASCAP/BMI and a potential licensee cannot come to terms as to a reasonable licensing fee, the licensee may appeal to a rate court to set an amount. *ASCAP Consent Decree* IX; *BMI Consent Decree* XIV(A).

[81] PASSMAN, *supra* note 59, at 201-02.

[82] About NMPA, http://www.nmpa.org/aboutnmpa/index.asp (last visited Dec. 27, 2006); *SIRA Hearing*, *supra* note 2, at 4 (testimony of Lamar Smith, Member, H. Comm. on the Judiciary).

[83] *See supra* note 20 and accompanying text.

rights to the reproduction and distribution of those sound recordings, without being subject to a compulsory license.[84] However, sound recording copyright owners do not have an exclusive right of public performance.[85] A 1976 House Report explained that the "Committee [on the Judiciary] considered at length the arguments in favor of establishing a limited performance right . . . but concluded that the problem requires further study."[86] The 1976 Act called on the Register of Copyrights to submit a report as to whether public performance rights should be included among the exclusive rights of a sound recording copyright owner.[87] The Register subsequently proposed that the performing right be included, but Congress failed to take further action.[88] Thus, the copyright owners of sound recordings—mostly record companies—are not entitled to any royalties when their sound recordings are played, for example, over commercial radio.

The congressional position changed with the 1995 DPRA, in which Congress decided that the public performance right for sound recordings *was* implicated in all digital non-broadcasts, i.e., webcasts and satellite radio.[89] The strange result is that sound recording copyright owners are compensated for webcasts of their works, but not for traditional broadcasts.

The DPRA also somewhat abridged sound recording copyright owners' public performance right by creating a compulsory license[90] for online subscription services, where a subscriber can download or stream as many songs as she wishes for a fixed monthly fee.[91] Eligibility for the compulsory license was expanded by the 1998 Digital Millennium Copyright Act[92] to include some non-subscription[93] and preexisting digital satellite

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84 1976 Copyright Act, *supra* note 33, § 114. The exception is certain digital public performances, particularly non-interactive streaming, satellite radio, digital cable, and direct satellite television, which are eligible to receive compulsory licenses. *See infra* notes 90-94 and accompanying text.

85 17 U.S.C. § 114(a) (2006).

86 H.R. REP. NO. 94-1476 (1976), *available at* http://uscode.house.gov/download/pls/17C1.txt.

87 *Id.*; H.R. REP. NO. 94-1733 (1976) (Conf. Rep.).

88 *See* 2 NIMMER, *supra* note 11, § 8.14[A] n.15 ("The 1978 report and a comprehensive follow-up in 1991 recommended conferring a full performance right on sound recordings.").

89 DPRA, *supra* note 42.

90 17 U.S.C. § 114(d)(2).

91 For a definition of subscription services, see *supra* note 48.

92 Digital Millennium Copyright Act of 1998, Pub. L. No. 105-304, 112 Stat. 2860 [hereinafter DMCA].

93 Non-subscription services include download services, such as iTunes, BuyMusic.com, and Rhapsody Online, which sell songs that a buyer can download for between seventy-nine and ninety-nine cents apiece. Buy Music at Buy.com, http://www.buy.com/buymusic/18250.html (last visited Dec. 27, 2006); iTunes Store, http://www.apple.com/itunes/store/ (last visited Dec. 27, 2006); Rhapsody Online, http://www.rhapsody.com/welcome.html (last visited Dec. 27, 2006); *see also Where to*

services.[94]

A new entity, SoundExchange, was established in order to administer this new revenue from the digital public performance of sound recordings.[95] SoundExchange is a nonprofit PRO jointly controlled by artists and sound recording copyright owners, designated by the Copyright Office to collect and distribute statutory royalties to sound recording copyright owners.[96]

Since the music licensing universe has become so complicated, it is perhaps easier to understand the scheme graphically rather than verbally. Accordingly, the Appendix features a diagram of the different rights in a musical composition and how those rights may be administered.

III. THE SECTION 115 CONUNDRUM

While the 1976 and 1995 amendments to § 115 have helped smooth the bumpy ride, § 115 is proving to be ineffective against today's challenges. In recent years, the widespread availability of unauthorized copies of digital phonorecords has allowed for the unprecedented ability of a consumer to download, for free, nearly any sound recording she wishes. This phenomenon has been well documented through the storied rise and fall of both Napster and Grokster.[97] The legitimate online market, though making strides through services such as iTunes, has failed to keep up. Many in

Listen to & Download Music: Tips & Recommendations. Part 1, ROCKDRIFT.COM, Sept. 15, 2006, http://www.rockdrift.com/wordpress/2006/09/15/293.html.

94 DMCA, *supra* note 92, at 2887. A potential licensee must abide by specific regulations in order to qualify for the compulsory license, namely that the Internet transmission does not exceed the sound recording performance complement, does not publish an advance program schedule or specify the songs to be transferred, does not automatically and intentionally switch from one program channel to another, includes specific information about the recording, including title and artist, and is not part of an interactive service. 17 U.S.C. § 114(d)(2). There are different types of interactive services. Some services operate similarly to a jukebox, such as Musicmatch On-Demand, which allows subscribers to stream any music in the Musicmatch library to any computer for a fixed $4.99 monthly fee. Musicmatch Jukebox, http://www.musicmatch.com/download/ondemandintro.htm (last visited Dec. 27, 2006). There are also free services, such as Pandora, in which a user inserts the name of a song she enjoys, and Pandora streams a playlist of similar songs based on an analysis of the particular elements of the original song. Pandora Internet Radio, http://www.pandora.com (last visited Dec. 27, 2006). Pandora also offers an advertising-free service for thirty-six dollars per year. Pandora FAQ, http://blog.pandora.com/faq/#25 (last visited Dec. 27, 2006).

95 About SoundExchange, http://www.soundexchange.com/about/about.html (last visited Dec. 27, 2006).

96 *Id.*

97 *See* A&M Records v. Napster, Inc., 284 F.3d 1091 (9th Cir. 2002); MGM Studios Inc. v. Grokster, Ltd., 125 U.S. 913 (2005); *see also Court Shuts Down Grokster Downloading Service*, CHI. TRIB., Nov. 8, 2005, at 10; Charles Duhigg & Chris Gaither, *The Changing Media Landscape; Grokster Surrenders to Labels*, L.A. TIMES, Nov. 8, 2005, at A1; Jon Healey, *Napster Ruling Is Upheld; Music: In a Decision that Could Affect Other Online Systems, Appeals Court Backs the Order that Shut Down the Free Service*, L.A. TIMES, Mar. 26, 2002, at Bus. 2.

the industry blame § 115 for this.[98]

With complicated notice and reporting procedures leading to prohibitive transactional costs and delays, and a lack of clarity regarding which activities require which licenses inciting frustration and uncertainty, § 115 has hindered online music providers in their attempts to successfully combat piracy. First, online music providers are unsure which rights are being implicated when they offer DPDs or other digital audio transmissions. For example, with webcasting, the webcasters are being told that they must not only get a license for the public performance of the composition, but also for the evanescent "copy" made on the receiving computer's hard drive which is necessarily incident to the streaming.[99] Though denouncing this as "double-dipping," the online providers have, as of yet, been unwilling or unable to litigate the issue. Thus, would-be online providers either find themselves paying two representatives of the same copyright owner (i.e., Harry Fox and ASCAP) for the right to make a single transmission of a single work, or become discouraged from entering the market altogether. Perhaps less ideally, some online providers may be responding to the confusion by paying only one license, and hoping to avoid lawsuit.

Some new technologies have also elicited consternation with regard to licensing requirements.[100] With kiosks, a user can burn a custom CD from the kiosk's library of music. Is this both a

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98 *See* Bigger Than Grokster?, The 463—Inside Tech Policy, http://463.blogs.com/the_463/2005/06/bigger_than_gro.html (June 23, 2005, 16:34); *see also supra* note 4.

99 *2005 House Digital Music Hearing*, *supra* note 2, at 19 (statement of Jonathan Potter, Executive Director, Digital Media Association). Generally, a "stream" is a transmission of media that allows for the user to begin displaying or listening to the data before the entire file has been downloaded. In the course of playing back, the streaming media is temporarily stored on the client machine's hard drive. For a more comprehensive definition, see *supra* note 50.

100 These new physical technologies include the SACD and DualDisc. SACD is the short name for Super Audio CD, a high-resolution CD audio format that provides sound quality superior to that of the traditional compact disc. TechWeb Encyclopedia, http://www.techweb.com/encyclopedia (last visited Dec. 27, 2006). A hybrid SACD includes a separate CD layer with the same titles so it can play in regular CD players. *Id.* A DualDisc is a combination CD/DVD with one side containing up to an hour of traditional CD audio, and the other side containing DVD material (such as music videos, behind the scenes footage, or higher-quality audio). *Id.* Another new technology is the music kiosk. The music kiosk is a free-standing computer that allows users to burn custom CDs or download music to their portable media players. Laurie Sullivan, *Retail Kiosks Dispense Custom Digital Tunes*, TECHWEB, Oct. 24, 2006, http://www.techweb.com/showArticle.jhtml;jsessionid=NEBUEDU5QJNWGQSNDL PSKH0CJUNN2JVN?articleID=193401688. To date, Starbucks and Wal-Mart are among the companies experimenting with kiosks. *Id.; see also* Laurie Sullivan, *Digital Content Kiosks Rock on*, TECHWEB, Dec. 2, 2005, http://www.techweb.com/wire/174900079; Press Release, SyncCast, Mix & Burn Selects SyncCast Technology to Advance CD Burning Music Kiosk (July 28, 2005), *available at* http://www.synccast.com/newsroom/default.asp?page=news&sub=20050728.

reproduction and a distribution of the compositions? With Pandora, a "generated" interactive streaming service,[101] a playlist is created by the website's software based on the input of a song that the user likes. The user cannot choose the songs on the playlist, nor does that user know what will be played next. Should Pandora be compelled to acquire the same licenses as an online service that allows the user to choose what she wants to hear? As of yet, industry parties have failed to agree on a solution for these issues.

While two separate licensing schemes for distribution/reproduction and public performance used to work well enough when the two rights rarely intersected, digital distribution has effectively wiped out these distinctions. As elucidated by Professor William Patry, former copyright counsel to the United States House of Representatives, Committee on the Judiciary, "[t]he relationship between the performance right, the copying right as implicated by buffering and caching, and the distribution right no longer hold up, and certainly cannot justify the type of separate payments that have impeded online licensing."[102]

The increased transactional costs and delays associated with complicated licensing are often cited as the reason legal music services have trouble competing against unauthorized peer-to-peer ("P2P") networks.[103] Section 115's notice provisions are burdensome on potential licensees. If a business wishes to take advantage of the compulsory license, it must engage in an expensive search for the copyright owner.[104] Should it fail to

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101 "Interactive" streams, also known as "on-demand" streams, are transmissions of a program that are specially created for the recipient, or a transmission of a particular song which is selected by or on behalf of the recipient. *See* CMA, *supra* note 41, § 102. There are "user-created" interactive streams, like those provided by Musicmatch On-Demand, which allow subscribers to choose which songs they wish to stream. There are also "generated" interactive streams, like those provided by Pandora, in which a playlist is generated based on user inputs. For an explanation of other types of streams, see *supra* note 50.

102 William Patry, Music Licensing Reform: A New Era?, The Patry Copyright Blog, http://williampatry.blogspot.com/2005/07/music-licensing-reform-new-era.html (July 14, 2005, 07:30 EST).

103 Bigger Than Grokster?, *supra* note 98; *2005 House Digital Music Hearing*, *supra* note 2 (statement of Jonathan Potter, Executive Director, Digital Media Association).

