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Article

**COLLECTIVE MANAGEMENT OF MUSIC COPYRIGHT IN THE DIGITAL AGE: THE ONLINE
CLEARINGHOUSE**

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***196 I. Introduction¹**

Today, the process by which digital music is licensed is both cumbersome and complex. This problem has been exacerbated by the growing prevalence of illegal music sharing online, as well as the multiplicity of new ways to distribute music electronically. Traditional understandings of music performance, reproduction, and distribution face new challenges in a

world of podcasts, webcasts, and streaming music. Globally, recorded music sales have plummeted nearly 20% since 2000, with signs of increased losses in recent years.² Since 1997, record sales have dropped more than 40% in the United States.³ The music industry remains in turmoil despite infringement actions brought on behalf of copyright owners attempting to combat illegal music distribution.⁴ Thus, many in the industry have recognized the need to effectively compete with illegal distribution technologies instead of simply fighting to shut them down.⁵ However, acquiring the rights necessary to legally *197 broadcast and distribute music on the Internet has proven to be difficult.⁶ Those seeking to obtain music licenses argue that the current music licensing structure is inefficient and requires reform to establish a competitive legal music marketplace online.⁷

Some seek to reform the traditional copyright licensing structure, delegating the task of music licensing to a single entity.⁸ This theory contends that organizations that represent songwriters and publishers should be combined with record companies, which represent the interests of performing artists, to create a single licensing conglomerate.⁹ Others advocate for substantial reform of the Copyright Act,¹⁰ while more radical reformers seek to abolish online copyright altogether.¹¹

Underlying all reform models is the presumption that we must streamline the process by which music copyright licenses are obtained in order to cope with--and allow legal music to compete in--a rapidly evolving online marketplace.¹² This paper seeks to reconcile the existing licensing structure with new technologies by positing a method of digitally licensing music copyright--an online music licensing clearinghouse (Clearinghouse). The Clearinghouse would provide licensors with fair compensation in a manner consistent with traditional licensing practices and would allow those seeking a license to easily and quickly pay one price for their desired use.

Today, consumers regularly rely on sites like Expedia and Travelocity to fulfill a wide variety of travel needs, including flight bookings, hotel reservations, and *198 car rentals.¹³ The interests of disparate travel licensors are centrally managed, but not combined.¹⁴ Such an arrangement provides the benefits of “one-stop shopping” while avoiding collusion concerns.¹⁵ In much the same way, an online clearinghouse would provide a central location for obtaining music copyright permissions without the antitrust encumbrances that have plagued industry joint ventures in the past.¹⁶ The Clearinghouse promises to preserve the valuable, divided music licensing infrastructure and to lower transaction costs for industry and consumers alike. When the process of obtaining music licenses is streamlined, obstacles are removed and the legal distribution of music online can flourish.¹⁷

This paper provides a historical and legal justification for the Clearinghouse, illuminated by recent licensing reform proposals. Part II of this paper provides a general overview of the United States music licensing structure and of the various organizations that manage the actual licenses. Part II also underscores the historical development of music copyright, suggesting that the current structure is both logically and economically justified in the online context. Part III sets forth several of the more recent calls for music licensing reform and highlights their strengths and weaknesses. Finally, Part IV presents the details of the online music copyright licensing clearinghouse, describing its structure, management, and future.

***199 II. Development of Music Copyright in the United States**

A. Overview

Today, those wishing to license music must obtain distinct rights from several different licensing entities.¹⁸ Reformers argue that bottlenecks can occur at each stage of the process and negotiations can break down over licensing rates, resulting in a difficult and time-consuming process.¹⁹ However, simply because complications arise in a divided marketplace does not necessarily suggest that unification or eradication of the existing licensing structure is the proper solution. The division among licensing entities serves a legitimate economic purpose, the balance of which has taken nearly a century to establish.

Music licensing consists of two separate categories of copyrightable works: musical works and sound recordings.²⁰ A musical work copyright belongs to the author or composer of a musical composition who typically assigns his or her rights to a publisher for purposes of representation.²¹ The publisher then licenses the rights associated with the musical work to organizations such as Broadcast Music, Inc.; the American Society of Composers, Authors and Publishers; and the Harry Fox Agency.²² These organizations collectively manage millions of musical work copyrights, sublicensing common commercial exploitations on behalf of the copyright owner.²³

Sound recording copyrights, on the other hand, are normally owned by the artist or record label and protect the originality of the sound recording itself as distinct from the underlying melody or lyrics.²⁴ Thus, there may be several different sound recordings based on numerous versions or “covers” of a single musical *200 work.²⁵ The sound recordings produced by artists are generally deemed “works made for hire” in recording agreements, granting all copyright interest therein to the record label, and not the artist.²⁶

Although these two rights are distinct, use of a single song can invoke both.²⁷ This is true of third-party music reproduction and distribution today, where both the artist or managing record label (for the sound recording rights) and the songwriter, managing publisher, or collective agency (for the musical work rights) must be compensated.²⁸

Carved out of the musical work copyright is a subset of exclusive rights granted by statute: performance, reproduction, and distribution rights.²⁹ A “performance license” must be obtained when a composition is to be performed publicly.³⁰ Uses requiring a performance license include live band performances, terrestrial radio music broadcasts, online webcasts, and even the playing of a CD in a restaurant or bar.³¹ A “mechanical license,” on the other hand, must be obtained when a musical work is either to be distributed or is to be reproduced in the form of *201 a vinyl record, cassette tape, or CD.³² The Copyright Act defines these physical embodiments of music as “phonorecords.”³³

As the various musical work rights developed, so too did organizations designed to represent the collective interests of songwriters and publishers. Established in 1914, the American Society of Composers, Authors, and Publishers (ASCAP) acts as an agent of owners of copyright in musical works for the purpose of licensing performance rights.³⁴ Broadcast Music, Inc. (BMI) and the Society of European Stage Authors and Composers (SESAC) developed later and are the other dominant performing rights organizations (PROs) in the United States today.³⁵ PROs generally issue “blanket licenses,” granting the licensee permission to perform all songs in their music libraries for a fixed period of time.³⁶ The cost of a blanket license for “general establishments” such as restaurants and bars depends on “seating capacity, frequency of music performances, type of rendition, admission charges, etc.”³⁷ Television and radio broadcasters also pay large royalties to PROs, with rates based largely on gross receipts.³⁸ Royalties are then distributed among member songwriters and music publishers.³⁹ Both ASCAP and BMI are subject to court-ordered consent decrees requiring that license negotiations with consumers be subject to district court review and resolution.⁴⁰

In 1927 the National Music Publishers Association created the Harry Fox Agency (HFA) to manage the reproduction and distribution rights of its affiliate *202 publishers.⁴¹ HFA serves as an intermediary, negotiating the rights to reproduce and distribute musical works directly with record labels.⁴² While HFA represents over 28,000 music publishers, the agency does not exercise exclusive domain over musical work reproduction and distribution rights.⁴³ A publisher not affiliated with HFA, for instance, retains the ability to grant mechanical licenses for its works.⁴⁴ Furthermore, as part of the Copyright Act of 1909, Congress created a statutory rate of payment for mechanical licenses issued by HFA and non-affiliated publishers.⁴⁵ Under the statute, once a copyright owner has authorized the reproduction of his or her musical work for distribution, any member of the public may thereafter reproduce and distribute the work, provided the person pays the statutory royalty fee and provides notice to the copyright holder.⁴⁶ The purpose of this compulsory license is to prohibit copyright holders from engaging in holdout behavior once a mechanical license for the musical work has been issued.⁴⁷ Because of the burdensome requirements of the statutory scheme, however, royalty rates are generally privately arranged through HFA.⁴⁸ The compulsory rate thus serves as a “ceiling rate,” operating in the background of mechanical license negotiations.⁴⁹

In 1971, Congress granted sound recordings federal copyright protection.⁵⁰ Thus, for the first time, record labels, which generally own sound recording rights, *203 could license their works under federal law.⁵¹ The license required to reproduce and distribute sound recordings is known as a “master use” license and is the sound recording equivalent of a musical work mechanical license.⁵² Unlike musical works, however, federal copyright law did not provide a sound recording performance right.⁵³ Broadcasters resisted the imposition of an additional performance royalty.⁵⁴ At the same time, PROs were concerned that their share of the royalty pool collected from broadcasters would be diminished if they had to split performance right royalties with record labels.⁵⁵ In limiting sound recordings to reproduction and distribution rights, Congress also recognized the historical “symbiotic” relationship between labels and broadcasters, finding that “[t]he financial success of recording companies . . . depends in great measure on the promotion efforts of broadcasters.”⁵⁶ The resulting alliance among PROs and broadcasters successfully blocked the addition of any sound recording performance right for over twenty years.⁵⁷

Sound recordings existed with only reproduction and distribution rights until 1995.⁵⁸ With the advent of streaming music on the Internet, record labels made compelling arguments before Congress that the traditional licensing structure inadequately protected and compensated artists’ interests.⁵⁹ Streaming content allowed users to avoid any physical or digital reproduction

of music, and record labels ***204** feared that consumers would stream all content, thereby reducing physical music sales.⁶⁰ To quell such apprehension, Congress enacted the Digital Performance Right in Sound Recordings Act of 1995 (DPRSRA), which added the right “to perform the copyrighted work publicly by means of a digital audio transmission.”⁶¹ As streaming technologies continued to advance, however, record labels fervently lobbied Congress to expand the scope of the Act, culminating in a series of amendments to § 114 of the Copyright Act as part of the Digital Millennium Copyright Act (DMCA) of 1998.⁶² The amendments differentiate between “interactive” and “noninteractive” streaming transmissions.⁶³ This distinction is based on the presumption that the more interactive a music stream, the greater the chance that it will displace physical sales of music that would traditionally generate reproduction and distribution royalties.⁶⁴ Purely interactive streaming music services, where listeners may select which sound recordings they wish to hear, present the highest risk for sales displacement, and thus require a “digital performance license” negotiated directly with the sound recording copyright owner (usually the record labels).⁶⁵ Noninteractive services, such as web radio, are subject to a compulsory license, provided the streaming service complies with numerous statutory requirements.⁶⁶ ***205** If the noninteractive service does not qualify for the compulsory license, it too must negotiate directly with the sound recording copyright owner for a digital performance license.⁶⁷ Regardless of how such subscription services compensate the sound recording copyright owner for the digital transmission, a performance license must still be acquired from the musical work copyright owner (generally represented by PROs).⁶⁸

Broadly speaking, the DPRSRA and DMCA amendments represented Congress’s attempt to reconcile digital music distribution with the traditional music licensing structure.⁶⁹ The DPRSRA classified digital transmission of music that results in an identifiable reproduction as a “digital phonorecord delivery,” or “DPD” for short.⁷⁰ A DPD can be considered the digital equivalent of a phonorecord, encompassing the same exclusive rights afforded to copyright holders under § 106 of the Copyright Act.⁷¹ Thus, a digital phonorecord delivery implicates sound recording and musical work rights, requiring mechanical and master use licenses.⁷² Furthermore, as discussed above, streaming music transmissions over the Internet also invoke the performance right, and therefore require a musical work license and a sound recording performance license. For the most part, the DPRSRA and the subsequent amendments thereto merely reaffirmed and transposed traditional licensing practices online.