104 17 U.S.C. § 115(b)(1) (2006). To do the search independently, a party must physically travel to the Copyright Office in Washington, D.C. where she may manually check the Copyright Office's records. U.S. COPYRIGHT OFFICE, CIRCULAR 22 (2006), *available at* http://www.copyright.gov/circs/circ22.html#how. If the party wishes to avoid a trip to Washington, she may engage the services of the Copyright Office to undertake the search on her behalf at a rate of $150 per hour. *See* U.S. Copyright Office—Search Request Estimate, http://www.copyright. gov/forms/search_estimate.html (last visited Dec. 27, 2006). However, not all copyright owners file with the Copyright Office, so after these expenses, the party may find herself in the same position she was in at the beginning. When you consider that these substantial costs are incurred in pursuit of a nine-cent license, it is clear why these requirements may deter potential licensees from using § 115 for even one license, let alone the hundreds or thousands they may be

locate the owner, it may file an intent to use with the Copyright Office, for a twelve dollar fee.[105] Between the initial search and the Copyright Office's administrative fees, using the compulsory license can be prohibitively expensive and time-consuming. Also, § 115's reporting requirements are extensive and complicated, requiring a licensee to submit monthly and audited annual statements of account to the copyright owner.[106] In her statement for the July 2005 Senate hearing, Register of Copyrights Marybeth Peters argued that the majority of consumers would choose to use a legal service over illegal P2P file sharing if the service 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 with publishers and record companies which result in time delays and increased transaction costs. In cases where they cannot succeed in obtaining all of the rights they need in order to make a musical composition available, the legal music services simply do not offer that selection, thereby making them less attractive to the listening public than the pirates.[107]

Furthermore, while ASCAP, BMI, and, SESAC are able to license public performances of virtually all musical compositions, there remain a significant number of compositions that are not represented through HFA. Even if a potential licensee chooses to forego private negotiations in favor of a statutory license, that licensee would still be required to serve a notice of intention to use the license with the copyright owner. With regard to those songs not represented at HFA, those wishing to license the reproduction and distribution rights for the works have complained of difficulties in locating copyright owners.[108] This is especially problematic for online music providers, who may find it

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seeking. Worse, if the potential licensee should fail to provide the copyright owner with notice within the proscribed period of time, the possibility of receiving a statutory license for that work is foreclosed altogether. 17 U.S.C. § 115(b)(2).

105 *See* U.S. Copyright Office—Current Fees, http://www.copyright.gov/docs/fees.html (last visited Dec. 27, 2006). A party may not take advantage of this option if she has not already executed the manual search described above. *See supra* note 104. A twelve dollar fee alone may not seem particularly significant, but when multiplied by the thousands of songs that an online provider may wish to make available, it is clear how quickly the cost can become prohibitive.

106 37 C.F.R. § 201.19 (2006).

107 *2005 Senate Hearing*, *supra* note 2 (statement of Marybeth Peters, Register of Copyrights, U.S. Copyright Office).

108 *See id.*

impossible to obtain the necessary reproduction and distribution rights for compositions they wish to license, which further impacts their ability to combat piracy through comparable offerings.

Record company representatives testifying before the Senate in the summer of 2005 also complained of difficulties in licensing compositions in new physical media, such as DualDiscs (combination CD/DVDs containing CD audio on one side and DVD content on the other) and SACDs (multilayer discs including both a standard stereo format and a surround-sound format).[109] Ismael Cuebas of the National Association of Recording Merchandisers ("NARM") lamented that under the current system, "it could take more than 100 separate licenses to clear one DualDisc."[110] Glen Barros, who testified before the Senate on behalf of his independent record label, echoed this concern.[111]

> After launching our SACD lines, we were informed that many music publishers think that, simply as a result of the music being technically encoded two times on the disc, they are entitled to get paid twice as much for an SACD release of a song as for a regular CD release. . . . It just doesn't make business sense . . . to invest in promoting a speculative new format while at the same time having to spend time and money arguing with our colleagues in the music publishing community. . . .[112]

Witnesses at the summer 2005 Senate hearings also attested to confusion over what activities are covered by the compulsory license and problems created by the per-unit penny rate established by § 115.[113]

IV. DISCUSSING SOLUTIONS

A number of interested parties have submitted proposals to Congress suggesting revisions to § 115. Before discussing these proffered solutions, it is valuable to examine who these parties are, and what they stand to gain or lose.

The groups most significantly affected by § 115 reform are: record companies, represented by the RIAA,[114] online music

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109 For more information about these new technologies, see *supra* note 100.

110 *2005 Senate Hearing*, *supra* note 2 (statement of Ismael Cuebas, on behalf of the National Association of Recording Merchandisers).

111 *Id.* (statement of Glen Barros, President and Chief Executive Officer, Concord Music Group).

112 *Id.*

113 *Id.* (statement of Marybeth Peters, Register of Copyrights, U.S. Copyright Office).

114 The RIAA's member record companies create, manufacture, or distribute approximately ninety percent of all legitimate sound recordings produced and sold in the United States. *2004 House Hearing*, *supra* note 24, at 38 (statement of Cary Sherman, President and General Counsel, Recording Industry Association of America).

providers, represented most notably by the Digital Media Association ("DiMA");[115] and music publishers, represented by the PROs, NMPA, and HFA.

The record companies are affected by § 115 reform in two primary ways: cover songs and piracy. It is questionable how much the record companies rely on cover songs for income, but to the extent they do, it is clearly in their best interest to maintain a compulsory license with a statutory rate ceiling. As described earlier, the record companies will also seek to preserve their controlled composition clauses. But mostly, the record companies are worried about piracy.[116] They want any reform to focus on streamlining the licensing process, enabling them to provide new products and media formats capable of competing with pirated offerings.[117]

DiMA's main concern is the ability of its members to offer online music services without confusion about when and whom to pay.[118] DiMA seeks a clarification and streamlining of the licensing process to minimize transactional costs.[119] Since online services must pay mechanical royalties, it is also in DiMA's best interest to maintain the statutory ceiling, in order to keep the licensing rates down. The key for DiMA is securing the prompt availability of the maximum amount of compositions with clear, ideally minimal, licensing requirements that will allow them to avoid liability.

It is worth distinguishing the PROs from HFA despite the fact that they generally represent the same copyright owners, since what each organization stands to gain and lose differs significantly. When it comes to § 115 reform, HFA finds itself in a sticky

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115 Members of DiMA include Amazon, AOL, Apple, DMX Music, Microsoft, Motorola, MP3.com/CNET, MTV Networks, Napster, National Geographic Society, Pandora Media, RealNetworks, Sony Connect, and Yahoo!. Join DiMA: DiMA Members, http://www.digmedia.org/content/joinDima.cfm?content=members (last visited Dec. 27, 2006).

116 *2005 House Digital Music Hearing*, *supra* note 2, at 15 (statement of Larry Kenswil, President, Universal Music Group e-Labs). *See also 2004 House Hearing*, *supra* note 24, at 38 (statement of Cary Sherman, President and General Counsel, Recording Industry Association of America).

117 *2005 House Digital Music Hearing*, *supra* note 2, at 15 (statement of Larry Kenswil, President, e-Labs, Universal Music Group). According to Kenswil,

> [T]he antiquated structure of Section 115, with its one-song-at-a-time, one-publisher-at-a-time licensing model, is frustrating the introduction of [new technologies and distribution platforms that Universal is using to give consumers more enjoyable and more convenient ways to access digital music]. . . . New technologies provide superior audio fidelity . . . as well as improved security to reduce the sting of piracy.

Id. at 17-19.

118 *Id.* at 21 (statement of Jonathan Potter, Executive Director, Digital Media Association).

119 *Id.* Potter testified that "[b]y clarifying and simplifying the compulsory composition mechanical license and the statutory sound recording performance license, Congress will provide business and legal certainty to legitimate online music innovators . . . ." *Id.*

situation. On the one hand, HFA's parent company is NMPA, which is an association of composition copyright owners. It is in the copyright owners' best interests to reap the highest reward for the licensing of their works. On the other hand, HFA has a healthy desire for self-preservation. Thus, NMPA has voiced its support for the elimination of the compulsory license in favor of free market negotiations. Should this occur, HFA could preserve its existence by negotiating and issuing licenses on behalf of willing copyright owners. NMPA resists proposals that eliminate HFA from the picture.[120] Thus, NMPA's and HFA's primary goals are increased royalties for copyright owners (through free market negotiations or an increased statutory rate), and the preservation of HFA.[121]

The PROs have the least to lose as a result of any drastic reform to § 115. As both ASCAP and BMI represented in 2004 letters to the Senate, they would ordinarily not involve themselves in discussions on mechanical licensing reform, since they only license public performance rights.[122] However, the PROs are concerned that in the name of the simplification being pushed for by both RIAA and DiMA, new legislation will unequivocally state that public performance rights *are not* implicated in streaming[123] or other online music uses.[124] As BMI CEO Del Bryant states, "our

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120 *See, e.g.*, *infra* text accompanying notes 152, 190.

121 NMPA has displayed a notable shift in its position on the compulsory license. In March 2005, NMPA President David Israelite argued against the elimination of the compulsory license, commending Congress on its "foresight in preserving the statutory compulsory license" and maintaining that such preservation was "all for the ultimate benefit of the listening public." "Consumers have been the winners," he claimed. *2005 House Digital Music Hearing*, *supra* note 2, at 10, 12 (statement of David Israelite, President and Chief Executive Officer, National Music Publishers' Association). However, in July 2005, NMPA Chairman of the Board Irwin Robinson stated that "NMPA supports eliminating Section 115 of the Copyright Act and truly allowing the marketplace to govern the music industry." *2005 Senate Hearing*, *supra* note 2 (testimony of Irwin Robinson, Chairman of the Board, National Music Publishers' Association). Presently, NMPA has maintained the latter position. *See SIRA Hearing*, *supra* note 2, at 6 (statement of David Israelite, President and Chief Executive Officer, National Music Publishers' Association) ("NMPA supports eliminating the compulsory licensing regime.").

122 Letter from BMI President and CEO Frances W. Preston to the Honorable Lamar Smith, Chairman of the Subcomm. on Courts, the Internet, and Intellectual Prop., and the Honorable Howard Burman, Ranking Minority Member of the Subcomm. of the Courts, the Internet, and Intellectual Prop. (Apr. 2, 2004) *in 2004 House Hearing*, *supra* note 24, at 72. *See also* Letter from ASCAP President and Chairman of the Board Marilyn Bergman to the Honorable Lamar Smith, Chairman of the Subcomm. on Courts, the Internet, and Intellectual Prop., and the Honorable Howard Burman, Ranking Minority Member of the Subcomm. of the Courts, the Internet, and Intellectual Prop. (Mar. 17, 2004) *in 2004 House Hearing*, *supra* note 24, at 66.

123 For a definition of streaming, see *supra* note 50.

124 [G]reat care must be taken by Congress if it acts in this area to ensure that no harm is done to the economic interests of songwriters, composers, and music publishers in the name of 'streamlining' the licensing process. . . . [A]ny amendment to section 115 that effectively curtails . . . the public performing right in downloads would deprive songwriters and publishers of the full

primary objective will be to safeguard the *full* value of our affiliated songwriters' and publishers' copyrights."[125] The PROs' chief goal in any reform is to preserve these public performance royalties.

The Copyright Office is the entity most inclined to a drastic change of § 115. After all, the Copyright Office had first tried to eliminate the mechanical license over forty years ago, in 1961.[126] Register Peters sees the mechanical licenses as "placing artificial limits on the free marketplace" since they "have rarely been used as functioning compulsory licenses and have served simply as a ceiling on the royalty rate in privately negotiated licenses."[127] Thus, the Copyright Office endorses a more plenary reform.

In July 2004, round table discussions were held involving the Copyright Office, DiMA, RIAA, and NMPA and its subsidiary, HFA.[128] There was general agreement that § 115 was in need of reform, and a "blanket license" structure was favored with a designated agent to collect and distribute royalty payments.[129] The group also discussed the scope of a statutory license, the collection and distribution of royalties, controlled composition clauses, sublicensing, and rate setting. Unfortunately, as Register Peters reported, "the parties reach[ed] no consensus on any particular issue."[130]

Among the issues discussed was the administrative cost of collecting and distributing royalties under a blanket license.[131] According to Register Peters, "NMPA suggested that a statute provide the means for the designated agent to recover its start-up costs."[132] The other parties were hesitant to endorse this suggestion without knowing whether the license would be

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economic value of their works.

Letter from BMI President and CEO Frances W. Preston to the Honorable Lamar Smith, Chairman of the Subcomm. on Courts, the Internet, and Intellectual Prop., and the Honorable Howard Burman, Ranking Minority Member of the Subcomm. of the Courts, the Internet, and Intellectual Prop. (Apr. 2, 2004).

In a letter addressed to the same recipients, dated March 17, 2004, ASCAP's President and Chairman of the Board, Marilyn Bergman, echoed Preston's concerns. In response to Peters' testimony that the public performance right is "valueless in the context of downloads," Bergman wrote that "[w]e strongly disagree. Current law is clear that the performance right is implicit in downloads. And there is neither a need nor a justification for changing the law."

125 *2005 Senate Hearing*, *supra* note 2 (statement of Del R. Bryant, President and Chief Executive Officer, Broadcast Music, Inc.).

126 *See supra* note 30 and accompanying text.

127 *2005 Senate Hearing*, *supra* note 2 (statement of Marybeth Peters, Register of Copyrights, U.S. Copyright Office).