Despite Congress’s best efforts, however, disputes quickly arose over the scope of music rights online. What distinguishes the digital distribution of music from traditional, physical distribution, are the “incidental” reproductions made while digital music travels to its final destination.⁷³ Because both Internet servers and computers make temporary copies of files (sometimes termed “buffer,” ***206** “RAM,” or “cache” copies), music publishers have demanded royalties for the ephemeral reproductions.⁷⁴ Perhaps in response to such concerns, Congress expanded the musical work compulsory license in the DPRSRA to include what Congress vaguely termed “incidental” DPDs.⁷⁵ These incidental DPDs are subject to a separate (and presumably lower) compulsory licensing rate.⁷⁶ However, because Congress never explicitly defined the term within the statute, there is some confusion as to whether interactive streams involve incidental DPDs.⁷⁷ If interactive streams indeed do involve incidental DPDs, music streamed to a consumer online in some instances would require a mechanical license from the musical work copyright owner.⁷⁸

More than any other aspect of the DPRSRA, the creation of rights concerned with incidental DPDs has become the subject of heated debate.⁷⁹ Not to be outdone, ***207** performing rights organizations have begun demanding a public performance license payment for purely downloaded music, arguing that consumers can begin listening to the transmitted portion of the music file before the download is complete.⁸⁰ Although a recent district court decision rejected the proposition that music downloads invoke performance rights, it is difficult to distinguish the “incidental” digital reproductions adopted by the DPRSRA from the “incidental” digital performances identified by the PROs.⁸¹

Moreover, there is significant disagreement as to whether Congress should be regulating in this area at all.⁸² Some commentators are concerned that by redefining and expanding music rights, licensors are “double-dipping” online, seeking to broadly expand their limited reproduction, distribution, and performance rights.⁸³ The Copyright Office, for instance, has recommended that Congress exempt incidental reproductions from a musical work copyright owner’s bundle of exclusive rights.⁸⁴ However, the legislative history suggests that pressure from industry interests played a dominant role in the creation of the 1995 DPRSRA and amendments thereto.⁸⁵ While licensing entities have undoubtedly felt the economic effects of illegal digital music distribution, it should be remembered that it is not uncommon for entrenched industry participants to dramatically bewail that new ***208** technology “is to . . . the American public as the Boston strangler is to the woman home alone.”⁸⁶

Finally, in addition to incidental reproductions, music publishers have insisted that royalties be paid for the server copies (or

“source phonorecords”) of musical works, which are the source files used in interactive music transmissions.⁸⁷ While it is technically correct that interactive streaming services store “master” copies of sound recordings on their servers, HFA has never before demanded analogous licenses from terrestrial radio stations for their “programming copies.”⁸⁸ However, from a policy perspective, publishers argue that because a listener may know in advance which songs will be transmitted on an interactive streaming site, there is a greater chance that she can prepare her computer to make a digital copy of the song, thereby displacing phonorecord or digital phonorecord delivery sales.⁸⁹ At least one court has sided with the publishers, requiring interactive streaming music providers to negotiate a mechanical license with the appropriate musical work administrator for the server copies.⁹⁰

***209** In sum, the underlying musical composition (the melody and lyrics) are categorized as “musical works.”⁹¹ There are exclusive rights granted to the musical work copyright owner, including the right to perform (requiring a performance license), and to reproduce and distribute (requiring a mechanical license).⁹² These rights are managed by performing rights organizations (ASCAP, BMI, SESAC), the Harry Fox Agency, and various independent publishers and songwriters.⁹³ Once a song is performed by an artist and recorded, the rendition is considered to be a “sound recording.”⁹⁴ Sound recording copyright owners are also granted the exclusive right to reproduce and distribute the work (requiring a master use license), as well as a limited digital performance right (requiring a digital performance license).⁹⁵ These rights are generally owned and managed by record labels.⁹⁶ Navigating this byzantine structure may at first seem as infeasible as attempting to negotiate with the myriad of music licensors involved. However, a more circumspect consideration suggests that the system’s architecture is as essential as the organizations that manage it.

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***210 Figure 1. United States Music Copyright Licensing Structure**

B. Relevancy of the Licensing Structure

The music licensing structure grew organically to meet the needs of an evolving marketplace.⁹⁷ During the course of its development, songwriters and music publishers came together to create PROs like ASCAP and BMI to enforce rights that would otherwise be nearly impossible to manage individually.⁹⁸ Music publishers also established HFA to facilitate the mechanical licensing of their music and to lower transaction costs imposed by the compulsory licensing process.⁹⁹ Today, HFA represents over 28,000 music publishers and 160,000 songwriters.¹⁰⁰

***211** These collective licensing organizations have developed particular expertise managing and marketing the interests of their members. PROs ensure that songwriters and publishers are fairly compensated, and, to do so, have developed complex methods of royalty distribution based on blanket licensing arrangements with their licensees.¹⁰¹ HFA has spent decades working with music publishers and record labels, individually negotiating mechanical rights for millions of works.¹⁰² Finally, record labels are especially experienced in representing the interests of performing artists and the evolving rights associated with the sound recordings the artists produce.¹⁰³

The divided process of creating music has resulted in the split licensing framework that has served the United States for nearly a century.¹⁰⁴ Today, the U.S. recording industry is the most lucrative recording industry in the world, larger than that of the U.K., France, Germany, Canada, Australia, Italy, Spain, and Mexico combined.¹⁰⁵ Altering the intricate music copyright licensing structure ultimately affects more than just the licensing conglomerates.¹⁰⁶ Without the resources of collective management organizations, many artistic creations would never see the light of day.¹⁰⁷ PROs, publishers, and record labels all serve an important and necessary role in maintaining a balanced music marketplace.

***212** However, because of the increasing prevalence of illegal digital music distribution, calls for licensing reform have surged.¹⁰⁸ Whereas the music licensing process went largely unnoticed in a pre-digital world, its complex structure has become a point of increased criticism in recent years.¹⁰⁹ This may be due in large part to the perceived barriers the music licensing system imposes when compared with the open, unregulated nature of the Internet.¹¹⁰ Some of the most well known and successful Internet companies like Google and eBay were created with little more than imagination and entrepreneurial zeal.¹¹¹ The success of the iTunes music store, on the other hand, stands in stark contrast to the grassroots achievements of its Internet peers.¹¹² Crafting an online music business involved careful negotiations with industry giants, substantial capital, a unique business plan, and an intimate knowledge of copyright law.¹¹³ The music industry and lawmakers have struggled to effectively adapt the music licensing process for use on the Internet.¹¹⁴ The online community, however, has not been

patient.¹¹⁵ With the proliferation of illegal music distribution, record sales have plummeted, and those advocating for reform have become an increasingly boisterous crowd.¹¹⁶ It is to these reform proposals that we now turn.

***213 III. Calls for Reform**

As methods of digitally distributing music have expanded, so too have calls for reform of the existing music copyright licensing structure. Academics, licensing organizations, and even the Copyright Office have proposed theories on how best to restructure the “broken” digital music licensing landscape.¹¹⁷ These reform proposals can be organized into two categories: those that seek to reform legislatively, and those that seek to combine (or “pool”) music licenses in some way. While these reform proposals may present theoretical solutions to digital licensing deficiencies, most fail to adequately consider insurmountable implementation obstacles or ensure long-term security in music copyright.

A. Legislative Reform Proposals

One perspective is that the licensing structure that developed under the various copyright laws of the nineteenth and twentieth centuries is ill-equipped to handle digital licensing needs.¹¹⁸ Instead of the stratified bundle of performance, reproduction, and distribution rights, at least one scholar argues in favor of a single “right to commercially exploit.”¹¹⁹ Presumably, such action would allow the various rights to be more easily licensed, better accommodate evolving technology, and eliminate entrenched industry players.¹²⁰ Unless we drastically reform the law, the author contends, “[c]opyright risks irrelevancy in the digital world.”¹²¹ One advantage of this proposal is the ability to structure new licenses around new markets and not around the limited categories of exclusive rights defined by statute.¹²² Thus, instead of forcing new technologies into one of the six enumerated existing rights defined in § 106, copyright owners could creatively sublicense their single right, easily adapting to new derivative markets.¹²³

***214** However, history has proven that no matter how licenses are afforded, an individual copyright owner’s ability to effectively manage and enforce her rights, on a nationwide scale, is nearly impossible.¹²⁴ While broadening the scope of exclusive rights may allow for more creative licensing, it poses more serious consequences. Under a unitary-right system, historical transaction-cost difficulties remain, regardless of what the exclusive rights of the copyright owner are labeled.¹²⁵ Without the help of PROs, songwriters and publishers would be forced to fend for themselves, which would be impractical and chaotic.¹²⁶ Instead, they would likely band together to form collective organizations with the resources to manage common commercial exploitations across the country.¹²⁷ Current entrenched players would be replaced with new ones, seeking to enforce a messy field of sublicenses.¹²⁸ Far from solving licensing complexities, license seekers would be cast into a state of confusion, not knowing which licenses are required, from whom they are required, or where they must go in order to obtain necessary permissions.¹²⁹

Another popular legislative reform proposal suggests expanding § 115 of the Copyright Act, which provides compulsory licenses for musical work mechanical rights.¹³⁰ Reformers embrace the compulsory rate and seek to apply it more generally to music licenses, because it eliminates many of the obstacles imposed by the divided licensing structure.¹³¹ Simply put, under a pure compulsory licensing system, ***215** there is no need to track down copyright owners and negotiate.¹³² To obtain a license, one need only file notice of intent to use the work with the Copyright Office.¹³³ If the copyright owner is on record, a statutory royalty rate must be paid.¹³⁴ If not, the filing of notice provides a safe harbor.¹³⁵ Reformers envision a licensing system in which a consumer would simply file notice in the Copyright Office or a designated regulatory agency, pay the statutory rate, and walk away with all necessary licenses.¹³⁶ Collected royalties would then be appropriately divided and distributed among rights holders.¹³⁷

Sweeping legislative action, however, should not be seen as a panacea to digital copyright reform, as it will likely involve numerous complications and delays.¹³⁸ When the Register of Copyrights sought to reform the musical work compulsory license in 2005, she noted that there were “significant differences” among licensing entities, resulting in no consensus for legislative change.¹³⁹ It is extremely unlikely that any licensing organization will voluntarily relinquish its licensing power without a vigorous and lengthy fight. In the past, lobbying efforts by powerful industry interests delayed legislative implementation of a single right (the sound recording performance right) by over twenty years.¹⁴⁰ Suggesting that numerous rights be combined for purposes of compulsory licensing significantly overlooks the historical and institutional nature of our music licensing system.¹⁴¹

*216 B. Pooling Proposals

Given the difficulty in reforming music copyright legislatively, some reformers suggest granting a single entity the power to administer all music rights.¹⁴² Under this structure, a middleman, often referred to as a “Music Rights Organization” (MRO), would provide a single license encompassing musical work and sound recording performance, reproduction, and distribution rights.¹⁴³ This “über-middleman” would then be responsible for dividing and distributing royalties to all copyright holders.¹⁴⁴

The Copyright Office itself has offered a slightly less ambitious MRO proposal, in which musical work performance, reproduction, and distribution rights would be administered by MROs.¹⁴⁵ Existing PROs like ASCAP and BMI would “automatically become MROs” due to their apparent licensing expertise.¹⁴⁶ However, the newly formed MROs would be free to multiply and compete.¹⁴⁷ Under the Copyright Office’s proposal, once an MRO has been authorized to license a musical work performance right, it simultaneously obtains authorization to license the reproduction and distribution rights of the work.¹⁴⁸ To accomplish this goal, the proposal envisions elimination of the § 115 compulsory license.¹⁴⁹ Thus, today’s largest PROs would effectively control all musical work rights online and HFA would either become an MRO itself or face extinction in the music licensing market.

*217 The infirmities of the license-pooling reform proposals are numerous.¹⁵⁰ First, the Copyright Office’s consolidation proposal does not completely remedy the problem exacerbated online by a divided licensing landscape.¹⁵¹ MROs, for instance, would be free to proliferate and compete.¹⁵² Furthermore, sound recording permissions would still have to be obtained from record labels or artists.¹⁵³ Therefore, not only does the desire for one-stop shopping remain unaddressed under the Copyright Office’s plan, but consumers might actually have to seek licenses from more organizations than they do now.¹⁵⁴ Second, serious antitrust concerns arise from such a license-pooling proposal.¹⁵⁵ Without an antitrust exemption, it is difficult to see how further concentrating music licenses would not be “in restraint of trade or commerce.”¹⁵⁶

The final critique of any license-pooling proposal is that it would disrupt the balance established by the existing licensing structure and result in unfair and inefficient results.¹⁵⁷ In response to the Copyright Office’s proposal, ASCAP, BMI, *218 and SESAC stated that they have neither the capacity nor the desire to manage the reproduction and distribution rights of millions of musical works.¹⁵⁸ Believing that a single organization will fairly represent the interests of different members and clients ignores the specialized roles developed by the PROs, HFA, and record labels.¹⁵⁹ Indeed, musical work copyright licensors are deeply skeptical of any proposal seeking to work dramatic changes to the licensing structure itself, regardless of promises of increased licensing power.¹⁶⁰

Creating a novel “über” entity with no licensing experience can hardly be expected to fare much better than the MROs envisioned by the Copyright Office. Aside from the considerable antitrust concerns associated with entrusting a single agency with the power to license the rights associated with all musical works and sound recordings, the history of music licensing in the United States has proven that competing interests, along with legislative and judicial regulation, provide an effective and equitable music licensing structure.¹⁶¹

Despite their differing approaches, reformers generally agree that reducing transaction costs is crucial to the goal of facilitating online music licensing.¹⁶² *219 While copyright reform may be an important step, it is unlikely that sweeping changes will occur in the face of longstanding licensing practices and such entrenched industry participants.¹⁶³ Similarly, merging licenses and the organizations that control them should be considered cautiously. The divided licensing structure provides creative talents with just compensation for their efforts and ensures that licensees have the ability to pay for only the rights they desire. While the Internet may have increased the speed and methods by which music is transmitted, digital licensing is not beyond the capability of our current system.¹⁶⁴ What many reformers fail to recognize is that it is not new technology that necessitates licensing reform, but rather the “brawl among the various licensing administrators for a piece of the emerging pie.”¹⁶⁵ Facilitating music copyright requires a system “narrowly focused to address the overlapping rights problem in cyberspace without affecting how divisibility works in real space.”¹⁶⁶

IV. The Clearinghouse Proposal

A. Overview

Given the institutional nature of the music copyright structure, today’s challenge is how to best streamline the licensing process for application online without disturbing nearly a century of industry experience and development.¹⁶⁷

Instead of replacing or consolidating the existing licensing organizations or the licenses themselves, this paper suggests a compromise: an online music licensing clearinghouse open to all current (and future) licensing entities. There are several major advantages to this proposal: (1) the existing licensing structure remains intact allowing songwriters, publishers, and artists to maintain their place at the *220 bargaining table; (2) consumers are provided with one-stop shopping; (3) licenses are issued on a non-refusal basis, eliminating prolonged negotiations and holdout behavior; (4) existing statutory compulsory licenses and court-ordered consent decrees are maintained; (5) no statutory modification is required to implement the proposal; (6) transaction costs are lowered for everyone involved; (7) there are few, if any, antitrust concerns; and (8) streamlining the licensing procedure will cause the availability and demand for legal music online to grow.

B. Structure

The Clearinghouse would be composed of all PROs, HFA, and publishers and songwriters not affiliated with Harry Fox or PROs seeking to license their musical work and enforce their performance, reproduction, and distribution rights. Similarly, the Clearinghouse would be open to record labels (both major and independent) exercising their ownership of sound recording reproduction, distribution, and digital performance rights, as well as artists seeking to represent their music independently.¹⁶⁸ Membership would be subject to only minimal restrictions, allowing for a broad spectrum of rights owners to easily join the Clearinghouse.

As a prerequisite for membership, each licensing organization would be required to provide access to its full music copyright collection and submit multiple algorithms for determining license fees based on numerous potential consumer uses.¹⁶⁹ For instance, PROs could submit one algorithm to be used when calculating the license fee for a small venue seeking to play songs from its music catalog, and submit another algorithm to calculate the license fee for music streaming on a subscription-based website.¹⁷⁰ The more algorithms submitted, the more flexible *221 the Clearinghouse becomes, allowing consumers to pay for the exact use they are seeking.¹⁷¹ Alternatively, individual algorithms themselves might be complex enough to encompass a wide array of licensing criteria. In line with existing provisions of PRO consent decrees, and to prevent holdout behavior, all Clearinghouse licensors would be required to fulfill all licensing requests made by registered Clearinghouse members.¹⁷²

The process would begin when a user visits the Clearinghouse and registers with the site. Registration might consist of questions regarding the company's business structure or desired license uses.¹⁷³ Such questions might include: Which of the following best describes your establishment? How many songs would you like access to? Are you seeking permission to stream, reproduce, or distribute music? Do you seek to make music available on the Internet? For what period are you seeking a license? Additional verification steps might be required before license purchases are permitted, including proof of business or commercial website ownership. Following registration, the user would be presented with additional questions, regarding specific uses of music. Each question answered would assist the Clearinghouse in identifying exactly which types of licenses are required (performance versus mechanical/master use) and from whom the license must be obtained (musical work versus sound recording copyright owners).¹⁷⁴ The proper algorithm from each licensing organization would be selected by the Clearinghouse, a simple (and *222 automatic) summation would be performed, and an offer would then be presented to the user.

Along with the offer would come a detailed breakdown describing which licenses are being obtained, from whom they are being obtained, and the total cost of each. At this point in the transaction, the user is free to either accept the offer and pay online, or use the detailed offer breakdown to pursue redress in rate court, when appropriate.¹⁷⁵ The "redress" step serves two important functions. First, it ensures that existing court ordered consent decrees are maintained. Second, it provides the user with the same remedial options available under the traditional licensing structure, but with the advantages of one-stop online license shopping.

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Figure 2. Representation of the Clearinghouse Relationship

*223 C. The Clearinghouse User

Because of the inherent flexibility of web-based technology, the Clearinghouse could be created in such a way so as to cater to a great variety of license-seeking commercial consumers. Potential users include those seeking to digitally reproduce and distribute music, those seeking to stream music online, and traditional business owners seeking to perform music at a restaurant or at some other commercial establishment.

For purposes of clarification, an example may be useful. A restaurant owner wishing to play CDs in her restaurant's dining room registers with the Clearinghouse and selects "Small Restaurant: 20-50 person seating capacity" when presented with the initial screening question.¹⁷⁶ After selecting "continue," the owner chooses the option "I would like a license to play ALL songs from BMI's, ASCAP's, and SESAC's music catalogs via a media system installed in the interior of the dining room."¹⁷⁷ On this page, the owner is presented with a link to a searchable index of the PROs' extensive song libraries. The Clearinghouse then selects the appropriate fee algorithm from each PRO, inserting variables based on the size of the establishment and estimated number of patrons. Because the restaurant owner wishes only to play songs in the restaurant, and not to distribute or reproduce the music, the Clearinghouse need not factor in musical work or sound recording mechanical and master use licenses. Furthermore, because no digital transmission is involved, a sound recording digital performance license is not required. The restaurant owner is then presented with the total price for the licenses requested, along with a breakdown of exactly how much each PRO's license costs. At this point the restaurant owner can pay via credit card for the licenses, and even sign up for varying contract lengths. Alternatively, the restaurant owner may contest the amount in rate court if the owner finds the fees unreasonable.¹⁷⁸ Finally, if the restaurant owner believes lower rates can be obtained through direct negotiations with each PRO, the owner is not precluded from obtaining the same licenses outside of the *224 Clearinghouse. While this example presents a simple transaction, it highlights the basic premise of the Clearinghouse.

A digital example may provide further clarification: Janet, the owner of a new website, Alternativemusic4you.com, logs on to the Clearinghouse in hopes of obtaining licenses for approximately 5,000 songs that she wishes to sell on her small site.¹⁷⁹ To edge out others in the online music distribution market, Janet would like to obtain licenses for only hard-to-find, alternative-music compositions. Janet's site will offer songs in individual, album, and streaming formats.¹⁸⁰

The Clearinghouse might present Janet with several music genres to choose from and even allow her to select the entire alternative-music repertoire of various publishers or record labels. If Janet has a particular song in mind, she might be allowed to search the Clearinghouse's sound recording database. Each song in the database is linked to all applicable license interests, to be filtered out or maintained based on the consumer's intended use.¹⁸¹

After Janet answers questions about use and distribution and selects approximately 5,000 songs, the site determines that Janet will require performance licenses (to allow users to stream songs) and mechanical and master use licenses (to reproduce and distribute the music).¹⁸² The Clearinghouse also determines that Janet's use invokes both musical work rights (to compensate the songwriter or publisher) and sound recording rights (to compensate the artist or label), thereby invoking the *225 full licensing spectrum.¹⁸³ After selecting a license term, Janet is presented with a detailed listing of all of the licenses required based on her selections, a contract incorporating the various licenses, and a grand total. Janet believes that the price is fair, and pays online with a credit card.¹⁸⁴ She is thereafter e-mailed additional information regarding the uses to which she is entitled based on the licenses she has obtained. Such information is also saved to Janet's account on the Clearinghouse, where she may make modifications at any time.¹⁸⁵

What, one might ask, would prevent Janet from simply falsifying information, purposely selecting or inputting those variables which would result in the most inexpensive licenses? The answer is the same as it is today: PROs, record labels, and all other licensing entities are free to request documentation, including copies of tax documents and business licenses, and can even conduct investigations to ensure compliance.¹⁸⁶ Furthermore, because of the flexibility of the Clearinghouse system, safeguards could be implemented such as requiring user validation before permitting the purchase of any licenses.¹⁸⁷ Finally, monitoring potential misuse would be greatly facilitated if the Clearinghouse reaches its goal of providing licenses to the digital community, where compliance investigation would be significantly easier to accomplish.

D. Management of the Clearinghouse

The Clearinghouse would require funding and direction from a representative yet detached governing body. Certainly, if one or only some licensing organizations *226 were given exclusive control of the Clearinghouse, there would be justifiable conflict-of-interest concerns.¹⁸⁸ Thus, a diverse advisory group made up of representatives from each of the major licensing organizations (PROs, HFA, and major record labels and publishers), as well as independent songwriters, artists, publishers,

and record labels, would be desirable to fairly establish and maintain the Clearinghouse.¹⁸⁹ The incentive for these organizations to come together is the mutual understanding that gross revenues would inevitably increase if the Clearinghouse succeeds in increasing music licensing transactions.¹⁹⁰ In this effort, incorporating a diverse board of licensing entities is necessary to ensure that no organization receives an unfair advantage and to allow the various groups to share the expense of creating and maintaining the site.

The board envisioned for the Clearinghouse is similar to the board governing SoundExchange.¹⁹¹ SoundExchange was created in 2000 to collect digital performance royalties on behalf of sound recording copyright owners.¹⁹² Its board of directors is composed of songwriters, major and independent record labels, and members of the Recording Industry Association of America.¹⁹³ However, unlike under the Clearinghouse proposal, SoundExchange's board makes decisions regarding distribution of licensing royalties.¹⁹⁴ Because each licensing organization sets its own licensing rates under the Clearinghouse model, the Clearinghouse's board *227 would not participate in such determinations.¹⁹⁵ Thus, the primary duty of any governing body would be to create and maintain the Clearinghouse infrastructure, and ensure equality and fairness in operation and membership.¹⁹⁶ Such a system guarantees that the division among licensing interests is maintained and better secures the venture against accusations of collusion.

Because diverse governance of the Clearinghouse would necessarily bring together the largest music licensors, antitrust concerns will inevitably arise. Therefore, it bears repeating that licensing rates would continue to be determined and collected by a diverse group of licensing organizations, and not by the Clearinghouse or its board of directors. The governing body would be prohibited from making or altering rate algorithms or fees, and each licensing entity would remain free to license independently of the Clearinghouse. Finally, traditional rate restrictions would apply, including statutory licensing and rate court review.