128 *Id.*

129 *Id.*

130 *Id.*

131 *Id.*

132 *Id.*

sufficiently broad to generate adequate funds.[133] Also discussed was the potential sublicensing of rights granted under the blanket license.[134] NMPA sought a restriction on the right of a record company to sublicense any works covered by the blanket license, in favor of requiring services to deal directly and exclusively with the designated agent or music publishers.[135] Such a restriction would facilitate HFA's collection and auditing efforts. Naturally, the RIAA disagreed. Record companies felt it would be extremely burdensome to offer new products if they could not themselves provide all the licensing for use of the product.[136] Lastly, the parties argued over the amount and methods of setting the rates.[137] Both record companies and DiMA urged for a rate setting body to establish a rate based on percentage of revenue.[138] DiMA in particular emphasized a need for clarification on whether a service must pay for server copies and intermediate reproductions, or whether one or both types were exempt.[139]

A. *The Copyright Office's Answer*

In the summer of 2005, Congress asked Register of Copyrights Marybeth Peters to submit a proposal for reforming § 115. In her July testimony, the Register articulated her goals, arguing that "[a]ny solution to the crisis in music licensing must make it easy for licensees to obtain, from a single source or at least a manageable number of sources, all the necessary rights for all the musical compositions licensees wish to offer to the public."[140] That is, Congress needs to create "one-stop shopping" for mechanical licenses, analogous to what currently exists with respect to performance rights. According to Peters, true one-stop shopping would require the availability of all musical compositions and all the necessary rights that one would wish to license.[141]

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133 *Id.*

134 *Id.*

135 *2005 Senate Hearing*, *supra* note 2 (statement of Marybeth Peters, Register of Copyrights, U.S. Copyright Office); *see also supra* note 55.

Another issue, hotly contested, was the abolition of the controlled composition clause in recording contracts for activities covered by the blanket license. The record companies argued that elimination of the controlled composition clause would inhibit their ability to conduct business and invest in new talent. Predictably, NMPA fully endorsed the eradication of the controlled composition clause. *See supra* notes 56-62 and accompanying text; *2005 Senate Hearing*, *supra* note 2 (statement of Marybeth Peters, Register of Copyrights, U.S. Copyright Office).

136 *2005 Senate Hearing*, *supra* note 2 (statement of Marybeth Peters, Register of Copyrights, U.S. Copyright Office).

137 *Id.*

138 *Id.*

139 *Id.*

140 *Id.*

141 *Id.*

Several proposals were considered by the Copyright Office in formulating a recommendation.

1. Blanket Licensing

A first potential solution addressed by the Register was the blanket licensing scheme that had been discussed by the relevant parties in the summer of 2004. Under this proposal, a music service such as iTunes would negotiate and pay for a single blanket license, which would give them the right to distribute all the musical compositions that fall under the blanket. The negotiated rate would also arguably represent a cost more reflective of current market rates.[142]

Register Peters urged for the license 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 the statutory license."[143] This way, a webcaster would pay only one fee for the transmission of a single composition. Peters emphasized that there "should be no liability for the making of buffer copies in the course of streaming a licensed public performance of a musical work."[144]

If § 115 were to be expanded under a blanket license, the administration of such a license would need to be evaluated. Would a party who wished to use the license have to contact the copyright owner, or would she contact a qualified service? According to Register Peters, if the process of acquiring a blanket license is to simplify the existing situation, prospective licensees should not have to do anything other than serve a notice of their intent to use the license with a qualified service.[145]

The natural follow-up to this issue is who the qualified service should be. A new entity could be created to serve this function, similar to the model established by § 114, the section of the Copyright Act governing sound recordings.[146] Alternatively, one of the PROs could perform this function. A third option, utilized in §§ 111 and 119 of the Copyright Act, is for the Copyright Office to receive and distribute royalties to copyright owners. Register Peters assured the Senate that "[t]his is a function that the Copyright Office could easily perform."[147]

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142 Bigger Than Grokster?, *supra* note 98.

143 *2005 Senate Hearing*, *supra* note 2 (statement of Marybeth Peters, Register of Copyrights, U.S. Copyright Office).

144 *Id.*

145 *Id.*

146 17 U.S.C. § 114 (2006).

147 *2005 Senate Hearing*, *supra* note 2 (statement of Marybeth Peters, Register of Copyrights, U.S. Copyright Office).

2. Unilicense

NMPA proposed a solution analogous to a narrow version of the blanket license, which they dub the "Unilicense." Under the Unilicense, which was endorsed by ASCAP and BMI,[148] online subscription services could obtain a blanket license covering public performance and mechanical rights through a "Super Agency" administered (not surprisingly) by NMPA and the existing PROs. This "Super Agency" would issue a blanket license to digital subscription companies that would cover both public performance and mechanical rights in exchange for a percentage of the digital media company's revenue. A designated mechanical agent (likely HFA) and designated performance agents (likely the PROs) would administer royalties and distribute them to the copyright owners. Irwin Robinson, NMPA's Chairman of the Board, contended that "the [U]nilicense proposal is a superior proposal that would appropriately balance the needs of the marketplace with the interests of copyright owners."[149] Further, Robinson argued, the Unilicense would achieve the goal sought by the Copyright Office to create "one stop shopping" for licensing of nondramatic musical works.[150] The Nashville Songwriters Association International and the Songwriters Guild of America ("SGA") also endorsed the Unilicense proposal.[151]

From HFA's perspective, the Unilicense proposal would succeed in maintaining its business structure, which Robinson lauded as "reaping the benefits of many decades of licensing experience and expertise."[152] BMI prefers the Unilicense because it would avoid "creat[ing] an upheaval in existing music industry licensing institutions with unsettling marketplace repercussions,"[153] i.e., it would not interfere with BMI's traditional business practices. Even more importantly, the Unilicense would preserve the ability of the PROs to charge multiple royalties for digital streaming, which is of particular importance to the PROs.[154] However, Ismael Cuebas, testifying before the Senate on behalf of NARM, dismissed the Unilicense proposal as "too narrow in

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148 *Id.* (statement of Del R. Bryant, President and Chief Executive Officer, Broadcast Music, Inc.).

149 *Id.* (statement of Irwin Robinson, Chairman of the Board, National Music Publishers' Association).

150 *Id.*

151 *Id.*

152 *Id.*

153 *Id.* (statement of Del R. Bryant, President and Chief Executive Officer, Broadcast Music, Inc.).

154 *Id.* (complaining that by seeking relief from "double-dipping," DiMA is seeking "not only ease of licensing the copyright rights they need, but also a bargain basement license fee, all at the expense of the songwriters whose work provide the very foundation of their businesses").

scope."[155] The NMPA proposal applied only to subscription services,[156] while Cuebas insisted that retailers wanted to offer alternative, non-subscription-based[157] digital distribution configurations.[158] Cuebas preferred the broader blanket licensing proposal offered by the Copyright Office, though he cautioned that elimination of the compulsory license altogether would create uncertainty and new complexity damaging to music retailers.[159] Further, neither the blanket licensing nor the Unilicense proposal addressed new physical media, such as DualDiscs or SACDs.[160]

Register Peters also criticized the blanket license and Unilicense schemes as doing "nothing to address the problems created by the competing claims of performing rights societies and The Harry Fox Agency (and/or music publishers) that online transmissions of music require separate licenses for the performance right and for the reproduction and distribution rights."[161] Furthermore, she argued that

> although it is easy to see how this practice serves the purposes of the two groups of licensing agents, it is difficult to understand how it serves the legitimate interests of copyright owners. To the extent that a particular form of digital transmission involves both the performance right and the reproduction and distribution rights, the copyright owner should be entitled to reap the actual value of both sets of rights.[162]

3. Simple Repeal

Another, albeit drastic, alternative presented by the Copyright Office is the simple repeal of § 115. After all, the initial justification for § 115—a fear of monopolistic activity by songwriters based on the proliferation of player pianos—has long since dissipated. Furthermore, the United States Constitution refers to the *exclusive* rights of an author over her work.[163] Allowing authors to determine the price and conditions under which they choose to part with their work would come closest to fulfilling what Register Peters calls "a fundamental principal" of

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155 *Id.* (statement of Ismael Cuebas, on behalf of the National Association of Recording Merchandisers).

156 For a definition of subscription services, see *supra* note 48.

157 For an example of non-subscription services, see *supra* note 48.

158 *2005 Senate Hearing*, *supra* note 2 (statement of Ismael Cuebas, on behalf of the National Association of Recording Merchandisers).

159 *Id.*

160 *See supra* note 100.

161 *2005 Senate Hearing*, *supra* note 2 (statement of Marybeth Peters, Register of Copyrights, U.S. Copyright Office).

162 *Id.*

163 U.S. CONST. art. I, § 8.

copyright.[164] Peters predicted that, under this regime, music publishers would voluntarily join together into licensing organizations, or create a "single online clearinghouse . . . which would permit one-stop shopping while nevertheless permitting each publisher to set its own rates." This approach has found favor with NMPA, who support "truly allowing the marketplace to govern the music industry."[165] Though Peters admitted favoring the approach "in principle," she ultimately saw it as unwise due to the current amount of flux in the music industry.[166] This approach, she felt, would hinder the ability of the music industry to combat piracy. As she stated, "a laissez-faire approach that gives each musical copyright owner the complete freedom to decide whether and how to license his or her works may be too risky in the current environment."[167]

4. The 21st Century Music Reform Act

Instead, in June 2005, Register Peters pitched a proposal tentatively titled the 21st Century Music Reform Act ("Reform Act") to Congress.[168] The purpose of this proposal was "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."[169] The proposal is essentially a collective licensing system under which the § 115 compulsory license would be eliminated. ASCAP, BMI, and SESAC have operated so successfully that Peters felt it appropriate to incorporate a similar model into her proposal. As she testified to Congress in July 2005,

> these performing rights organizations license the public performance of musical works—for which there is no statutory license—providing users with a means to obtain and pay for the necessary rights without difficulty. It seems reasonable to ask whether a similar model would work for licensing of the rights of reproduction and distribution.[170]

Under the Reform Act, new licensing entities called "Music

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164 *2004 House Hearing*, *supra* note 24, at 13 (statement of Marybeth Peters, Register of Copyrights, U.S. Copyright Office) ("A fundamental principle of copyright is that the author should have the exclusive right to exploit the market for his work, except where this would conflict with the public interest.").

165 *2005 Senate Hearing*, *supra* note 2 (statement of Irwin Robinson, Chairman of the Board, National Music Publishers' Association).

166 *Id.* (statement of Marybeth Peters, Register of Copyrights, U.S. Copyright Office).

167 *Id.*

168 *2005 House Licensing Reform Hearing*, *supra* note 2 (statement of Marybeth Peters, Register of Copyrights, U.S. Copyright Office).

169 *Id.*

170 *2005 Senate Hearing*, *supra* note 2 (statement of Marybeth Peters, Register of Copyrights, US. Copyright Office).

Rights Organizations" ("MROs") would be created. These MROs would be authorized by copyright owners to license public performance rights of a nondramatic musical work (i.e., a composition). Further, for all works for which the MROs were authorized to license public performance rights, the legislation would require the MROs to license reproduction and distribution (mechanical) rights for those same works. In order to address online music providers' concerns, an MRO would be required to offer, in conjunction with any public performance license for digital audio transmissions, a non-exclusive license to reproduce and distribute copies to the extent that such uses are necessary in facilitating the digital audio transmission. Additionally, an MRO would be required to license reproductions (such as downloads) made in the course of a digital audio transmission even in the absence of a public performance.[171] Essentially, a potential licensee would only have to go to one MRO to license public performance rights, mechanical rights, or rights associated with digital audio transmissions for any given composition.

Register Peters submitted a discussion draft of the proposed legislation to the House of Representatives in June 2005.[172] The critical element of the Reform Act is that it effectively repeals 17 U.S.C. § 115, and replaces it with language describing the roles and responsibilities of the newly minted MROs.[173] The Register testified that, with the Reform Act, she hopes to create "'one-stop-shopping' for music licensees and streamlined royalty processing for copyright owners."[174] Peters compared this approach to the Unilicense proposed by NMPA and argued that it "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)[175] implicate the public performance right and/or the reproduction and distribution right and if so in what proportions."[176]

Under this plan, ASCAP, BMI, and SESAC would automatically become MROs. Others (such as HFA) could also become an MRO if a copyright owner authorized that entity to

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171 *2005 House Licensing Reform Hearing*, *supra* note 2 (statement of Marybeth Peters, Register of Copyrights, U.S. Copyright Office).

172 *Id.* at app. A (statement of Marybeth Peters, Register of Copyrights, U.S. Copyright Office).

173 *Id.* § 3.

174 *Id.* (statement of Marybeth Peters, Register of Copyrights, U.S. Copyright Office).