In addition to funding from the board, the site might charge a small fee for each transaction to help offset administration costs. However, this option should be adopted with caution. If consumers must pay more for licenses via the Clearinghouse, they may find it more economical to negotiate directly with licensors. As with travel clearinghouses, consumers are willing to pay a bundled price as long as the convenience outweighs the surcharge.¹⁹⁷ Alternatively, those licensing organizations wishing to participate could bear the monetary burden of creating and maintaining the site through annual membership fees. Membership fees might be based on the number of works controlled by individual licensors on the Clearinghouse. Some might argue that such fees would ultimately come out of the pockets of songwriters and artists, but, as with other overhead fees charged by licensors, the costs would be a necessary investment by licensing agents in order to more effectively market their clients' copyrights.

***228 E. Potential Objections to the Clearinghouse**

There are a number of potential objections to the Clearinghouse proposal, but such criticisms pale in comparison to those which have been lodged against the legislative and pooling reform proposals discussed in Part III.

First, the user's ability to bargain is significantly impaired. Unless the user takes a performance license offer to rate court, the user has little room to negotiate in the licensing process. In this respect, however, market forces should not be underestimated. With the growing proliferation of both legal and illegal music alternatives online, the Clearinghouse will not survive long if its prices exceed what consumers in the market are willing to pay.¹⁹⁸ In addition, the current negotiation practice draws significant criticism.¹⁹⁹ Individual negotiations with licensing agencies often result in negotiation breakdowns, holdouts, and a prolonged licensing process.²⁰⁰ By enabling the immediate fulfillment of all legitimate licensing requests, the Clearinghouse would greatly facilitate consumers' ability to quickly obtain necessary permissions. Finally, because the Clearinghouse seeks only to make music licenses more accessible, the proposal does not proscribe traditional, direct negotiations with individual licensing entities.

Second, subjective licensing determinations are largely eliminated by the Clearinghouse. Sound recording copyright owners, who traditionally reserve the right to refuse certain sound recording license requests, would be required to offer licenses on a non-refusal basis.²⁰¹ To the extent that this would result in a cognizable economic harm, labels could compensate by factoring such considerations into their algorithms.²⁰² Furthermore, the Clearinghouse's non-refusal requirement *229 would be imposed upon all licensing organizations alike, and would result in an increase in the overall number of income-generating license transactions. As the Internet continues to evolve into the primary market for consumer music sales, accelerating the licensing process for recording rights should be an increasingly important priority for music copyright holders.

Practically speaking, the Clearinghouse would require most, if not all, of the major music industry licensors to participate in the project from the outset to establish an appreciable music library.²⁰³ Thus, implementation obstacles could be seen as a barrier to the adoption of the Clearinghouse. While consensus among licensing entities has been difficult to obtain in the past, the Clearinghouse does not require licensors to significantly alter their business structure or to modify the scope of their licenses. Rather, the Clearinghouse provides a central location and a streamlined method by which consumers can more easily access and purchase the music licenses they seek. Thus, one major motivating factor for initial collaboration is the potential for greatly increased licensing revenue.²⁰⁴ Once implemented, independent labels, publishers, and artists would be more inclined to join the Clearinghouse, further augmenting the Clearinghouse's music copyright library and licensing power. The financial and functional success of SoundExchange, as well as other online clearinghouses like Expedia, Orbitz, and Travelocity, might provide additional motivation for industry collaboration. Toward this end, the RIAA or the labels themselves could spearhead participation in and adoption of the Clearinghouse. After all, the successful launch of the iTunes Music Store turned largely on convincing a single record label to participate, resulting in a chain reaction among fellow music licensors.²⁰⁵

***230** Finally, any system that offers a license on behalf of all of the licensing organizations will likely attract the attention of the Justice Department's Antitrust Division.²⁰⁶ It must be emphasized, however, that this is not a proposal for issuing consumers "unilicenses," in the traditional sense. As with travel clearinghouses, no interests are combined, and no anticompetitive behavior is furthered. Each licensor retains its ability to represent the unique interests of its members, and consumers are provided with a detailed report of exactly which licenses they have obtained, from whom they obtained them, and to what uses they are entitled.²⁰⁷

It is also important to distinguish the Clearinghouse model from a traditional joint venture among music copyright owners. A joint venture is defined as a collaboration "where disparate parties combine resources and efforts to undertake a given enterprise for profit."²⁰⁸ Traditional music joint venture models involved the pooling of licensing rights by industry participants in an attempt to compete in the online music marketplace.²⁰⁹ In 2001, for instance, record labels introduced two ***231** subscription music services: Pressplay and MusicNet.²¹⁰ The joint ventures were undertaken almost entirely by Universal Music Group, Sony Music, Warner Music, Bertelsmann AG (BMG), and EMI, which collectively controlled approximately 83% of the prerecorded music in physical form market.²¹¹ The collaborations drew the attention of the Department of Justice and the European Commission before the ventures even began their operations.²¹² Because these traditional joint ventures have the potential for anticompetitive behavior, similar collaborative models are likely to face comparable antitrust opposition.²¹³

Thus, it is important to identify two distinct types of music industry joint ventures. The first type is the traditional model described above, in which a group of licensing organizations pool resources and effort to offer music directly to the consumer.²¹⁴ The second type is the Clearinghouse model, in which licensing entities pool resources and effort only to provide consumers with more convenient access to the licenses required under the current music licensing structure.

Besides the obvious risk of collusion, logistical concerns of traditional joint ventures include the limited selection of songs available to consumers and the unfulfilled need for one-stop license shopping.²¹⁵ The Clearinghouse, however, could bring together all of the licensing agencies to provide true one-stop shopping without posing similar antitrust concerns. Furthermore, as discussed in Part IV.C, the Clearinghouse model does not seek to monopolize the music licensing process and deter license seekers from negotiating directly with the licensing organizations outside ***232** of the online context.²¹⁶ In stark contrast, when joint venturers seek to directly participate in the music distribution market under the traditional joint venture model, there is little incentive to license rivals, thereby creating online-market competition.²¹⁷ Thus, the Clearinghouse would eliminate one of the most egregious forms of antitrust behavior: withholding licenses from the market, which results in anticompetitive prices.²¹⁸ Traditional joint ventures exacerbate this practice, permitting record labels to restrict the dissemination of licenses to competitors, thereby aggrandizing their music distribution monopoly.²¹⁹ The Clearinghouse model, in contrast, would require that all legitimate license requests be fulfilled, encouraging competition and eliminating the burdens of holdout behavior.

F. Curing the Split Copyright Syndrome

The Clearinghouse would also face more fundamental difficulties arising from the divided copyright structure. One such obstacle has been referred to as the "split copyright syndrome," in which music copyright owned by divided interests poses

serious if not fatal complications to obtaining license permissions.²²⁰ Securing the necessary rights to reproduce and distribute a song is often a complex process, especially if a publisher is not associated with HFA, or if a sound recording is *233 not managed by a major label.²²¹ Furthermore, even when a musical work mechanical license can be obtained through HFA on a compulsory basis, record labels are not similarly obligated to grant a master use license for the sound recording.²²² This can lead to holdout behavior, which can significantly or permanently delay the licensing process.²²³ Finally, because all licenses are traditionally negotiated individually, the duration and terms of licenses may differ. In response, music license clearance companies have formed to act as middlemen to the middlemen, charging clients to ascertain administration rights and obtain coordinated permissions.²²⁴

Implementing the Clearinghouse would drastically reduce the split copyright syndrome in several ways. First, the onus would shift to the licensing entities themselves to ensure that their license interests are properly linked to all applicable works on the Clearinghouse. If, for instance, a consumer seeks to obtain permission to digitally distribute and stream all songs from a particular band, the Clearinghouse must be able to immediately identify all licensing interests involved.²²⁵ If any one of the licensing entities fails to attach its interest to the artist or song, the Clearinghouse would be unable to issue that license, resulting in a loss of income and a lack of consumer confidence in the system. Thus, the responsibility of identifying and coordinating license interests would fall upon the parties who stand to make a profit by doing so.

Second, once licenses have been coordinated for a particular work among licensors on the Clearinghouse, there would be no need to modify the affiliated rights again, unless interests are assigned or terminated. The duplicative and time- *234 consuming act of researching the ownership interests of the same songs would be virtually eliminated by the Clearinghouse.²²⁶ Besides selling licenses, the Clearinghouse would also serve as a central database of license interests, “remembering” who manages what.²²⁷ While the clearing rights industry might still be needed to determine obscure and difficult-to-track ownership interests, the Clearinghouse would largely reduce the split copyright syndrome for the vast majority of popular, regularly licensed works.

Finally, the Clearinghouse could significantly reduce overlapping and inconsistent license durations. The ability of licensors to use algorithms in determining license costs would allow for specific licenses that are tailored to an individual consumer’s intended uses. In the case of a webcast, for instance, a PRO’s algorithm may determine that based on the size of the site, level of interactivity, and estimated number of musical work performances, the fee for a one-year blanket license is \$5,000. If the consumer is seeking a shorter or longer license, the Clearinghouse might automatically prorate that total. The same could be done for the record label’s sound recording digital performance license quote. Alternatively, the Clearinghouse might require standardized licensing terms, such as six month intervals, to which all performance license algorithms must be adapted.²²⁸

G. The Clearinghouse’s Future

Finally, there is the continuing difficulty in clearly identifying whether some requested digital uses invoke performance, reproduction, or distribution rights, and how the Clearinghouse would adapt to future digital music innovations. As discussed in Part II, copyright contentions abound in such areas as “incidental” and *235 “server” reproductions.²²⁹ Furthermore, the next generation of digital music distribution will undoubtedly raise even more complex licensing concerns.

There is no clear solution as to who would be given authority to decide such issues for purposes of the Clearinghouse. One option is to leave it to the board of directors. Presumably, it is in the interest of all members of the Clearinghouse to compromise and establish a fair and equitable solution to the problem of overlapping rights in order to implement the Clearinghouse and begin effectively competing in the digital music marketplace.²³⁰ So long as the board consists of members representing disparate interests, such conflicts can be resolved privately in an efficient and mutually beneficial manner.²³¹ Although consensus among industry interests has been difficult in the past, the Clearinghouse provides a more flexible opportunity for license experimentation that can quickly respond to market demands. Furthermore, because the Clearinghouse requires that all valid license requests be fulfilled automatically, licensors must predetermine applicable license rights, encouraging swift (if only temporary) compromise among Clearinghouse licensors.²³² Finally, and most importantly, any decision made by the board would be subject to legislative action and judicial review.

V. Conclusion

There is no quick fix to the dilemma of digital music licensing. Many reformers seeking to significantly restructure the music

licensing landscape suffer from what has been termed the “nirvana fallacy,” believing that a new system will better facilitate rights that have taken other organizations decades to establish.²³³ In addition, the reformers fail to adequately consider the logistical difficulty in altering *236 a complex licensing network made up of long-standing organizations, which represent millions of copyright holders nationwide.

The Clearinghouse proposal suggests a compromise, creating a unified online platform where licensing entities can come together to streamline the process by which licenses are obtained, thus increasing music licensing transactions and thereby promoting the legal distribution of music online. Such collaboration and compromise is both necessary and overdue.

One of the greatest strengths of the Clearinghouse proposal is its preservation of the existing licensing structure. This preservation ensures that disparate interests maintain their rightful place at the bargaining table. Because licenses are offered on a non-refusal basis, holdout behavior is largely eliminated on the Clearinghouse. Furthermore, antitrust concerns are mitigated by the division among licensors and the lack of license pooling. Consumers are provided with true one-stop license shopping at a central online location, providing a convenient, easily adaptable, and secure system with the capacity to handle thousands of transactions every day. The Clearinghouse also provides an efficient way to manage and store the licensing organizations’ enormous music catalogs, as well as the detailed accounts of all Clearinghouse users. Finally, the Clearinghouse could be implemented with virtually no modification to the Copyright Act or interference with prior judicial rulings.