175 For definitions of the different types of digital transmissions, see *supra* notes 41, 50.

176 *2005 House Licensing Reform Hearing*, *supra* note 2 (statement of Marybeth Peters, Register of Copyrights, U.S. Copyright Office).

license her performance rights.[177] A copyright owner could only authorize one MRO per work, in order to maintain efficiency.[178] This way, a potential licensee could identify which MRO it needs to contact with greater ease.[179]

The Reform Act called for the compulsory license to be entirely eliminated. Licenses would be freely negotiated between the MROs and potential licensees. A benefit of this approach is a return to what the Register sees as a fundamental tenet of copyright law, 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."[180] Peters argues that the free market has never been given an opportunity to work, since the creation of the copyright owners' right to mechanical reproductions of their works was accompanied by the creation of the compulsory license. According to the Copyright Office, "statutory licenses should be enacted only in exceptional cases, when the marketplace is incapable of working."[181] Even with regard to the complex scenario created by different types of downloads and streaming[182] in which licensees are forced to speculate which rights are implicated by each action, the royalty recipients are the same regardless of the right. For example, if a songwriter owns a copyright for a composition that is later streamed over the Internet, the songwriter would be the recipient of any performance, distribution, or reproduction royalties, whether one, two, or all three are determined to have been implicated by the stream. Thus, the licensing quandary becomes "merely a valuation and accounting issue more appropriately left to market forces rather than legislative fiat."[183]

Peters demonstrated the same preference for marketplace solutions over legislation with regard to issues (such as ringtones and multi-format discs) raised by Cuebas of NARM, Glen Barros, President of Concord Records, and other music industry

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177 As is the case with PROs today, a copyright owner would not be obligated to join an MRO, but can opt out, leaving her free to license her works on her own behalf. Nonetheless, Register Peters believes that the added efficiency of this structure would provide a powerful incentive for copyright owners to utilize the MROs, just as they have utilized PROs. *Id.*

178 *Id.*

179 Also, it simplifies the MROs' calculation and accounting of royalties. To encourage efficiency, the Reform Act also predicates any recovery of statutory damages for infringement on the MRO having made a list of works it licenses publicly available, and the list must have included the work at the time of infringement. *Id.*

180 *Id.*

181 *2005 Senate Hearing*, *supra* note 2 (statement of Marybeth Peters, Register of Copyrights, U.S. Copyright Office).

182 *See supra* notes 41, 50.

183 *2005 House Licensing Reform Hearing*, *supra* note 2 (statement of Marybeth Peters, Register of Copyrights, U.S. Copyright Office).

representatives.[184] Peters commented that she "consider[ed] these to be business or economic issues which are best resolved in the free marketplace. [My proposal] creates this marketplace, and . . . [I believe that] there is no need for Government to legislate what the parties can negotiate themselves."[185]

The Reform Act was met with criticism from key industry officials. At the July 2005 congressional hearing before the Senate Judiciary Committee Subcommittee on Intellectual Property, not one of the executives invited to testify endorsed Register Peters' proposal.[186]

Cuebas conceded that the Reform Act would offer broader blanket licensing, but cautioned that "unfortunately, the administrative process resulting from eliminating the compulsory license altogether would likely create more uncertainty, and add new levels of complexity, that could actually make things worse instead of better for music retailers."[187]

As the representative for NMPA, parent organization of HFA, Robinson more stridently opposed the Reform Act as "fatally flawed," outlining a litany of criticisms.[188] First, Robinson feared that due to the fact that anyone could become an MRO with a copyright owner's authorization, there would be a proliferation of MROs.[189] Second, the proposal would threaten the viability of HFA.[190] Third, additional overhead due to an "expensive "licensing, collection and distribution infrastructure" would compromise artist and publisher royalties.[191] Lastly, Robinson claimed that mechanical rights would become devalued once

184 *See 2005 Senate Hearing*, *supra* note 2 (statement of Glen Barros, President and Chief Executive Officer, Concord Music Group; *id.* (statement of Ismael Cuebas, on behalf of the National Association of Recording Merchandisers).

185 *See id.* (statement of Marybeth Peters, Register of Copyrights, U.S. Copyright Office).

186 *See id.* (statement of Rob Glaser, Chairman and Chief Executive Officer, RealNetworks, Inc.); *id.* (statement of Ismael Cuebas, on behalf of the National Association of Recording Merchandisers); *id.* (statement of Glen Barros, President and Chief Executive Officer, Concord Music Group); *id.* (statement of Rick Carnes, President, Songwriters' Guild of America); *id.* (statement of Irwin Robinson, Chairman of the Board, National Music Publishers' Association); *id.* (statement of Del R. Bryant, President and Chief Executive Officer, Broadcast Music, Inc.).

187 *Id.* (statement of Ismael Cuebas, on behalf of the National Association of Recording Merchandisers).

188 *Id.* (statement of Irwin Robinson, Chairman of the Board, National Music Publishers' Association).

189 *Id.* Robinson contended that despite the Copyright Office's intent to "create one (or three) stop shopping for the digital media companies . . . it is entirely conceivable that several MROs could emerge and complicate things even more. [Music publishers] may decide it is more economical to create their own MROs and license directly." *Id.*

190 *Id.* Robinson worried that the Reform Act would put HFA "at a severe competitive disadvantage" and would likely "threaten[] its viability all together." *Id.*

191 *Id.*

combined with performance rights.[192]

B. *Section 115 Reform Act of 2006 ("SIRA")*

In May 2006, NMPA worked closely with DiMA to propose its own discussion draft, tentatively titled the Section 115 Reform Act of 2006, or SIRA.[193] Unlike the three-page discussion draft proposed by Register Peters, SIRA is eighty-five pages and very complex.

Currently, music is licensed on a song-by-song basis. As DiMA Director Jonathan Potter explains:

> In the era of digital music, this song-by-song process has created enormous transaction costs for parties wishing to utilize the compulsory license, as new services require more than one million songs for an offering to be competitive, and each song must be licensed again for each new service that is introduced.[194]

SIRA creates a blanket license that allows digital music providers ("DM Providers") access to the entire catalogue of copyrighted music.[195] The blanket license refers to digital transmissions only; it does not replace or revise the underlying mechanical licenses required upon the creation of a CD or other physical format.

Under SIRA, a General Designated Agent ("GDA"), and possibly other Designated Agents ("DAs"), are established to grant mechanical licenses for all compositions. Only DM Providers are eligible to receive a blanket license from the GDA and DAs. The main elements of the proposed legislation are as follows:

- SIRA creates a new subsection (e) at the end of § 115. A GDA is established to issue blanket licenses for certain digital uses of musical compositions.[196] The GDA is chosen on the basis that it is the entity "represent[ing] the greatest share of the music publishing market, as measured by the amount of royalties collected during the preceding 3 full calendar years."[197] The Copyright Office may certify other entities as DAs if they represent at least fifteen percent

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192 *Id.*

193 Since SIRA's introduction in a discussion draft on May 16, 2006, the bill has been incorporated as Title 1 of a larger bill, known as the Copyright Modernization Act. *See* CMA, *supra* note 41, tit. I (2006) [hereinafter SIRA].

194 *SIRA Hearing*, *supra* note 2, at 17-18 (statement of Jonathan Potter, Executive Director, Digital Media Association).

195 *DiMA Applauds Bill to Streamline Digital Music Licensing, Promote Music Innovation and Defeat Piracy*, DIMA, June 8, 2006, http://www.digmedia.org/content/legUpdate.cfm#115a.

196 The Copyright Office may revoke the certification of the GDA/DA if it fails to operate properly. SIRA, *supra* note 193, § 102(e)(9).

197 *Id.*

of the reproduction and distribution rights for all published compositions.[198]

- If the copyright owner does not affirmatively choose a DA, that rightsholder will automatically be represented by the GDA.[199] Only one DA/GDA may be chosen to represent a copyright owner.[200] Copyright owners may not opt-out of SIRA, but they can independently negotiate with licensees in lieu of SIRA.[201]
- The scope of the license is limited to "(A) the making and distribution of general and incidental [DPDs] in the form of full downloads, limited downloads,[202] interactive streams,[203] and any other form constituting a [DPD] or hybrid offering"; and "(B) all reproduction and distribution rights necessary to engage in [such] activities . . . ."[204] Blanket licenses are only available to DM Providers.[205]
- Server and incidental copies used to facilitate non-interactive streaming[206] are exempt from liability.[207]

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198 *Id.* Currently, the only companies that qualify to become DAs are EMI Music Publishing and Warner/Chapell Music. Susan Butler, *Legislation Landmark*, BILLBOARD, June 24, 2006, at Upfront News.

199 SIRA, *supra* note 193, §§ 102(e)(9)(B)(i)(II), 102(e)(9)(E)(ii)(II). Copyright owners may choose which DA represents them, and change their representative DA annually. *Id.* §§ 102(e)(9)(C)(ii), 102(e)(9)(E)(ii).

200 *Id.* § 102(e)(9)(E)(i).

201 *Id.* §§ 102(e)(9)(B)(i)(II), (e)(9)(E)(iv).

202 For a definition, see *supra* note 41.

203 For a definition, see *supra* note 50.

204 SIRA, *supra* note 193, § 102(e)(1)(A)-(B). Hybrid offerings were not included in the original SIRA discussion draft, but were added during the summer of 2006. A pedestrian explanation of a hybrid offering might be "a digital transmission that results in a physical product." An example of this is a kiosk where a user chooses songs from the kiosk's library that the kiosk then burns on a CD, or a website where a user can pay the website to create a custom CD with specifically chosen tracks, and have the custom CD mailed to them. SIRA defines a "hybrid offering" as:

> (i) a reproduction or distribution of a phonorecord in physical form subject to a compulsory license under this section if a digital transmission of data by or under the authority of the licensee is required to render the sound recording embodied on the phonorecord audible to the end user, or to enable the continued rendering of the sound recording after a finite period of time or a specified number of times rendered; or
>
> (ii) a reproduction or distribution of a phonorecord subject to a compulsory license under this section that is custom-made by or under the authority of the licensee—
>
> > (I) using a device located at a physical retail establishment based upon the specific request of an end user for distribution as a digital phonorecord delivery or in physical form to that end user at such retail establishment; or
> >
> > (II) based upon the specific request of an end user for distribution in physical form to that end user (or the end user's designee) through a mail order or private delivery service.

Id. § 102(e)(14)(G).

205 *Id.* § 102(e)(2). In order to secure a blanket license, the DM Provider must identify in its application to the GDA/DA in which types of activities it intends to engage. *Id.* § 102(e)(4). The license is effective upon filing the application. *Id.*

206 For a definition, see *supra* note 50.

However, services that take "affirmative steps to intentionally induce, cause, or promote the making of reproductions of musical works for . . . future listening are not eligible for the exemption."[208] Consequently, if a DM Provider offers software enabling a user to record any works for later listening, then that DM Provider would not qualify under the exemption, but would be obligated to purchase licenses for any server, buffer, or cache copies made in the course of a non-interactive stream. However, SIRA also states that the above provisions "shall [not] be construed to imply that the making of server or incidental reproductions not covered by the exemption does or does not constitute copyright infringement."[209]

- Provisions are established for retroactive payments of works previously used by DM Providers.[210]
- Royalty rates for the blanket licenses would be determined by CRJs (Copyright Royalty Judges).[211]
- On written notice, a DA may conduct a royalty compliance examination of any licensee.[212] The DA will be the sole judge of the examination's result, and will bear the cost of the examination unless the licensee underpaid royalty fees by ten percent or more.[213]
- Each DA must distribute royalties to the copyright owners it represents.[214] Unclaimed funds are held in an interest bearing account for three years, at which point the GDA or DA is permitted to use such funds to offset licensing administrative costs.[215]

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207 SIRA, *supra* note 193, § 102(e)(3).

208 *Id.*

209 *Id.*

210 *Id.* § 102(e)(6). Songwriters are still largely unpaid for online uses of their compositions. "[B]ecause no statutory rate has been set for the use of musical works by digital subscription services, and publishers have been unable to reach voluntary agreements for a fair share of royalties in an environment where they are forced to license their works anyway." Thus, "in many cases the songwriters who wrote the songs in [digital subscription services'] recordings, and the music publishers who represent them, have yet to be paid a penny." *SIRA Hearing*, *supra* note 2 (statement of David Israelite, President, National Music Publishers' Association). A DM Provider would have until March 1, 2008, to pay the royalties. SIRA, *supra* note 193, § 102(e)(6).