In a time when consumers can book an online vacation package that includes hotels, flights, cruises, excursions, and all applicable taxes and fees from a single website, it seems natural to suggest that the various music licensing entities do much the same: combine in the interest of mutual benefit and the promise of lower transaction costs for all involved. If the Clearinghouse proves effective in practice, it may one day render the current process of music licensing as antiquated as the travel agent is to vacation bookings today.

Footnotes

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¹ This article is a part of a duo of works by the author to be published this year on music copyright issues in the United States. While both works contain some overlap in the historical analysis, each work addresses a separate and distinct issue. This article proposes a solution to streamline music licensing in a digital era; the second work, titled “The Super Brawl: The History and Future of the Sound Recording Performance Right,” examines the proposed Performance Rights Act and suggests an alternative solution for the expansion of sound recording performance rights online. The second work is scheduled to be published in Volume 16, Fall 2009 issue, of the Michigan Telecommunications & Technology Law Review.

² Measured by the total percentage change in the value of worldwide recorded music sales between 2000 and 2007. International Federation of the Phonographic Industry, Music Market Statistics: Recorded Music Sales, http://www.ifpi.org/content/section_statistics/index.html (last visited Oct. 28, 2009) (follow “Recorded Music Sales” hyperlinks for years 2000-07).

³ This percentage represents the difference in the number of CD, cassette, LP/EP, and digital album units shipped between 1997 and 2007. Recording Industry Association of America, 2007 Year-End Shipment Statistics: Manufacturers’ Unit Shipments and Retail Dollar Value, <http://76.74.24.142/81128FFD-028F-282E-1CE5-FDBF16A46388.pdf> (last visited Oct. 28, 2009).

⁴ See, e.g., Metro-Goldwyn-Mayer Studios, Inc. v. Grokster, Ltd., 545 U.S. 913, 919-20 (2005); *In re Aimster Copyright Litig.*, 334 F.3d 643, 645 (7th Cir. 2003); A&M Records, Inc. v. Napster, Inc., 239 F.3d 1004, 1010-11 (9th Cir. 2001); see also Mark F. Schultz, *Fear and Norms and Rock & Roll: What Jambands Can Teach Us About Persuading People to Obey Copyright Law*, 21 Berkeley Tech. L.J. 651, 661 (2006) (“The RIAA’s experience with its lawsuits has echoed the general experience with such deterrence-based strategies: they are enthusiastically pursued but not necessarily effective.”).

⁵ See Robert C. Piasentin, *Unlawful? Innovative? Unstoppable? A Comparative Analysis of the Potential Legal Liability Facing P2P End-Users in the United States, United Kingdom and Canada*, 14 Int’l J.L. & Info. Tech. 195, 229-31 (2006) (“For Owners to

effectively compete with the current P2P networks on the basis of cost and services, they must revamp their business models.”); Copyright Office Views on Music Licensing Reform: Hearing Before the Subcomm. on Courts, the Internet, and Intellectual Property of the H. Comm. on the Judiciary, 109th Cong. 17 (2005) [hereinafter Copyright Office Views] (prepared statement of Marybeth Peters, Register of Copyrights, U.S. Copyright Office) (“Legal music services can combat piracy only if they can offer what the ‘pirates’ offer.”).

⁶ See Jefferey W. Natke, *Collapsing Copyright Divisibility: A Proposal for Situational or Medium Specific Indivisibility*, 2007 Mich. St. L. Rev. 483, 491-500 (2007).

⁷ *Id.* at 501-31.

⁸ W. Jonathan Cardi, *Uber-Middleman: Reshaping the Broken Landscape of Music Copyright*, 92 Iowa L. Rev. 835, 838 (2007).

⁹ See *id.*

¹⁰ Lydia Pallas Loren, *Untangling the Web of Music Copyrights*, 53 Case W. Res. L. Rev. 673, 676 (2003).

¹¹ See, e.g., Raymond Shih Ray Ku, *The Creative Destruction of Copyright: Napster and the New Economics of Digital Technology*, 69 U. Chi. L. Rev. 263, 294 (2002).

¹² See generally Natke, *supra* note 6; Cardi, *supra* note 8; Loren, *supra* note 10.

¹³ See Expedia, <http://www.expedia.com> (last visited Oct. 28, 2009) (selling travel packages that include airfare, car rentals, cruise tickets, and hotel accommodations); Travelocity, <http://www.travelocity.com> (last visited Oct. 28, 2009) (same).

¹⁴ See Missy Sullivan, *Vacation Wars*, Forbes.com, Mar. 20, 2003, http://www.forbes.com/best/2003/0320/001_print.html (describing the price-bundling services of Orbitz, Travelocity, and Expedia).

¹⁵ See American Antitrust Institute, *Network Access, Regulation and Antitrust* 209 (Diana L. Moss ed., Routledge 2005) (describing the Justice Department’s investigation and continued allowance of the Orbitz business structure); see also William F. Adkinson, Jr. & Thomas M. Lenard, *Orbitz: An Antitrust Assessment*, 16 Antitrust 76, 76 (2002) (discussing the antitrust concerns raised by Congress and the Department of Transportation in response to Orbitz’s launch).

¹⁶ See Harry First, *Online Music Joint Ventures: Taken for a Song* 10-16 (N.Y. Univ. Law & Econ. Research Paper Series, Working Paper No. 04-006, 2004), available at <http://ssrn.com/abstract=508685> (describing the history of online music ventures).

¹⁷ See Steven Levy, *The Perfect Thing: How the iPod Shuffles Commerce, Culture, and Coolness* 155 (2006) (noting that Steve Jobs, the creator of Apple iTunes, recognized early on the potential in making access to legal music online easier, pointing out that “people pay good money for bottled water when a free alternative is the turn of a faucet away”); see also *infra* note 190 (discussing the enormous market success of online travel clearinghouses).

¹⁸ See Natke, *supra* note 6, at 495-501.

¹⁹ See Natke, *supra* note 6, at 495-501; see also Cardi, *supra* note 8, at 852-66.

²⁰ See 17 U.S.C. §102(a)(2) (2006) (“Works of authorship include ... musical works, including any accompanying words”); 17 U.S.C. §102(a)(7) (2006) (“Works of authorship include ... sound recordings.”).

²¹ Donald S. Passman, *All You Need to Know About the Music Business* 206-07 (6th ed. 2006); see also Al Kohn & Bob Kohn, *Kohn on Music Licensing* 107-57 (3d ed. 2002) (describing songwriter agreements with music publishers).

²² Kohn & Kohn, *supra* note 21, at 702-03, 904-07.

²³ Kohn & Kohn, *supra* note 21, at 702-03, 904-07.

²⁴ Kohn & Kohn, *supra* note 21, at 1312.

²⁵ Kohn & Kohn, *supra* note 21, at 1311-12.

²⁶ See M. William Krasilovsky et al., *This Business of Music: The Definitive Guide to the Business and Legal Issues of the Music Industry* 27 (10th ed. 2007). This practice has resulted in significant controversy, including whether sound recording artists may exercise termination rights. See Abbott M. Jones, *Get Ready Cause Here They Come: A Look at Problems on the Horizon for Authorship and Termination Rights in Sound Recordings*, 31 Hastings Comm. & Ent. L.J. 127, 130-31, 137-38 (2008).

²⁷ Kohn & Kohn, *supra* note 21, at 10-11.

²⁸ Kohn & Kohn, *supra* note 21, at 10-11.

²⁹ 17 U.S.C. §106(1), (3), (4) (2006).

³⁰ See 17 U.S.C. §101 (2006) (explaining that to “perform” a work means to “recite, render, play, dance, or act it, either directly or by means of any device or process” and to do so publicly means to “perform or display it at a place open to the public or at any place where a substantial number of persons ... is gathered”).

³¹ Kohn & Kohn, *supra* note 21, at 903, 1284-87.

³² See Passman, *supra* note 21, at 201 (“Even though devices haven’t reproduced sound ‘mechanically’ since the 1940s, the name has stuck and the monies paid to copyright owners for the manufacture and distribution are still called mechanical royalties.”).

³³ See §101 (defining phonorecords as “material objects in which sounds ... are fixed by any method now known or later developed”).

³⁴ See Krasilovsky et al., *supra* note 26, at 145.

³⁵ See Krasilovsky et al., *supra* note 26 at 145-47.

³⁶ See Krasilovsky et al., *supra* note 26, at 145-47.

³⁷ Robert A. Gorman & Jane C. Ginsburg, *Copyright: Cases and Materials* 678 (7th ed. 2006).

³⁸ Krasilovsky et al., *supra* note 26, at 145.

³⁹ Krasilovsky et al., *supra* note 26, at 145.

⁴⁰ See *United States v. Am. Soc'y of Composers, Authors & Publishers*, 1940-43 Trade Cas. (CCH) P 56,104 (S.D.N.Y. Mar. 4, 1941); see also *United States v. Broad. Music, Inc.*, 1996-1 Trade Cas. (CCH) P 71,378 (S.D.N.Y. Nov. 18, 1994) (modifying BMI's original consent decree to include a fee determination provision similar to that of ASCAP's).

⁴¹ Krasilovsky et al., *supra* note 26, at 165.

⁴² Krasilovsky et al., *supra* note 26, at 165, 176-77.

⁴³ Kohn & Kohn, *supra* note 21, at 1308.

⁴⁴ Kohn & Kohn, *supra* note 21, at 1308.

⁴⁵ Act of Mar. 4, 1909, ch. 320, §1(e), 35 Stat. 1075, 1076 (current version at 17 U.S.C. §115 (2006)) (incorporated into the 1976 Copyright Act).

⁴⁶ See 17 U.S.C. §115(a)-(c) (2006) ("When phonorecords of a ... musical work have been distributed to the public ... any other person ... may ... obtain a compulsory license to make and distribute phonorecords of the work.").

⁴⁷ Paul Goldstein, *Copyright's Highway: from Gutenberg to the Celestial Jukebox* 53 (rev. ed., Stanford Univ. Press 2003).

⁴⁸ See 17 U.S.C. §115(c)(5) (2006); Gorman & Ginsburg, *supra* note 37, at 595 ("Harry Fox allows reporting [of royalties] by calendar quarter"); see also Kohn & Kohn, *supra* note 21, at 683 (explaining the monthly reports and royalty payments required under the compulsory statute).

⁴⁹ See Robert P. Merges, *Contracting into Liability Rules: Intellectual Property Rights and Collective Rights Organizations*, 84 Cal. L. Rev. 1293, 1310 (1996).

⁵⁰ Act of Oct. 15, 1971, Pub. L. No. 92-140, 85 Stat. 391 (Act effective Feb. 15, 1972).

⁵¹ See Krasilovsky et al., *supra* note 26, at 64.

⁵² See Krasilovsky et al., *supra* note 26, at 69.

⁵³ Kohn & Kohn, *supra* note 21, at 1296-97.

⁵⁴ Kohn & Kohn, *supra* note 21, at 1296-97.

⁵⁵ Kohn & Kohn, *supra* note 21, at 1296-97.

⁵⁶ S. Rep. No. 93-983 at 225-26 (1974); see also Erich Carey, *We Interrupt This Broadcast: Will the Copyright Royalty Board's March 2007 Rate Determination Proceedings Pull the Plug on Internet Radio?*, 19 Fordham Intell. Prop. Media & Ent. L.J. 257, 264-65 (2008).

⁵⁷ Kohn & Kohn, *supra* note 21, at 1296-97. Note that a general performance right in sound recordings still does not exist. However, recent legislation introduced in the House and the Senate seeks to expand sound recording performance rights to encompass terrestrial AM/FM radio transmissions. See *Performance Rights Act*, S. 379, H.R. 848, 111th Cong. (2009).