211 SIRA, *supra* note 193, § 102(e)(8). Until the CRJs set a final rate for new activities, an interim CRJ process will be established to set a temporary rate. *Id.*

212 *Id.* § 102(e)(10)(b). Each DA and GDA must maintain an electronic database of all the compositions it represents. *Id.* § 102(e)(6). Licensees are responsible for reporting their monthly usage of compositions and make appropriate royalty payments. *Id.* § 102(e)(10). An interest rate is applied to the balance of overdue royalties. *Id.*

213 *Id.*

214 *Id.* § 102(e)(11). If a licensee disputes a royalty payment, a dispute committee established by the DA consisting of an equal number of the DA's music publishing entities and songwriters will hear and resolve the dispute. *Id.*

215 *Id.* In SIRA, "administrative fees" and "licensing administrative costs" are defined

- SIRA's administrative costs are to be shared with the licensees. The degree of this cost sharing will be determined by the CRJs.[216]
- DAs are empowered to "engage in such additional activities in the interest of music publishers and songwriters as the designated agent considers appropriate, including industry negotiations, ratesetting proceedings, litigation, and legislative efforts;" and they may "apply any administrative fees or other funds [they] collect[] to support [these] activities."[217]
- SIRA includes a fair use savings clause, stating that "[n]othing in this title shall affect any right, limitation, or defense to copyright infringement, including fair use, under title 17, United States Code."[218]

SIRA includes some surprising, possibly alarming elements. To begin with, while the legislation does not refer to a specific entity as the GDA, the market-share requirement of the GDA belies a transparent intention by NMPA to make Harry Fox the GDA. Currently, HFA has the largest market share of mechanical copyrights. Next, in describing the scope of SIRA as "the making and distribution of . . . [DPDs] in the form of full downloads, limited downloads, [and] interactive streams," SIRA essentially contends that interactive streams can constitute a DPD.[219] This is far from a well-accepted position; many believe that interactive

differently. *Compare id.* § 102(e)(14)(A), *with id.* § 102(e)(14)(I). While the former can include such costs as lobbying and litigation, the latter is restricted to "actual costs to a [DA] that are attributable to the issuance and administration of licenses under this subsection," such as the costs of collecting and distributing royalties, and identifying or locating copyright owners. *Id.* The DAs may only use the unclaimed funds to offset their licensing administrative costs after a "reasonably diligent search" for the copyright owner. *Id.* §§ 102(e)(11)(B)-(C). "Reasonably diligent search" is not defined in SIRA, though it is discussed in a separate title of the CMA governing orphaned works. *See* CMA, *supra* note 41, tit. II, § 202 (Orphan Works Act of 2006). In this title, a "reasonably diligent search" includes review of "the records of the Copyright Office that are relevant to identifying and locating" owners, "other sources of copyright ownership information reasonably available to users," "methods to identify copyright ownership information associated with a work," and "sources of reasonably available technology tools and reasonably available expert assistance." *Id.* It is interesting that NMPA chose not to include similar language in SIRA. It leads one to suspect that NMPA, expecting HFA to fill the role of GDA, did not wish to bind HFA to these requirements; instead allowing HFA to create its own definition of "reasonably diligent search" before it is empowered to help itself to the unclaimed funds. It is possible for the copyright owners to share in these unclaimed funds, however. If the DAs do not use all of the funds unclaimed for three years, they must distribute the remaining funds to the other DAs, who will then distribute their share to their member copyright owners. SIRA, *supra* note 193, § 102(e)(11)(B)(ii)(III).

216 SIRA, *supra* note 193, § 102(e)(12).

217 *Id.* §§ 102(e)(9)(d)(ii)-(iii).

218 *Id.* § 107(b).

219 *Id.* § 102(e)(1)(A).

streams are not "deliveries," and thus are not DPDs.[220] Also, excluding interactive services and certain non-interactive services from the incidental copy exemption suggests that such copies require licenses, whereas many online services believe that such uses are fair.[221] Another surprise is the cost-sharing element of SIRA: neither the PROs nor SoundExchange require their licensees to directly share the expense of the licensing infrastructure.[222] NMPA argues that because this reform is being undertaken to benefit online music providers, they should help bear the burden of the cost.[223] Further, SIRA gives a startling amount of power to the DAs to investigate licensees for underpaid royalties.[224] The DA, not an independent auditor, would be the sole judge of the licensees' compliance, and can even force the licensee to pay for the investigation if the DA decides that the licensee has underpaid by more than ten percent.[225] Lastly, SIRA gives the DAs sweeping discretion to spend royalties on "such additional activities in the interest of music publishers and songwriters as the [DA] considers appropriate."[226] The DA does not need the approval of its represented songwriters/publishers to spend portions of their royalties on litigation, lobbying, and nearly anything it claims is "in the interest of music publishers and songwriters."[227]

1. Response to SIRA

In addition to NMPA, DiMA, ASCAP, BMI, and SESAC, the National Academy of Recording Arts & Sciences and the SGA, among others, have all emerged in support of SIRA.[228] They have hailed SIRA as an "unprecedented opportunity to improve the licensing environment for digital music innovators and creators."[229] The bill gained support in the House Judiciary

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220 *See infra* notes 262-68 and accompanying text.

221 *See infra* notes 255-61 and accompanying text.

222 *SIRA Hearing*, *supra* note 2, at 39 (statement of Cary Sherman, President and General Counsel, Recording Industry Association of America).

223 *Id.* at 12 (statement of David Israelite, President and Chief Executive Officer, National Music Publishers' Association).

224 *See supra* notes 212-13 and accompanying text.

225 *Id.*

226 *See supra* note 217 and accompanying text.

227 *Id.*

228 Letter from Am. Fed'n of Musicians et. al. to F. James Sensenbrenner, Chairman, Comm. on the Judiciary and John Conyers, Ranking Member, Comm. on the Judiciary (Sept. 21, 2006), *available at* http://www.publicknowledge.org/pdf/sira-letter-20060921.pdf. The other signatories were the American Federation of Television and Radio Artists, ASCAP, BMI, Church Music Publishers' Association, Nashville Songwriters Association International, National Academy of Recording Arts & Sciences., Inc., National Music Publishers' Association, Recording Artists Coalition, SESAC, Inc., and the Songwriters Guild of America. *Id.*

229 *Id.* at 1.

Committee's Subcommittee on Courts and the Internet and Intellectual Property (the "Subcommittee") as well, passing unanimously on June 8, 2006.[230]

The virtues of SIRA were outlined in a *Billboard* article co-written by Jonathan Potter of DiMA and David Israelite of NMPA.[231] They claim that SIRA "solves the problems [of the online music licensing system] by . . . allow[ing] for quick licensing of new business models. The neutral Copyright Royalty Board will set rates for digital uses, based upon an independent evaluation of what each activity is worth."[232] They argue that "[s]ongwriters in particular benefit from this proposed legislation" [by] "ensur[ing] copyright owners their guaranteed rights in the digital world, including those associated with interactive streaming of their works."[233] Potter and Israelite speculate that "interactive streaming could someday be the dominant method of delivering music to consumers, [so] this victory could be one of the most significant for songwriters in the history of copyright protection."[234] Since SIRA would improve the system for collecting and distributing royalties, "writers can focus on what they do best—creating great songs the world can enjoy. The biggest winner, however, will be music fans."[235] According to Potter and Israelite, more DM Providers will form, no longer deterred by daunting licensing procedures and the risk of infringement litigation.[236]

Lamar Smith, chairman of the Subcommittee, labeled SIRA as "a major step forward," expressing his confidence in the bill's ability to serve the needs of digital music providers and songwriters alike.[237] Smith said that SIRA "paves the way for legal music services to offer a full range of music to consumers . . . [and] puts escrowed money into artists' hands."[238] As discussed previously, legal digital music companies have been paying advance money into escrow since 2001, since a final rate for certain digital uses of works had not yet been set.[239] At present,

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230 *Movement on Publishing Reform Bill Expected This Week*, DIMA, Sept. 25, 2006, http://www.digmedia.org/content/release.cfm?id=31&content=news; *see also SIRA Markup Hearing*, *supra* note 54.

231 David Israelite & Jonathan Potter, *Commentary: SIRA Provides Framework for Digital Music Future*, BILLBOARD, July 29, 2006.

232 *Id.* at 1.

233 *Id.*

234 *Id.*

235 *Id.* at 2.

236 *Id.*

237 *SIRA Markup Hearing*, *supra* note 54 (testimony of Rep. Lamar Smith, Member, H. Comm. on the Judiciary).

238 *Id.; see supra* note 210 and accompanying text.

239 *SIRA Markup Hearing*, *supra* note 54 (testimony of Rep. Lamar Smith, Member, H. Comm. on the Judiciary).

songwriters have not received any of these advances.[240] SIRA would enable the CRJs to set final rates and "pay artists the money they have earned years ago."[241] Howard Berman, Ranking Member of the Subcommittee, echoed Smith's support for the legislation. "While this bill doesn't make up for the injustice of having a two-cent rate for over 60 years, it does create a fluid mechanism for the determination of rates for new services."[242]

SIRA has also found favor with the Copyright Office, which called it "a productive step forward."[243] The Copyright Office praised the proposal as "a significant advancement toward modernizing the Copyright Act to facilitate digital audio transmissions of music while balancing the interests of songwriters, music publishers, and online music services, as well as the consuming public."[244] The support expressed by the Subcommittee and the Copyright Office was not without some reservations; concerns were voiced by both the Copyright Office and Subcommittee members regarding a few key SIRA provisions, which will be discussed in detail below.[245]

In what appears to be a reversal from the Reform Act's reception, SIRA enjoys support from most of the industry players (including NMPA, DiMA, SGA, and the PROs), but has been met with hostility by many online commentators. The Information Policy Action Committee ("IPAC") calls it "the worst bill you've never heard of."[246] On the Public Knowledge website, Art Brodsky opines that "you aren't really paranoid if they really are after you,"[247] and Gigi Sohn argues that SIRA "gives the music publishers everything they want, and gives digital satellite and digital broadcast radio nothing."[248] The Electronic Frontier Foundation ("EFF") has taken a staunch anti-SIRA position. On their website, EFF characterizes SIRA as "an unholy alliance between the major music service providers and music publishing industry."[249] "If the bill passes," EFF warns, "they win, but fair use loses." Along with a collection of eighteen other companies and

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240 *Id.*

241 *Id.*

242 *Id.* (testimony of Rep. Howard Berman, Member, H. Comm. on the Judiciary).

243 *SIRA Hearing*, *supra* note 2 (statement of U.S. Copyright Office).

244 *Id.*

245 *See infra* notes 267-68, 272-74 and accompanying text.

246 *The Worst Bill You've Never Heard of*, INFORMATION POLICY ACTION COMMITTEE, June 5, 2006, http://ipaction.org/blog/2006/06/worst-bill-youve-never-heard-of.html.

247 Art Brodsky, *More Assaults on Consumers' Rights*, PUB. KNOWLEDGE, June 6, 2006, http://www.publicknowledge.org/articles.

248 Gigi Sohn, *Now the Fun Starts: Music Licensing, Orphan Works and the Copyright Modernization Act of 2006*, Sept. 11, 2006, http://www.publicknowledge.org/node/622.

249 Fred von Lohmann, *Season of Bad Laws, Part 4: Music Services Sell Out Fair Use*, EFF DEEP LINKS, June 4, 2006, http://www.eff.org/deeplinks/archives/004721.php.

groups, EFF signed a letter (the "Anti-SIRA Letter"), urging Smith and Berman not to support SIRA.[250] The letter was also signed by BellSouth Corp., the American Association of Law Libraries, RadioShack Corporation, Cox Radio, Inc., Sirius Satellite Radio Inc., and XM Satellite Radio Inc., among others.[251] Many of these websites urge readers to call or write their congressmen and voice opposition to SIRA.[252]

The root of the controversy seems to revolve around what many of these organizations see as the deterioration of fair use. IPAC writes that

> SIRA fundamentally redefines copyright and fair use in the digital world. . . . Even copies of songs that are cached in your computer's memory or buffered over a network would need yet another license. Once again, Big Copyright is looking for a way to double-dip into your wallet, extracting payment for the same content at multiple levels. . . . Out of the blue, copyright holders would have created an entire[ly] new market to charge for—and sue over. Good for them, bad for us.[253]

In the Anti-SIRA Letter, SIRA is referred to as an "ill-advised incursion on the fair use rights of consumers."[254]

The fair use argument can be divided into two main areas of contention. First, these groups contest the limited exemption for server, cache, and other incidental copies. Second, they resist the characterization of a stream as a "delivery."

SIRA grants an exemption for incidental reproductions made in the course of non-interactive streaming, unless the streamer takes "affirmative steps to intentionally induce, cause, or promote the making of reproductions of musical works . . . for future listening."[255] Interactive streaming services are not eligible for the exemption.[256] In order to reach a compromise with NMPA, DiMA finally agreed that interactive streaming implicates a reproduction right in addition to a performance right, though the value of that

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250 Letter from Am. Ass'n of Law Libraries et. al., to Lamar Smith, Chairman, Comm. on the Judiciary, and Howard Berman, Ranking Member, Comm. on the Judiciary (June 6, 2006) [hereinafter Anti-SIRA Letter]. The other signatories were: Bonneville International Corp., Computer & Communications Industry Ass'n, Consumer Electronics Ass'n, Consumer Project on Technology, Entercom Communications Corp., Greater Media, Inc., Home Recording Rights Coalition, Local Radio Internet Coalition, National Religious Broadcasters Music License Committee, Public Knowledge, Salem Communications Corp., and U.S. Public Policy Committee of the Ass'n for Computing Machinery (USACM). *Id.*

251 *Id.*

252 *See* Brodsky, *supra* note 247; Sohn, *supra* note 248; von Lohmann, *supra* note 249.