⁵⁸ See *Digital Performance Right in Sound Recordings Act of 1995*, Pub. L. No. 104-39, 109 Stat. 336; 17 U.S.C. §106(6) (2006).

⁵⁹ See *Bonneville Int'l Corp. v. Peters*, 347 F.3d 485, 488 (3d Cir. 2003) (“The recording industry was concerned that the traditional balance that had existed with the broadcasters would be disturbed and that new, alternative paths for consumers to purchase recorded music (in ways that cut out the recording industry’s products) would erode sales of recorded music.”).

⁶⁰ *Id.*; see also S. Rep. No. 104-128, at 13-14 (1995), reprinted in 1995 U.S.C.C.A.N. 356, 360 (“[T]he Committee has sought to address the concerns of record producers and performers regarding the effects that new digital technology and distribution systems might have on their core business....”); H.R. Rep. No. 104-274, at 14 (1995) (“[D]igital transmission services ... are most likely to have a significant impact on traditional record sales, and therefore pose the greatest threat to the livelihoods of those whose income depends upon revenues derived from traditional record sales.”).

⁶¹ See *Digital Performance Right in Sound Recordings Act of 1995*, Pub. L. No. 104-39, §2, 109 Stat. 336, 336.

⁶² Pub. L. No. 105-304, 112 Stat. 2860 (1998); Kimberly L. Craft, *The Webcasting Music Revolution is Ready to Begin, as Soon as We Figure Out the Copyright Law: The Story of the Music Industry at War with Itself*, 24 Hastings Comm. & Ent. L.J. 1, 15-16 (2001).

⁶³ See 17 U.S.C. §114(d)(1)-(4) (2006).

⁶⁴ Kohn & Kohn, *supra* note 21, at 1329.

⁶⁵ Kohn & Kohn, *supra* note 21, at 1332-33.

⁶⁶ See §114(d)(2) (requiring, for instance, that the transmission not provide a program schedule in advance or induce the making of a phonorecord by the transmission recipient); §114(f). The statute further distinguishes between “subscription” and “nonsubscription,” noninteractive digital transmissions. §114(d). The factors considered in determining whether a subscription or nonsubscription service qualifies for a compulsory license under §114(f) differ based on whether the noninteractive service existed prior to 1998 and uses the same medium of transmission after that date that it was using before. If not, it is subject to additional statutory requirements. Compare §114(d)(2)(A)-(B) with §114(d)(2)(A), (C).

⁶⁷ See Kohn & Kohn, *supra* note 21, at 1334-36.

⁶⁸ §114(d)(4)(B)(i).

⁶⁹ See *supra* note 60.

⁷⁰ 17 U.S.C. §115(d) (2006).

71 Kohn & Kohn, *supra* note 21, at 1352-57.

72 See §115(d).

73 See Copyright Office Proposed Rules: Mechanical and Digital Phonorecord Delivery Compulsory License, 66 Fed. Reg. 14099, 14101-02 (Mar. 9, 2001) (codified at 37 C.F.R. pt. 255) (“Streaming necessarily involves a making of a number of copies of the musical work--or portions of the work-- along the transmission path to accomplish the delivery of the work.”).

74 Kohn & Kohn, *supra* note 21, at 1325, 1328-29, 1357; see also R. Anthony Reese, Copyright and Internet Music Transmissions: Existing Law, Major Controversies, Possible Solutions, 55 U. Miami L. Rev. 237, 254 (2001) (“The Harry Fox Agency appears to be taking the position that essentially every streaming transmission involves a reproduction for which payment must be made.”).

75 See §115(c)(3)(C) (requiring that when the Copyright Royalty Judges determine appropriate DPD compulsory mechanical rates, they must 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”) (emphasis added).

76 *Id.*; Kohn & Kohn, *supra* note 21, at 1332.

77 See Cardi, *supra* note 8, at 855-56 (“[T]here is some question as to whether cache copies constitute phonorecords at all. A work is not ‘fixed’ and therefore does not constitute a reproduction unless it is ‘sufficiently permanent or stable to permit it to be perceived, reproduced, or otherwise communicated for a period of more than transitory duration.’”) (citation omitted). Compare Cartoon Network LP v. CSC Holdings, Inc., 536 F.3d 121, 129-30 (2d Cir. 2008) (holding that buffer copies stored on a network as part of a digital video recording system did not constitute copies within the meaning of the Copyright Act), with MAI Sys. Corp. v. Peak Computer, Inc., 991 F.2d 511, 519 (9th Cir. 1993) (holding that a copy of software created in RAM is sufficiently fixed so as to be considered a “copy” for purposes of the Copyright Act). See also Kristen J. Mathews, Misunderstanding RAM: Digital Embodiments and Copyright, 1997 B.C. Intell. Prop. & Tech. F. 41501, 41501 (1997) (arguing that “a close reading of the [Copyright] Act and its legislative history reveals that a digital work embodied in RAM should not be considered a reproduction of the work”).

78 Kohn & Kohn, *supra* note 21, at 1325.

79 See Notice of Roundtable Regarding the Section 115 Compulsory License for Making and Distributing Phonorecords, Including Digital Phonorecord Deliveries, 72 Fed. Reg. 30039, 30040 (May, 30, 2007), available at <http://www.copyright.gov/fedreg/2007/72fr30039.pdf> (“The incidental DPD debate has been hotly contested and, along with the reform of section 115, the subject of numerous hearings before the Subcommittee on Courts, the Internet and Intellectual Property of the House Committee on the Judiciary Yet, in spite of all the attention, the legal issues remain unresolved.”).

80 United States v. Am. Soc'y of Composers, Authors & Publishers, 485 F. Supp. 2d 438, 446 (S.D.N.Y. 2007).

81 See *id.*

82 See Cardi, *supra* note 8, at 866-69 (discussing the debate over and possible legislative solutions to incidental DPDs).

83 Kohn & Kohn, *supra* note 21, at 1329.

84 U.S. Copyright Office, DMCA Section 104 Report xxvi (2001), <http://www.copyright.gov/reports/studies/dmca/sec-104-report-vol-1.pdf> (“We recommend that Congress enact legislation amending the

Copyright Act to preclude any liability arising from the assertion of a copyright owner's reproduction right with respect to temporary buffer copies that are incidental to a licensed digital transmission of a public performance of a sound recording and any underlying musical work.”).

85 See S. Rep. No. 104-128, at 13 (1995), reprinted in 1995 U.S.C.C.A.N. 356, 360 (“[T]he Committee has sought to address the concerns of record producers and performers regarding the effects that new digital technology and distribution systems might have on their core business”) (emphasis added); see also Craft, *supra* note 62, at 13-15 (arguing that “in an effort to appease the RIAA,” Congress held additional hearings and made significant revisions to the DPRSRA as part of the Digital Millennium Copyright Act).

86 Home Recording of Copyrighted Works: Hearings on H.R. 4783, H.R. 4794, H.R. 4808, H.R. 5250, H.R. 5488, and H.R. 5705 Before the Subcomm. on Courts, Civil Liberties, and the Admin. of Justice of the H. Comm. on the Judiciary, 97th Cong. 8 (1982) (opening statement of Jack Valenti, President, Motion Picture Association of America, Inc.) (commenting on the Sony Betamax video cassette recorder).

87 Kohn & Kohn, *supra* note 21, at 1328-31. Section 112 of the Copyright Act provides an exemption for one ephemeral server copy of a sound recording so long as the webcaster making the reproduction qualifies for the statutory rate under §114(f) and complies with several statutory requirements. See 17 U.S.C. §112(a)(1)(A)-(C) (2006). However, the RIAA currently contends that this exception does not apply to webcasters, and thus SoundExchange requires statutory payment for even one sound recording ephemeral server copy. See Kohn & Kohn, *supra* note 21, at 1344-47. Section 112(e) was drafted to provide a statutory rate of payment for webcasters needing to make one or more server copies (for multiple servers, for example). See H.R. Rep. No. 105-796, at 89-90 (1998) (Conf. Rep.), as reprinted in 1998 U.S.C.C.A.N. 639, 665-67. A 2007 Copyright Royalty Board ruling, however, refused to assign any distinct value to the §112 statutory rate. See Digital Performance Right in Sound Recordings and Ephemeral Recordings, 72 Fed. Reg. 24084, 24100-02 (May 1, 2007) (to be codified at 37 C.F.R. pt. 380). Thus, current regulations provide that royalties for sound recording server copies are considered to be “included” in the §114(f) statutory license and do not require separate payment. 37 C.F.R. §380.3 (2007).

88 Cardi, *supra* note 8, at 862-63.

89 Kohn & Kohn, *supra* note 21, at 1329.

90 See Rodgers & Hammerstein Org. v. UMG Recordings, Inc., No. 00 CIV. 9322(JSM), 2001 WL 1135811, at *9-10 (S.D.N.Y. Sept. 26, 2001) (requiring an online music provider to negotiate a musical work mechanical license for the server reproductions). Note that the court did not permit the licensee to obtain a compulsory license under §115. *Id.* at *8.

91 17 U.S.C. §102(a)(2) (2006).

92 17 U.S.C. §106(1), (3)-(4) (2006).

93 Krasilovsky et al., *supra* note 26, at 145-47, 165.

94 See 17 U.S.C. §101(2006); §102(a)(7).

95 Krasilovsky et al., *supra* note 26, at 64.

96 Kohn & Kohn, *supra* note 21, at 1312.

97 Cf. S. Rep. No. 104-128, at 13 (1995), reprinted in 1995 U.S.C.C.A.N. 356, 360 (explaining that the 1995 DPRSRA was enacted to

avoid “upsetting the longstanding business and contractual relationships among record producers and performers, music composers and publishers and broadcasters that have served all of these industries well for decades”).

⁹⁸ See *Columbia Broad. Sys., Inc. v. Am. Soc'y of Composers*, 400 F. Supp. 737, 741 (S.D.N.Y. 1975) (“Prior to ASCAP’s formation in 1914 there was no effective method by which composers and publishers of music could secure payment for the performance for profit of their copyrighted works. The users of music, such as theaters, dance halls and bars, were so numerous and widespread, and each performance so fleeting an occurrence, that no individual copyright owner could negotiate licenses with users of his music, or detect unauthorized uses.”).

⁹⁹ Krasilovsky et al., *supra* note 26, at 165, 176-77.

¹⁰⁰ Krasilovsky et al., *supra* note 26, at 165.

¹⁰¹ Krasilovsky et al., *supra* note 26, at 152-55.

¹⁰² See Kohn & Kohn, *supra* note 21, at 702-03.

¹⁰³ See Mark F. Schultz, *Live Performance, Copyright, and the Future of the Music Business*, 43 U. Rich. L. Rev. 685, 690 (2009) (“Record companies have played an essential (albeit much-maligned) role of absorbing both the risks and the costs in the recording business.”); see also Cardi, *supra* note 8, at 869 (“[A] majority of albums by performing artists are commercial failures. This high rate of failure forces labels to rely on a modified shotgun approach in developing talent, a strategy that entails recording a correspondingly large number of songs In light of this volume, the industry’s licensing costs are enormous.”) (footnote omitted).

¹⁰⁴ See Robert P. Merges, *The Continuing Vitality of Music Performance Rights Organizations* 15, 26-27 (Univ. of Cal., Berkeley Sch. of Law, Pub. Law & Legal Theory Research Paper Series, Paper No. 1266870, 2008), available at <http://ssrn.com/abstract=1266870>.

¹⁰⁵ Performance Rights Act: Hearing on H.R. 4789 Before the Subcomm. on Courts, the Internet, and Intellectual Property of the H. Comm. on the Judiciary, 110th Cong. 47 (2008) (statement of Steven W. Newberry, President and CEO, Commonwealth Broadcasting Corporation).

¹⁰⁶ See Merges, *supra* note 104, at 24-26, 33.

¹⁰⁷ See Schultz, *supra* note 103, at 690.

¹⁰⁸ See *infra* Part III.

¹⁰⁹ See Natke, *supra* note 6, at 491-508 (discussing the history and importance of the “Doctrine of Indivisibility” in music copyright).

¹¹⁰ See Natke, *supra* note 6, at 491-508.

¹¹¹ See generally David A. Vise & Mark Malseed, *The Google Story* (2005) (providing the story behind the creation and growth of Google); Adam Cohen, *The Perfect Store: Inside eBay* (Back Bay Books 2003) (2002) (discussing the origins and growth of eBay).

¹¹² See Levy, *supra* note 17, at 156 (“Unlike an upstart founder of some punk Internet start-up or an expatriate Microsoft executive, he [(Steve Jobs)] was a full equal of, and sometimes held superior status to, the top executives he wooed.”).

¹¹³ See Levy, *supra* note 17, at 156.

¹¹⁴ Seth Mnookin, Universal’s CEO Once Called iPod Users Thieves. Now He’s Giving Songs Away, *Wired Magazine*, Nov. 27, 2007, at 5, available at http://www.wired.com/entertainment/music/magazine/15-12/mf_morris (quoting Universal Music Group’s CEO as admitting that: “[The industry] just didn’t know what to do [about music and digital technology]. It’s like if you were suddenly asked to operate on your dog to remove his kidney. What would you do?”).

¹¹⁵ See Schultz, *supra* note 4, at 658-62 (discussing the problem of music piracy).

¹¹⁶ See Loren, *supra* note 10, at 676 (calling for reform to the Copyright Act to assure compensation to authors in a world of digital delivery of music); see also Schultz, *supra* note 4, at 661 (discussing the increasingly widespread problem of music piracy and the failure of recent strategies to stop it).

¹¹⁷ See Loren, *supra* note 10, at 702-03 (proposing ways to reform copyright law and their potential negative effects); see generally Cardi, *supra* note 8, at 879-90 (discussing a recommendation for industry-reformative regulation).

¹¹⁸ See Loren, *supra* note 10, at 716-17.

¹¹⁹ Loren, *supra* note 10, at 717.

¹²⁰ Loren, *supra* note 10, at 717-18.

¹²¹ Loren, *supra* note 10, at 721.

¹²² Loren, *supra* note 10, at 718.

¹²³ Loren, *supra* note 10, at 718-19.

¹²⁴ See Krasilovsky et al., *supra* note 26, at 144 (“A central licensing agency such as ASCAP is the only practical way that copyright proprietors may enjoy their rights under the federal copyright laws [S] ingle copyright owners cannot deal individually with all users or individually police the use of their songs”) (quoting a Solicitor General’s brief submitted to the United States Supreme Court in 1967).

¹²⁵ See Loren, *supra* note 10, at 719.

¹²⁶ See Krasilovsky et al., *supra* note 26, at 143-44.

¹²⁷ See Krasilovsky et al., *supra* note 26, at 143-44.

¹²⁸ See Loren, *supra* note 10, at 719 (conceding that “as new means of exploitation develop, we may see fights” over control of those means).

¹²⁹ See Loren, *supra* note 10, at 719.

¹³⁰ See 17 U.S.C. §115 (2006) (“In the case of nondramatic musical works, the exclusive rights ... to make and to distribute phonorecords of such works, are subject to compulsory licensing under the conditions specified by this section.”); Kohn & Kohn, *supra* note 21, at 421-22 (“One of the benefits of this compulsory license provision is that it appears to be an effective solution to the split copyright syndrome insofar as it facilitates the clearing of licenses to use music in sound recordings”); Ankur Srivastava, *The Anti-Competitive Music Industry and the Case for Compulsory Licensing in the Digital Distribution of Music*, 22 *Touro L. Rev.* 375, 445-60 (2006).

¹³¹ See Kohn & Kohn, *supra* note 21, at 417, 421.

¹³² See Kohn & Kohn, *supra* note 21, at 417, 421

¹³³ See 17 U.S.C. §115(b)(1).

¹³⁴ *Id.* §115(c)(1).

¹³⁵ *Id.* §115(b)(1).

¹³⁶ Srivastava, *supra* note 130, at 449.

¹³⁷ Srivastava, *supra* note 130, at 449.

¹³⁸ See Natke, *supra* note 6, at 509 (“Coming to a legislative consensus will be difficult and may include significant start-up costs and concerns over implementation.”); Posting of David Oxenford to Broadcast Law Blog, <http://www.broadcastlawblog.com/archives/on-line-media-copyright-office-holds-a-roundtable-discussion-of-the-mechanical-royalty-an-other-confusing-royalty-for-the-use-of-music-on-the-internet.html> (June 17, 2007) (reporting that at the Copyright Roundtable, agreement among industry representatives on “Congressional action did not look imminent”).

¹³⁹ Copyright Office Views, *supra* note 5, at 14 (prepared statement of Marybeth Peters, Register of Copyrights, U.S. Copyright Office).

¹⁴⁰ See *supra* note 57 and accompanying text.

¹⁴¹ See *supra* note 57 and accompanying text.

¹⁴² See Cardi, *supra* note 8, at 887.

¹⁴³ Cardi, *supra* note 8, at 882, 887.

¹⁴⁴ Cardi, *supra* note 8, at 881, 887.

¹⁴⁵ Copyright Office Views, *supra* note 5, at 21-27 (prepared statement of Marybeth Peters, Register of Copyrights, U.S. Copyright Office).

¹⁴⁶ Copyright Office Views, *supra* note 5, at 22 (prepared statement of Marybeth Peters, Register of Copyrights, U.S. Copyright Office).

¹⁴⁷ Copyright Office Views, *supra* note 5, at 22 (prepared statement of Marybeth Peters, Register of Copyrights, U.S. Copyright Office).

¹⁴⁸ Copyright Office Views, *supra* note 5, at 21-22 (prepared statement of Marybeth Peters, Register of Copyrights, U.S. Copyright Office).

¹⁴⁹ Copyright Office Views, *supra* note 5, at 29 (prepared statement of Marybeth Peters, Register of Copyrights, U.S. Copyright Office).

¹⁵⁰ See Skyla Mitchell, *Reforming Section 115: Escape from the Byzantine World of Mechanical Licensing*, 24 *Cardozo Arts & Ent. L.J.* 1239, 1270 (2007) (“As the representative for NMPA, parent organization of HFA, Robinson more stridently opposed the Reform Act as ‘fatally flawed,’ outlining a litany of criticisms.”).

¹⁵¹ See Copyright Office Views, *supra* note 5, at 91 (statement by Del R. Bryant, President of BMI) (“It appears as drafted to enable any music publisher and potentially any copyright owner or aggregator to become an MRO. We do not believe that creating a world of dozens (or hundreds) of MROs necessarily would be an improvement over the current landscape.”).

¹⁵² See Copyright Office Views, *supra* note 5, at 91, 99 (statement by Del R. Bryant, President of BMI).

¹⁵³ See Cardi, *supra* note 8, at 884 (“[T]he separate licensing of complementary copyrighted works ... leaves unchecked the costs to potential licensees of obtaining and servicing licenses from two sets of entities.”) (footnote omitted).

¹⁵⁴ See Copyright Office Views, *supra* note 5, at 63 (response from the National Music Publishers’ Association, Inc. in response to the testimony of Marybeth Peters, Register of Copyrights) (“[I]t is entirely conceivable that several MROs could emerge and complicate things even more.”).

¹⁵⁵ See Copyright Office Views, *supra* note 5, at 91 (statement by Del R. Bryant, President of BMI) (“[W]e question whether the Department of Justice will support the Copyright Office’s ‘MRO’ concept.”).

¹⁵⁶ See 15 U.S.C. §1 (2006). Note that the Copyright Office suggested an antitrust exemption in its draft revision of 17 U.S.C. §115(a)(5). Copyright Office Views, *supra* note 5, at 30 (“The rights and obligations of this subsection shall apply notwithstanding the antitrust laws”).

¹⁵⁷ See Merges, *supra* note 104, at 4 (suggesting that “[p]roposals to consolidate music rights ... would undermine the gains songwriters have made since the advent of PROs”).

¹⁵⁸ See Gorman & Ginsburg, *supra* note 37 (statements of ASCAP, BMI, and SESAC) (“ASCAP and BMI do not have any administrative structure in place to deal with mechanical rights. The proposal thus would penalize songwriters and publishers, who would have to pay the costs of creating and administering such a structure.”). Resisting any change to the musical work licensing structure itself, ASCAP, BMI, and HFA favor an antitrust exemption permitting each musical work organization the right to grant digital musical work “unilicenses.” Copyright Office Views, *supra* note 5, at 90, 99. They emphasize that this would solve digital challenges, while maintaining the current licensing structure. Copyright Office Views, *supra* note 5, at 90, 99;

¹⁵⁹ While it is true that both PROs and HFA represent songwriters and publishers, their respective clientele and licensing practices differ significantly. See Kohn & Kohn, *supra* note 21, at 702-03, 904-07. ASCAP and BMI regularly work with terrestrial

broadcasters, webcasters, and commercial business entities to issue blanket performance licenses. Gorman & Ginsburg, *supra* note 37, at 678. HFA, on the other hand, works with record labels and artists, individually clearing the mechanical rights of musical works necessary for large-scale reproduction and dissemination of phonorecords and digital phonorecord deliveries. Gorman & Ginsburg, *supra* note 37, at 595-96. These structural and procedural considerations have resulted in industry-wide condemnation of an MRO proposal. See *supra* note 158.

¹⁶⁰ See *supra* note 156; Copyright Office Views, *supra* note 5, at 55-56; see also Merges, *supra* note 104, at 4, 23-24 (describing defects of reform proposals and social costs of creating a single licensing body).

¹⁶¹ See, e.g., Merges, *supra* note 104, at 27 (“What this history shows is that the combination of competition and reasonable regulation has served songwriters well for a long time.”).

¹⁶² Merges, *supra* note 104, at 22 (arguing that reformers are “motivated by the same desire ...: the dream of lowered transaction costs.”); see also Loren, *supra* note 10, at 699 (“High transaction costs are a primary cause of market failure.”); Cardi, *supra* note 8, at 888 (“[T]he joint licensing of musical composition and sound recording copyrights is central to the goal of reducing transaction costs and inefficient pricing in music licensing.”).

¹⁶³ See discussion, *supra* Part III.A.

¹⁶⁴ See Copyright Office Views, *supra* note 5, at 10 (statement of Marybeth Peters, Register of Copyrights, U.S. Copyright Office).

¹⁶⁵ Cardi, *supra* note 8, at 885.

¹⁶⁶ Natke, *supra* note 6, at 504.

¹⁶⁷ See Natke, *supra* note 6, at 504 (“Transaction costs for obtaining authorization to use copyrighted content in cyberspace should be reduced to the degree that the cost-benefit balance shifts and users find it more advantageous to comply with copyright requirements than risk litigation and a fair use defense.”).

¹⁶⁸ This paper expresses no opinion as to whether the Clearinghouse should or could be privatized, proliferated, or both, similar to its travel peers.

¹⁶⁹ The Clearinghouse model envisioned in this paper would be designed primarily for commercial users (distributors of music and commercial establishments). Thus, the term “consumers” in this section refers to commercial licensees.