253 *The Worst Bill You've Never Heard of*, *supra* note 246; *see also* von Lohmann, *supra* note 249.

254 Anti-SIRA Letter, *supra* note 250.

255 SIRA, *supra* note 193, § 102(e)(3).

256 *Id.*

reproduction right may be nothing.[257] However, the Anti-SIRA Letter argues that "[v]irtually every digital transmission and display technology requires some degree of caching or buffering. Such caching or buffering is integral to the nature of digital technology in order for the consumer to hear or display data."[258] Gigi Sohn, President of Public Knowledge, argues that "'incidental' copies like cache copies and buffer copies . . . are copies that the Copyright Office . . . declared to be 'fair use.' Requiring a license for a fair use sets a dangerous precedent for all fair uses of information, be they radio, TV or print."[259] Other online commentators echo the concern that requiring a license for a use that should be fair sets a "dangerous precedent."[260] The argument is that courts will look to SIRA for legislative intent at some future point, and will take from it the idea that even a fair use can require a license.[261]

SIRA also incorporates interactive streaming as a form of DPD, a stance that has evoked considerable controversy.[262] The Anti-SIRA Letter argues that SIRA "appears to establish, for the first time, that every digital performance or display is also a distribution, for which the transmitter must take additional licenses, and potentially pay duplicative fees, for consumer conduct that has long been considered private, noncommercial 'fair use.'"[263] DiMA itself contests the presence of this language in SIRA, arguing that two licenses cannot be justified since

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257 *SIRA Hearing*, *supra* note 2, at 17-18 (statement of Jonathan Potter, Executive Director, Digital Media Association).

258 Anti-SIRA Letter, *supra* note 250.

259 Sohn, *supra* note 248; *see also* U.S. COPYRIGHT OFFICE, DMCA SECTION 104 REPORT 132-41 (2001) [hereinafter DMCA REPORT], *available at* http://www.copyright.gov/reports/studies/dmca/sec-104-report-vol-1.pdf. Sohn was referring to a 2001 report in which the Copyright Office wrote that "the making of temporary buffer copies to enable a licensed performance of a musical work by streaming technology is a fair use to be a strong one." DMCA REPORT, *supra* at 141.

260 *See* Sohn, *supra* note 248; von Lohmann, *supra* note 249; Brodsky, *supra* note 247; Natali Del Conte, *Copyright Law Faces New Test on Thursday*, PC MAG., June 7, 2006, *available at* http://www.pcmag.com/article2/0,1759,1973266,00.asp.

261 *See* von Lohmann, *supra* note 249 (arguing that SIRA will be used as a precedent in future judicial proceedings by copyright industries attempting to require licenses for incidental fair uses of copyrighted material).

262 SIRA, *supra* note 193, § 102(e)(1). *See* Brief for the Elec. Frontier Found. as Amicus Curiae Supporting Defendant, Elektra Entm't Group v. Barker, No. 05 CV 7340 (KMK) (2006), *available at* http://www.eff.org/IP/P2P/RIAA_v_ThePeople/elektra_v_barker/elektra-amicus-efiled.pdf. In this amicus brief, EFF argues that the plain language and legislative history of the Copyright Act demonstrate that "distribution" was only intended to refer to tangible, material objects. EFF emphasizes that 17 U.S.C. § 106(c) does not restrict all distributions, only distributions of *phonorecords* or *copies* of a copywritten work by sale or other transfer of ownership, or by rental, lease, or lending. According to EFF, phonorecords and copies are defined in the Copyright Act as physical, material objects. The EFF contends that digital transmissions should only require licenses for public performance, not for distribution. *Id.*

263 Anti-SIRA Letter, *supra* note 250.

"consumers experience music in one of two ways—either by enjoying a *performance* that is heard and then no longer available; or by possessing music (permanently or temporarily, through ownership or subscription "rental") which occurs as a result of a *distribution*."[264] Gigi Sohn of Public Knowledge articulates the general argument, stating:

> Music licensing provisions would give music publishers a chance to require two licenses (and therefore two payments) for interactive performances like on-demand Internet streaming. . . . But the bill does not resolve the question as to whether such interactive services are also "performances" which require yet another license. Failing to resolve this ambiguity permits music publishers to double-dip, the cost of which will likely be borne by you and me.[265]

This treatment of interactive streaming is similarly condemned by a number of online commentators.[266]

The Copyright Office also disagreed with the characterization, and

> strongly urge[d] that SIRA not characterize streaming as a distribution or as a form of [DPD]. A stream, whether interactive or non-interactive, is predominantly a public performance. . . . A stream does not, however, constitute a "distribution," the object of which is to deliver a usable copy of the work to the recipient. . . . Characterizing streaming as a form of distribution is factually and legally incorrect . . . .[267]

The Copyright Office suggested that the new § 115(e) apply to both DPDs and streams, defined separately.[268]

Critics of SIRA contend that a parade of horribles would follow the bill's passage, suppressing TiVo, Sirius, and XM radio, as well as creating a restriction on new physical technologies. "The bill would effectively declare all home recording—even time-shifting—to be unlawful without a reproduction license. . . . [SIRA] is a back-handed technology mandate that will stifle innovation."[269] It is widely feared that SIRA would suppress home

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264 *SIRA Hearing*, *supra* note 2, at 18 (statement of Jonathan Potter, Executive Director, Digital Media Association).

265 Sohn, *supra* note 248.

266 In a *PC Magazine* article, EFF Activist Derek Slater is quoted as saying:

> [SIRA] says that basically every transmission of a copyright work is also a distribution. That's very dangerous because the record industry has said if you're performing these songs and you're allowing them to be recorded, like with a TiVo for radio, that's a distribution and it treats it as licensable.

Conte, *supra* note 260. *See also* von Lohmann, *supra* note 249 (arguing that another "dangerous, subtle change" is the "treatment of digital transmissions as 'distributions'").

267 *SIRA Hearing*, *supra* note 2, at 59-60 (statement of the U.S. Copyright Office).

268 *Id.*

269 Anti-SIRA Letter, *supra* note 250.

recording; Scott Burns contends that "[t]his bill incentivizes music services to *prevent* consumer-friendly activities like time-shifting for future listening—think TiVo for your XM radio. So much for home recording."[270] According to Gigi Sohn, the incidental reproduction license

> translates into: radio stations that permit you to record music for future listening would have to pay music publishers more than other music services, and could be denied access to the music altogether . . . who loses? The radio listener, who may either have to pay for the extra fees radio services pay to publishers, may not have access to certain music, or who may be denied the right . . . to record music off the radio.[271]

Some members of the Subcommittee share this fear. Representative Zoe Lofgren argued that "the draft before us would preclude TiVo . . . something we [do not want] to do, because there's millions of TiVo users who value the ability to use their TiVo."[272] Representative Boucher agreed. With SIRA, he argued, if a license applicant used streaming technology, and "with regard to his product" had "something that would encourage time shifting," this license applicant would "have to pay twice."[273] Boucher supported eliminating the requirement that a non-interactive service may not take affirmative steps to intentionally induce, cause, or promote the making or reproduction of musical works for future listening.[274]

2. Is SIRA the Right Solution?

While the above criticisms of SIRA are not without validity, it must be made clear that the consumer is not directly affected by SIRA—the bill only applies to DM Providers. The consumer may still listen to satellite radio, use interactive streaming services, and make home recordings without directly paying any royalties at all. Also, SIRA is not intended to impact fair use, and even includes a savings clause to that effect.[275] In a fact sheet offered by DiMA, the organization assures that SIRA will not obligate music service or technology companies to license any activities that did not

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[270] Scott Burns, SIRA: Licensing Problems for Consumers and Innovators, Public Knowledge (Sept. 11, 2006), http://www.publicknowledge.org/node/623. *See also* Brodsky, *supra* note 247 (SIRA "would put home recording in jeopardy"); von Lohmann, *supra* note 249 (SIRA would "erode lawful home recording").

[271] Sohn, *supra* note 248.

[272] *SIRA Markup Hearing*, *supra* note 54 (statement of Rep. Zoe Lofgren, Member, H. Comm. on the Judiciary).

[273] *Id.* (statement of Rep. Rick Boucher, Member, H. Comm. on the Judiciary).

[274] *Id.*

[275] SIRA, *supra* note 193, § 107(b); *see also* DiMA, Section 115 Reform Act Fact Sheet (2006), http://www.digmedia.org/docs/DiMA-%20SIRA%20FACT%20SHEET1.pdf [hereinafter SIRA Fact Sheet].

previously require a license.[276] The proposed legislation is carefully worded to emphasize that "[i]n evaluating a claim of infringement based on the making by a service of server or incidental reproductions . . . a court shall not take into account" the service's eligibility for an exemption or lack thereof.[277] However, it is true that Sirius radio and TiVo could, and probably will, be affected by this legislation. Yet it is not clear that satellite radio and TiVo will be destroyed by this legislation. After all, to the extent that a user is able to both listen to a stream and record music for future listening, is it that unreasonable to require two licenses? The legislation does not preclude TiVo; it simply requires TiVo to acquire certain licenses depending on TiVo's activities. As long as TiVo pays the fair value of those licenses, as determined by the CRJs, TiVo can continue to operate as it currently does. If it costs the end-users more, perhaps it should. If the fair value of those uses is higher than is currently being paid, is it justifiable to refuse the copyright owners those funds simply because end users do not want to pay? On the other hand, it hardly seems fair to compensate a copyright owner for a use that cannot be seen or listened to, as is the case with server, buffer, and cache copies.

Professor Patry comments that there seems to be no clear answer to the question of whether a single transmission of a single song can implicate multiple rights, and thus multiple royalties. He concedes that "[h]istorically, the bundle of rights granted in the Act have been an effort to describe different acts . . . . There is no doubt that digital technology has put pressure on this ancient system."[278]

V. SEEKING THE HEART OF COPYRIGHT

Rick Carnes, President of the SGA, pleads for additional economic support of songwriters in his statement to the Subcommittee.[279] In his analysis, Carnes has balanced the bill's potential economic harm to songwriters against the potential economic benefit.[280] As a result, SGA is supportive of the characterization of interactive streams as reproductions,

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276 SIRA Fact Sheet, *supra* note 275.

277 SIRA, *supra* note 193, § 102(e)(3).

278 William Patry, Fish Is Fish, The Patry Copyright Blog, http://williampatry.blogspot.com/ 2006/06/fish-is-fish.html (June 12, 2006, 06:53 EST).

279 *SIRA Hearing*, *supra* note 2 (statement of Rick Carnes, President, The Songwriters Guild of America).

280 *Id.* ("We therefore approach any proposed legislation with the following questions: (1) will the legislation do any harm to those songwriters who still make this artistic calling their profession; and (2) will the legislation improve the economic opportunities for those who wish to pursue the craft of songwriting full time?").

distributions, and public performances, and is asking for non-interactive streaming to be characterized as multiple activities requiring multiple royalties.[281]

It is evident that without songwriters, there would be no songs, and thus the SGA is right that songwriters need to be economically rewarded for their contributions. However, the SGA is missing the point with their "by any means necessary" approach. The appropriate solution is to provide songwriters with fair compensation for the rights to use their works, but only to the extent that those rights are actually implicated.

Instead of trying to compensate for inadequate royalties by finding creative ways to force additional licenses on users, the inadequate royalty should be made adequate. If songwriters cannot presently support themselves based on the actual uses of their copyrighted works—i.e., reproduction and distribution of cover songs, public performance of broadcast and streamed radio, reproduction of their works for downloads from online music services, etc.—then the price of those actual uses should be increased to the point where songwriters can support themselves.

All consumers of musical compositions should bear the cost of supporting the creation of such music; it is unfair to put the burden of this bounty on the backs of online music providers, simply because technology has given copyright owners an excuse to do so. In *Sony Corp. of America v. Universal City Studios, Inc.*, the Supreme Court held that "when technological change has rendered its literal terms ambiguous, the Copyright Act must be construed in light of [copyright's] basic purpose."[282] The Court identified this basic purpose as "motivat[ing] the creative activity of authors and inventors by the provision of a special reward, and [allowing] the public access to the products of their genius after the limited period of exclusive control has expired."[283] In *Twentieth Century Music Corp. v. Aiken*, the Court elaborated on this purpose:

> The limited scope of the copyright holder's statutory monopoly, like the limited copyright duration required by the Constitution, reflects a balance of competing claims upon the public interest: Creative work is to be encouraged and rewarded, but private motivation must ultimately serve the cause of promoting broad public availability of literature, music, and the other arts. The immediate effect of our copyright law is to secure a fair return for an "author's" creative

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281 *Id.*

282 Sony Corp. of Am. v. Universal City Studios, Inc., 464 U.S. 417, 432 (1984) (citing Twentieth Century Music Corp. v. Aiken, 422 U.S. 151, 156 (1975)).

283 Harper & Row, Publishers, Inc. v. Nation Enters., 471 U.S. 539, 545 (1985).

> labor. But the ultimate aim is, by this incentive, to stimulate artistic creativity for the general public good.[284]

Thus, though technological change has rendered such literal terms as "distribution" and "reproduction" ambiguous, the terms should be construed according to this purpose. Where a "reproduction" cannot be listened to by a user and only exists to facilitate a licensed activity, the creation of the reproduction should be considered fair—to act otherwise would be contrary to the "cause of promoting broad public availability" of music.[285] Accordingly, all such uses should be exempt from liability, regardless of whether they are associated with an interactive or a non-interactive service. With regard to streaming, copyright owners should be compensated for the public performance of the work, not the incidental reproduction. It should be definitively stated that streaming of any kind is not a distribution. On the other hand, to the extent that interactive streaming creates a reproduction that can be listened to by the end-user at a later date, SIRA should preserve the copyright owner's entitlement to compensation for the public performance and the reproduction.

Additionally, the portions of SIRA allowing the GDA authority to run its own royalty investigations and spend administrative fees and royalties on a variety of activities should be amended prior to SIRA's enactment. The Copyright Office agrees that the GDA/DA's authority to elect and spend administrative fees is too unfettered.[286] It is their position that collected fees should only be used to pay for the actual costs of collecting and distributing the royalties, and the remainder should go to the copyright owners.[287] The Copyright Office also voiced disapproval over the GDA's ability to control its own audit of a licensee. Rightly, the Copyright Office suggested that these determinations be entrusted to independent auditors.[288] In the interest of discouraging inappropriate behavior, these suggestions are reasonable, and should be incorporated into SIRA prior to passage.

VI. IDEALISM VERSUS PRACTICALITY

The Copyright Office is correct: SIRA is a step in the right direction. The revisions proposed above may be "deal breakers" for NMPA or even DiMA, but the legislature should not be bound

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284 Twentieth Century Music Corp. v. Aiken, 422 U.S. 151, 156 (1975) (footnotes omitted).

285 *Id.*

286 *SIRA Hearing*, *supra* note 2 (statement of U.S. Copyright Office).

287 *Id.*

288 *Id.*

to what is most beneficial for two organizations with special, individualized interests. This legislation will affect a much broader universe than NMPA and DiMA and should be drafted in the best interest of that universe.

Besides, NMPA is already greatly benefiting from SIRA. Under the Reform Act, the ultimate viability of HFA was greatly threatened. Assuming that Harry Fox is named the GDA, SIRA puts HFA in a position of power significantly greater than what they currently enjoy.

This begs the question: Who is this legislation good for? Clearly, it is good for HFA.[289] It is also good for DiMA, whose members desperately require a more efficient way to license the millions of works they must offer to the public in order to compete effectively with pirated services. But is this legislation good for the two most important parties in copyright—the creators and the general public?

Herein lies the most fundamental difference between the Reform Act and SIRA. The Reform Act was written with the needs of the creators and the general public taking precedence over the needs of the middlemen (NMPA, HFA, PROs, RIAA, etc.). Register Peters' solution did not concern itself with preserving the business practices of HFA, DiMA, or other industry organizations. Instead, the Reform Act was focused on the copyright owners and the general public. The Act eliminated the compulsory license, allowing copyright owners to negotiate for the full value of their works, yet allowed the listening public access to all the works through one complete license that covered public performance, reproduction, and distribution rights. In fact, what made the Reform Act so strong is what ultimately doomed it, since it is not the general public or the creators with the lobbying power, but the middlemen.

Representative Berman compared SIRA to the Reform Act, saying that "the [C]opyright [O]ffice proposed creating a method where users could have a one-stop shop to obtain their mechanical licenses. . . . [SIRA] provides that ability."[290] Equating SIRA with the Reform Act is really a mischaracterization. With the Reform Act, a party could have gone to one entity, an MRO, to license any composition right—whether it was reproduction, distribution, or public performance—in one blanket license. The use was immaterial—the license could be for physical phonorecords or

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289 While the bill does not mention HFA, it is clear that the drafting occurred with HFA in mind. At present, it is the only entity that is statistically eligible to become the GDA.

290 *SIRA Markup Hearing*, *supra* note 54 (statement of Rep. Berman, Member, H. Comm. on the Judiciary).

any kind of digital audio transmission. This is one-stop-shopping. With SIRA, a potential licensee wishing to release a CD of cover songs must still acquire the reproduction and distribution license for each song individually via the same antiquated § 115 system we have today. No improvements have been made for this licensee. A digital music provider must still: 1) acquire performance rights from a PRO, to the extent they are required; and 2) acquire reproduction rights from a DA or GDA, to the extent they are required. To what extent are they required? The parties continue to disagree on this point. With SIRA, a copyright owner might have *two separate* representatives for their mechanical rights—one for physical phonorecords and one for digital transmissions.

Section 115 requires more wholesale reform. The Copyright Office commends this piecemeal approach, saying that the "sheer number and complexity" of issues faced by the music industry "render a holistic reform improbable, if not impossible."[291] The Office further contends that it is good that licensing for physical phonorecords is undisturbed by the bill, using what can be generally characterized as "if it ain't broke, don't fix it" reasoning. "[I]t is appropriate that SIRA leaves undisturbed the structure established by § 115 for the reproduction and distribution of nondramatic musical works in physical formats, a structure that has worked well for that marketplace."[292]

This reasoning is misguided. When one calls in a plumber to fix the rusted pipes, it seems sensible to have the plumber fix the leaky sink as well. Those wishing to offer new physical formats such as SACDs and DualDiscs are in the same position of uncertainty. RIAA Chairman and CEO Mitch Bainwol laments that "SIRA does nothing at all for the current generation of licensing problems encountered by record companies—clearing [copyrighted works] for the new generations of products that consumers want."[293] RIAA President Cary Sherman maintains that though "new formats and business models have proliferated, uncertainty and disagreements have paralyzed the licensing process and the existing one-size-fits-all licensing system is ill-suited to the many new business models we're trying . . . there is no process for resolving [these licensing challenges]."[294] Further,

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[291] *SIRA Hearing*, *supra* note 2, at 56 (statement of U.S. Copyright Office).

[292] *Id.* at 57.

[293] Letter from Mitch Bainwol, Chairman and Chief Exec. Officer, Recording Indus. Ass'n of Am., to Lamar Smith, Chairman, and Howard Berman, Ranking Member, Subcomm. on Courts, the Internet and Intellectual Prop. of the Comm. on the Judiciary (Sept. 12, 2006) [hereinafter Bainwol Letter], *available at* http://www.publicknowledge.org/pdf/bainwol-letter-20060912.pdf.

[294] *SIRA Hearing*, *supra* note 2, at 30 (statement of Cary Sherman, President and General Counsel, Recording Industry Association of America).

as discussed earlier, § 115's notice provisions are still burdensome for those attempting to get mechanical licenses for physical formats.[295] For those who successfully navigate the notice provisions, the reporting provisions are still overly extensive and onerous.[296] Even with SIRA, § 115 is obsolete. After all, as the RIAA pointed out, SIRA addresses "less than 10% of the marketplace, and leaves the remainder subject to the archaic provisions first enacted in 1909."[297]

The root of this debate can be boiled down to one fundamental conflict: idealism versus practicality. The Reform Act was rooted in idealism, or what solution would best conform to the fundamental tenets of copyright. SIRA, on the other hand, is rooted in practicality, or what solution will have enough support of the strongest lobbyists to pass the legislature. That is not to say that SIRA is wrong and should not be passed into law; it is only to say that SIRA is insufficient. It is a bandage where a cast is needed.

However, the SIRA negotiations seem to demonstrate a stubborn refusal by major industry players to respect the roots of copyright law in a meaningful way.[298] As discussed above, a critical element of copyright law is ensuring the availability of art for the growth of the general public. An artist should not be allowed complete and permanent control of her work, for to allow this would not be to "promote the arts or sciences." However, the other critical element of copyright law is to provide the artist with sufficient returns as to encourage additional creation. Songwriters are insufficiently paid for their work. Rick Carnes testified that "[s]ongwriters today are struggling to make ends meet."[299] Carnes claims that songwriters are in fact discouraged from creating due to an inability to financially support themselves. "A substantial number of songwriters have left the profession entirely despite artistic success, because they simply can no longer support themselves on their dwindling royalty income."[300] The songwriters' royalty rate was a mere two cents for sixty-nine years. Today it is only 9.1 cents. If it had increased commensurate with the consumer price index, it would be forty cents.[301] In his written

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295 *See supra* notes 104-05.

296 *See supra* note 106 and accompanying text.

297 Bainwol Letter, *supra* note 293.

298 For example, the SGA and NMPA attempt to require payment for buffer, server, and cache copies. DiMA has resisted paying for reproduction rights in situations where a user can record a song for future listening.

299 *SIRA Hearing*, *supra* note 2 (statement of Rick Carnes, President, The Songwriters Guild of America).

300 *Id.*

301 *See 2005 House Digital Music Hearing*, *supra* note 2, at 12 (statement of David Israelite, President, National Music Publishers' Association).

statement to the Subcommittee, Carnes encapsulated the problem in a telling accounting example:

> Under the present compulsory licensing provisions, a songwriter is to receive 9.1 cents per song on any CD ("phonorecord") manufactured and distributed, or legally downloaded, in the United States. So, if one of my songs appears on a million selling album, I am theoretically due $91,000 by statute. However, I split that money [in] half . . . with my music publisher by contract. That leaves me $45,500. Then I must split that in half again with the recording artist who co-wrote the song with me, leaving me with $22,750. Because of the controlled composition clause, and with transaction costs deducted, my royalty income is reduced by thousands more dollars. Thus, after all is said and done, I end up making less than $17,000 for having a song on a million selling CD.[302]

In his testimony before the Subcommittee, Carnes added "[f]or one million sales, I am eligible to receive a platinum award from the RIAA, but it is cold comfort when I can't afford a house to hang it in."[303]

VII. CONCLUSION

The current system fails to support the songwriters the way that copyright intends it should. However, as explained above, the solution is not in making up licenses for ephemeral, incidental "uses" without independent economic value.[304] The solution is the elimination of the compulsory license. Songwriters should be allowed to negotiate the value of their work. In a statement by the Antitrust Division of the Department of Justice, Deputy Assistant Attorney General Makan Delrahim warns that "[c]ompulsory

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[302] *SIRA Hearing*, *supra* note 2, at 23 (testimony of Rick Carnes, President, The Songwriters Guild of America). Carnes explained:

> Practically every artist now co-writes every song on his or her album with the primary songwriter, because the record labels have included a controlled composition clause in every new artist's contract that makes it financially ruinous for the artist to record more than one or two tracks that he or she did not co-write. The reason the record companies do this is so they can pay the artist, and his or her co-writer, 75% of the statutory mechanical royalty rate.

Id. For a discussion of controlled composition clauses, see *supra* notes 56-59 and accompanying text.

[303] *SIRA Hearing*, *supra* note 2, at 20 (testimony of Rick Carnes, President, The Songwriters Guild of America).

[304] Just because a reproduction is indispensable to the act that has been licensed (i.e., the public performance in a non-interactive webcast) does not mean that it has economic value. Sure, it has value because the webcast cannot occur without it. But one would be hard-pressed to find an end user willing to purchase an incidental buffer copy when it is unaccompanied by a stream. It is in this respect that it has no independent economic value. What is the point in owning a cache copy when one cannot listen to it?

licensing . . . has the real potential to harm innovation."[305] He counsels that compulsory licenses in non-merger cases, such as the § 115 compulsory license, "should be a rare beast."[306] According to Delrahim, compulsory licenses "should be avoided where another, simpler remedy is available."[307] Most importantly, Delrahim describes the circumstances for the justified use of compulsory licensing in a non-merger case:

> [C]ompulsory licensing may be used in a non-merger case when other, less restrictive remedies would most likely fail to address anticompetitive conduct by a defendant. Before imposing the remedy in this type of case, we would look for an extraordinary level of market dominance and a demonstrated history of monopolization and resistance to reform. In other words, we would look for a situation where the chief objections to compulsory licenses evaporate, because monitoring the defendant's behavior has *already* been demonstrated to be a problem and the harm to *other* innovation, by *other* competitors, trumps the alleged harm to the defendant's innovation incentives.[308]

Not one of the parties to the § 115 reform debate could argue that the current universe of mechanical licensing meets the standard put forth by the Department of Justice. Not only is there *not* a demonstrated history of monopolization, but as the Register stated, "the marketplace has never been given a chance to succeed."[309] So far, the only justification put forth by the witnesses testifying before the legislature for maintaining the compulsory license is to avoid "upheaval" and "disruption."[310] A wish to avoid disruption to one's business is a sensible inclination, but hardly justification for compelling a copyright owner to part with her creations on statutorily proscribed terms.

As it is, SIRA does successfully address one of § 115's weaknesses—its ability to cater to the online music businesses. Currently, the bill's fate is unknown. SIRA was tabled by Lamar

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305 Makan Delrahim, Deputy Assistant Att'y General, U.S. Dep't of Justice Antitrust Div., Forcing Firms to Share the Sandbox: Compulsory Licensing of Intellectual Property Rights and Antitrust, Address Before the British Institute of International and Comparative Law (May 22, 2004), *available at* www.usdoj.gov/atr/public/speeches/203627.pdf.

306 *Id.*

307 *Id.*

308 *Id.*

309 *2005 Senate Hearing*, *supra* note 2 (statement of Marybeth Peters, Register of Copyrights, U.S. Copyright Office).

310 *See 2005 Senate Hearing*, *supra* note 2 (statement of Ismael Cuebas, on behalf of the National Association of Recording Merchandisers); *id.* (statement of Del R. Bryant, President and Chief Executive Officer, Broadcast Music Inc.); *id.* (statement of Irwin Robinson, Chairman of the Board, National Music Publishers' Association).

Smith on September 27, 2006.[311] Representative Smith offered encouraging words that he "intend[s] to move forward with this legislation in the next year and that I am confidant that we will pass it then."[312] Some online commentators have taken a bleaker view, referring to the bill as "killed" and noting that it is a "real shame that this issue couldn't get resolved."[313]

The future of SIRA will also be affected by the recent elections. Since the Democrats have gained control of the House, Representative Howard Berman has replaced Lamar Smith as Chair of the Subcommittee. Berman has acknowledged the need for § 115 reform, but his endorsement of SIRA was not without reservation.[314] With his new position in the Subcommittee, it is not clear that he will continue to support the legislation.

Ultimately, with some amendments, SIRA should be passed. The world of online music is growing exponentially. According to the RIAA, sales of digital music rose 86.6% between January 1, 2006 and June 30, 2006.[315] Kiosk sales were up 155.2%, digital album sales increased 112%, and digital singles sales improved by 71.3%.[316] Conversely, sales of physical phonorecords were down 16%.[317] "The music community is embracing the digital age," said Mitch Bainwol of RIAA.[318] The digital music industry is in dire need of a legislative solution to their licensing quandaries. Until the industry gets this solution, inefficient licensing mechanisms, right implication ambiguities, and fear of copyright infringement litigation will continue to suppress the online legal music services. SIRA may not cure the plight of songwriters, but it will help by providing for the payment of accumulated royalties held in escrow

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311 *115 Reform Bill Tabled for 2006, but Congress Commits to Early Attention in 2007*, DIMA, Sept. 27, 2006, http://www.digmedia.org/content/legUpdate.cfm.

312 *See Copyright Modernization Act Tabled in Congress*, DIGITAL MUSIC NEWS, Oct. 2, 2006, http://www.digitalmusicnews.com/results?title=Lamar%20Smith; *OW Bill Dropped*, THE STOCK ASYLUM, Sept. 27, 2006, http://www.stockasylum.com/text-pages/articles/a6fa092006-ow-out.htm.

313 Chris Castle, *Section 115 Reform Act Is Withdrawn*, KINGS OF A&R, Sept. 28, 2006, http://www.kingsofar.com/2006/09/28/koars-mixed-31/#more-672; *Ding Dong, The Copyright Modernization Act Is Dead*, ORBITCAST, Sept. 29, 2006, http://www.orbitcast.com/archives/ding-dong-the-copyright-modernization-act-is-dead.html; Alex Curtis, *CMA 2006 Is No More*, PUBLIC KNOWLEDGE, Sept. 27, 2006, http://www.publicknowledge.org/node/661; *You Did It! CMA Is Dead . . .* , INFORMATION POLICY ACTION COMMITTEE, Sept. 27, 2006, http://ipaction.org/blog/2006/09/you-did-it-cma-is-dead.html.

314 *SIRA Hearing*, *supra* note 2, at 3 (statement of Rep. Howard Berman, Member, Comm. on the Judiciary).

315 RECORDING INDUSTRY ASSOCIATION OF AMERICA, 2006 MID-YEAR STATISTICS (2006), *available at* http://www.riaa.com/news/newsletter/pdf/2006midYrStats.pdf.

316 *Id.*

317 *Id.*

318 *RIAA Announces First Half 2006 Music Shipment Numbers ll*, RECORDING INDUSTRY ASSOCATION OF AMERICA, Oct. 12, 2006, http://www.riaa.com/news/newsletter/101206.asp.

from prior online uses of their works.

In conclusion, § 115's compulsory license is an antiquated relic created to allay a monopoly threat that no longer exists. In the interest of the basic doctrines of copyright, § 115 should be repealed. But while SIRA may not be the plenary reform that § 115 truly needs, SIRA will enable a crippled digital music industry to operate with greater efficiency. In other words, as Israelite stated, "we must not allow the perfect to be the enemy of the good."[319]

*Skyla Mitchell**

[319] *SIRA Hearing*, *supra* note 2, at 6 (testimony of David Israelite, President and Chief Executive Officer, National Music Publishers' Association).

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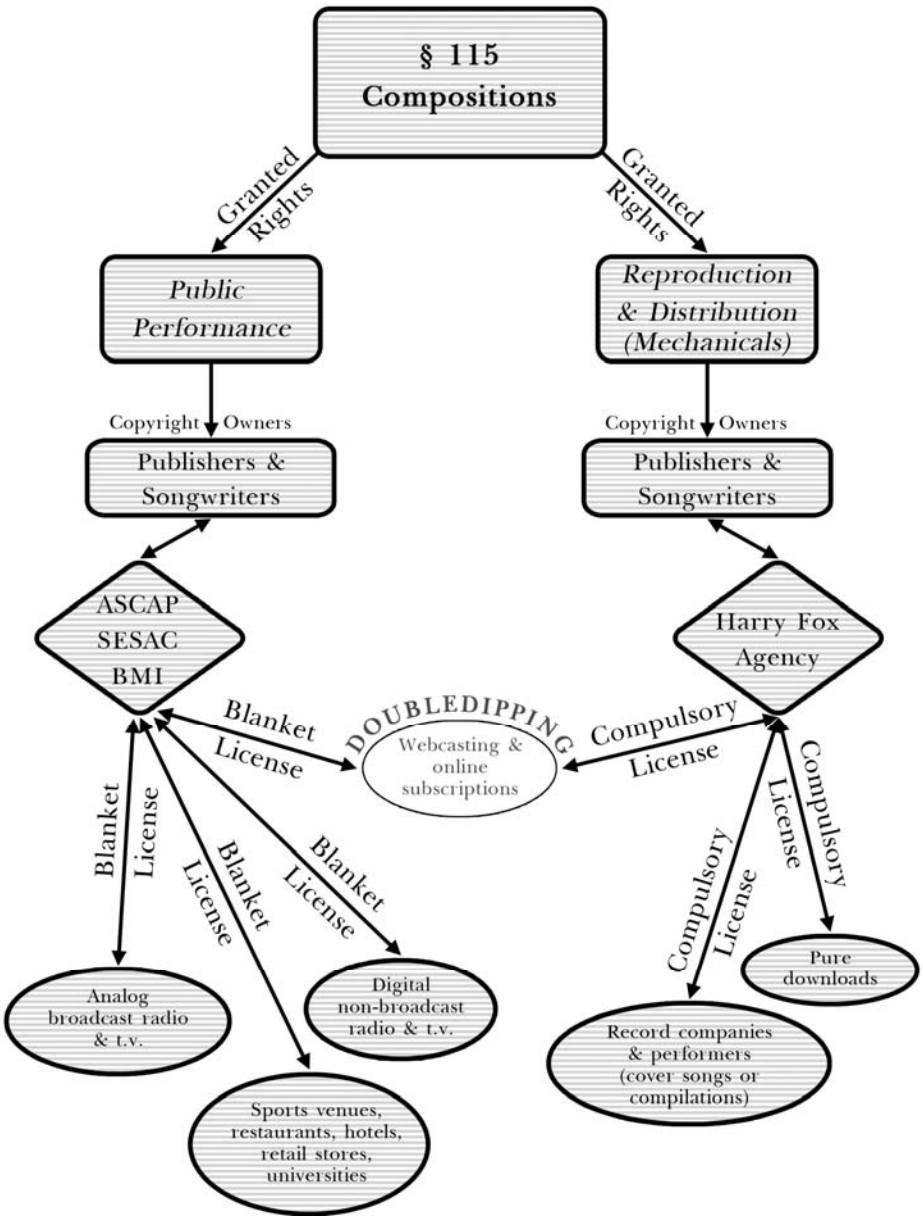
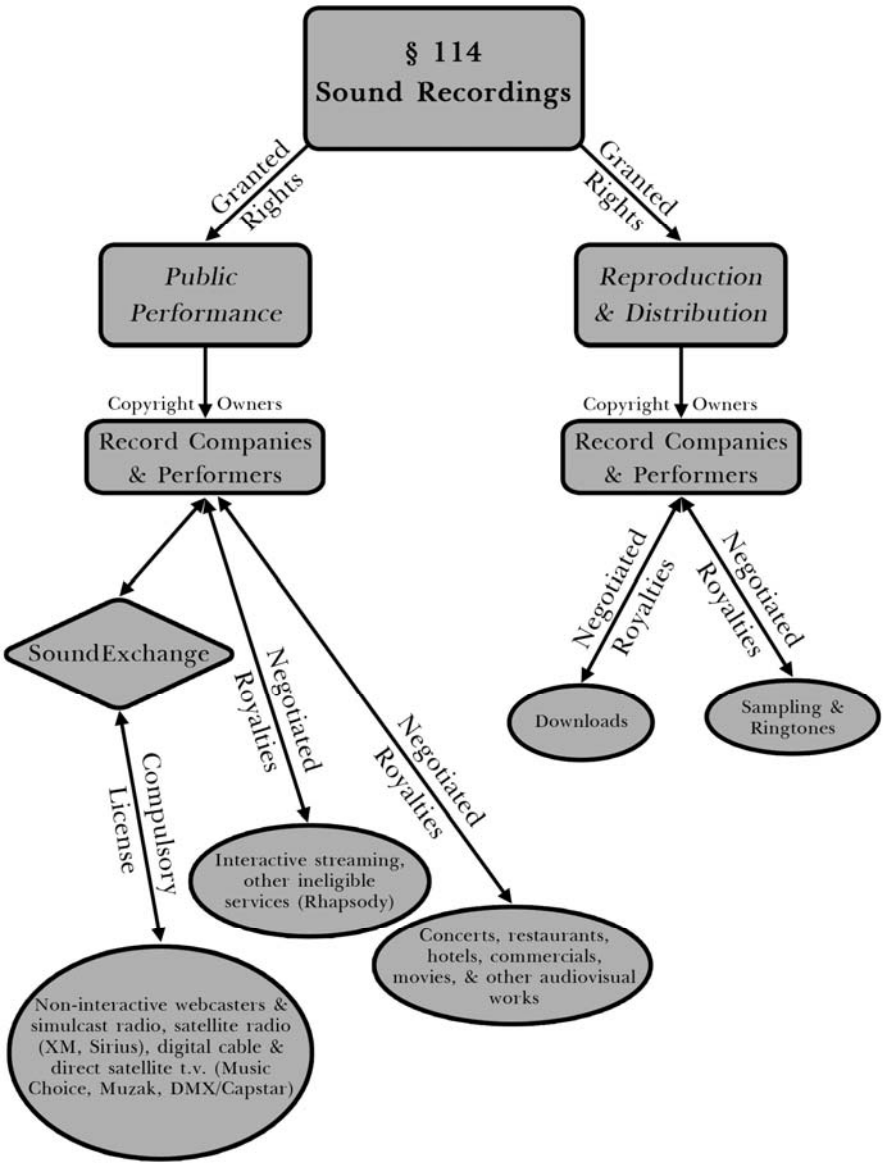
APPENDIX



** This diagram is an illustration of the most typical rights and uses; it is not intended to provide a complete list of granted rights, uses, rightsholders, or negotiating bodies.*



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