¹⁷⁰ Under current consent decrees, ASCAP and BMI are not currently required to offer licenses for individual or specific groups of works from their content libraries. Performing rights organizations generally issue only blanket licenses for their entire repertoire based on the duration and scale of use. See *United States v. Am. Soc'y of Composers, Authors & Publishers*, 331 F.2d 117, 121-22 (2d Cir. 1964) (holding that ASCAP is “not bound to grant every kind of license” requested by a television network); *United States v. Broad. Music, Inc.*, 275 F.3d 168, 174 (2d Cir. 2001) (applying the holding of *Am. Soc'y to BMI*). However, in the interest of increased online licensing transactions, there is nothing preventing performance rights organizations from offering more specific licenses, if they so choose. See, e.g., *United States v. Broad. Music, Inc.*, 1996-1 Trade Cas. (CCH) P71,378, (S.D.N.Y. Nov. 18, 1994) (noting specifically that BMI’s original consent decree allows the organization to “license ... any, some or all of the compositions in defendant’s repertory”) (emphasis added); see also First, *supra* note 16, at 22 (“[T]he efficiency which justified the refusal to offer individual licenses likely no longer holds.”).

¹⁷¹ See Cardi, *supra* note 8, at 853 (“The greater flexibility a copyright owner has to match the price of a product to the price the consumer is willing to pay, the more efficient the market.”). While this paper does not consider “synch” licenses for use in audiovisual works, there appears to be no reason why such licenses could not also be offered by the clearinghouse.

¹⁷² Copyright Office Views, *supra* note 5, at 101 (letter from Marybeth Peters, Register of Copyrights, U.S. Copyright Office) (“It is my understanding that Section VI of the consent decree that governs the American Society of Composers, Authors and Publishers (‘ASCAP’) requires that ASCAP grant to any music user who makes a written request a non-exclusive license Article XIV(A) of the consent decree that governs Broadcast Music, Inc. (‘BMI’) has been construed to establish a similar requirement.”).

¹⁷³ BMI has already implemented an online licensing process that asks licensees questions regarding their business structure similar to those proposed in this section. See BMI.com, Licensing, <http://www.bmi.com/licensing> (last visited Oct. 28, 2009).

¹⁷⁴ The Clearinghouse’s determination of applicable licenses would be largely undisputed for the majority of commercial uses. For information on how the Clearinghouse would license contested digital uses, see *infra* Part IV.G.

¹⁷⁵ This would apply to a PRO’s musical work performance right license. See, e.g., Simon H. Rifkind, *Music Copyrights and Antitrust: A Turbulent Courtship*, 4 *Cardozo Arts & Ent. L.J.* 1, 6-10 (1985).

¹⁷⁶ Alternatively, this initial screening question might be a part of the registration process.

¹⁷⁷ Currently, licensees must negotiate with each PRO individually, resulting in increased transaction costs. While PROs have developed methods for granting blanket licenses online to facilitate this process, there is currently no way to obtain a license from all three major PROs at once--a necessity for any establishments wishing to play a wide variety of music. By offering performance licenses from all PROs at a central location, the Clearinghouse would increase the overall number of performance licenses issued by PROs.

¹⁷⁸ See *supra* note 40 and accompanying text.

¹⁷⁹ This paper takes no position as to the maximum number of works that might be made available to a single licensee via the site. See, e.g., HFA’s Songfile, <http://www.harryfox.com/public/songfile.jsp> (last visited Oct. 28, 2009) (permitting consumers to obtain a mechanical license for no more than 2,500 musical works online).

¹⁸⁰ Under §114 of the Copyright Act, Janet’s intended streaming use would likely be considered interactive, which would require direct negotiation for a digital performance license with the sound recording copyright owner. See 17 U.S.C. §114(f)(2) (2006). On the Clearinghouse, direct negotiation is replaced with a specialized algorithm that can take into account such factors as the level of interactivity of the intended use, number of songs requested, popularity of the songs, and size of the site.

¹⁸¹ In other words, each song has all potential licensors associated with it. If, for example, the user identifies that he or she is seeking only to publicly perform the work, the Clearinghouse would include only those licensors which represent the applicable performance rights in the transaction.

¹⁸² As discussed previously, Janet may also have to compensate HFA for her “source phonorecords” or server copies of the musical works. See *supra* note 87 and accompanying text. For a discussion of the how the Clearinghouse might resolve this and other controversial digital licenses, see *infra* Part IV.G.

¹⁸³ Janet’s use would require a sound recording performance right under the Digital Performance Right in Sound Recordings Act of 1995, which created a limited sound recording performance right for digital performances--in this case, the interactive digital music streams. See 17 U.S.C. §106(6) (2006).

¹⁸⁴ As a means of encouraging businesses, the Clearinghouse might establish a payment plan. Not only would a payment plan system assist emerging businesses, but it would also allow licensors to periodically audit consumer uses and ensure continued adherence to licensing terms.

185 Publishers and record labels might also be able to automatically license new works to Clearinghouse members, streamlining the licensing process for distributors of popular music.

186 PROs have a long history of conducting investigations to ensure license compliance. See, e.g., *Broad. Music, Inc. v. 84-88 Broadway, Inc.*, 942 F. Supp. 225, 229-30 (D.N.J. 1996) (describing the infringement reports of investigators hired by BMI); *Am. Soc'y of Composers, Authors, & Publishers v. Pataki*, 930 F. Supp. 873, 876-77 (S.D.N.Y. 1996) (explaining the role of BMI and ASCAP investigators).

187 For instance, once a user has registered, the Clearinghouse might require forms of proof such as business status or website ownership.

188 See First, *supra* note 16, at 26 (“Firms in control of essential inputs do not usually want to help create competitors.”).

189 See First, *supra* note 16, at 26 (finding that the anticompetitive effects of online music ventures did not materialize as predicted)

190 A recent University of Minnesota study evaluated the effects of increased “market transparency” produced by online travel clearinghouses like Orbitz and Travelocity, and found that “market transparency influences the potential size of a market and the price elasticity of demand” resulting in an “extraordinary” growth in market size and sales. Nelson Granados et al., *Orbitz, Online Travel Agents and Market Structure Changes in the Presence of Technology-Driven Market Transparency* 32, 16 (Carlson Sch. Of Mgmt. Info. & Decision Sciences, Working Paper No. 326, 2003), available at http://misrc.csom.umn.edu/workingpapers/2003/0326_070903.pdf.

191 See SoundExchange, <http://soundexchange.com> (follow the “About” hyperlink, then follow the “Board of Directors/Executive Staff” hyperlink) (last visited Oct. 28, 2009).

192 Id. (follow the “FAQ” hyperlink, then follow the “What is SoundExchange?” and “When was SoundExchange Founded?” hyperlinks).

193 Id. (follow the “About” hyperlink, then follow the “Who governs SoundExchange?” hyperlink). Note that the Clearinghouse’s board would be more diverse, including musical work copyright owner representatives (PROs, publishers, and songwriters).

194 Id. (follow the “About” hyperlink, then follow the “Background” hyperlink).

195 If the Clearinghouse proposal is implemented, SoundExchange’s board would of course be free to operate in the same manner that it does today. Sound recording digital performance royalties would be distributed from the Clearinghouse to SoundExchange, which would then split those royalties in whatever way SoundExchange deems appropriate. The Clearinghouse’s board of directors, on the other hand, would have no analogous distribution discretion.

196 Ultimately, the board could be made an insignificant part of the day-to-day operations of the Clearinghouse. Once the site is active and an administrative operation is put in place, the board could meet occasionally to discuss membership, site maintenance, and relevant or novel aspects of digital licensing.

197 See, e.g., Sullivan, *supra* note 14 (discussing the bundled travel packages offered by Orbitz, Travelocity, and Expedia).

198 See Copyright Office Views, *supra* note 5, at 18 (prepared statement of Marybeth Peters, Register of Copyrights, U.S. Copyright Office) (suggesting reforming §115 of the Copyright Act to allow legal music services to “compete with ... [and] effectively combat[] piracy”) (emphasis added).

¹⁹⁹ See Cardi, *supra* note 8, at 872 (“The potential for lengthy delays in the licensing of music via new technologies is three times as likely, as distribution services attempt to negotiate with multiple entrenched and powerful intermediaries.”).

²⁰⁰ See Cardi, *supra* note 8, at 872.

²⁰¹ Cardi, *supra* note 8, at 849 (“Unlike the copyright in musical works, none of the listed rights in sound recordings are subject to compulsory licensing.”).

²⁰² The Clearinghouse would allow labels to protect their most valuable works via differing algorithms incorporating both quantitative and qualitative factors affecting the value of sound recordings. See Kohn & Kohn, *supra* note 21, at 577-78; see also John Borland, *Music Moguls Trumped by Steve Jobs?*, *Cnet News*, Apr. 15, 2005, http://news.cnet.com/music-moguls-trumped-by-Steve-Jobs/2100-1027_3-5671705.html (“[Record labels] want to sell older titles at a discount ... and charge more for popular songs to take advantage of market demand.”).

²⁰³ See Joseph Salvo, Vice President and Senior Counsel, Sony BMG Music Entm’t, Remarks at the Fordham Intellectual Property, Media and Entertainment Law Journal Summer 2005 Symposium: Panel II: Licensing in the Digital Age: The Future of Digital Rights Management (2005), 15 Fordham Intell. Prop. Media & Ent. L.J. 1009, 1028 (2005) (“[W]ithout the cooperation of both the copyright proprietors of the musical works and the copyright proprietors of the sound recordings, we cannot get anything happening here.”); see also First, *supra* note 16, at 11 (explaining that consumers did not react favorably to the recording industry’s initial efforts to enter the online music business in part because “consumers who wanted access to all the music controlled by ... the distributors would need to subscribe to [multiple] services”).

²⁰⁴ See *supra* note 190 (discussing the enormous market success of online travel clearinghouses).

²⁰⁵ Levy, *supra* note 17, at 158 (“At the end of the day, everything follows Universal [Music Group] [T]he rest of [the record labels] just follow Universal, the strongest square.”) (quoting Sean Ryan, founder of Rhapsody).

²⁰⁶ See Copyright Office Views, *supra* note 5, at 24 (prepared statement of Marybeth Peters, Register of Copyrights, U.S. Copyright Office) (discussing potential antitrust concerns tied to the establishment of MROs); see also Copyright Office Views, *supra* note 5, at 90 (letter from Del R. Bryant, President and CEO, BMI) (noting that the “Unlicense” proposal would entail allowing an antitrust exemption); First, *supra* note 16, at 1.

²⁰⁷ In *Broadcast Music, Inc. v. Columbia Broadcast Systems, Inc.*, the Supreme Court applied the “rule of reason test” in determining that the licensing practices of ASCAP and BMI did not violate §1 of the Sherman Antitrust Act, even though the Court recognized that the policy of issuing blanket licenses substantially reduced interseller price competition. *Broad. Music, Inc. v. Columbia Broad. Sys., Inc.*, 441 U.S. 22-26 (1979). The Court relied heavily on the efficiency of blanket licenses, arguing that individual copyright owners are “inherently unable to compete fully effectively” in the licensing market. *Id.* at 23. However, while the case has generally been interpreted as justifying collaborative behavior in limited circumstances, it does not justify partial or complete pooling of distinct exclusive rights. The Columbia Broadcasting case involved only two licensing organizations, both representing only the musical work performance right. It is highly unlikely that the Court would extend the rule of reason test to collaboration between several licensing entities representing different exclusive rights. Furthermore, while the Court recognized the efficiency of collaboration for purposes of facilitating access to licenses, it does not follow that pooling multiple rights is the best way to accomplish this end. See Srivastava, *supra* note 130, at 443. The Clearinghouse proposal provides the efficiency and collaboration the Court sought to protect in Columbia Broadcasting, while maintaining the competitive autonomous structure necessary to ensure a healthy licensing market. See *Columbia Broadcasting*, 441 U.S. at 19-20 (“[O]ur inquiry must focus on whether ... the practice facially appears to be one that would always or almost always tend to restrict competition and decrease output”).

²⁰⁸ Jonathan A. Mukai, *Joint Ventures and the Online Distribution of Digital Content*, 20 *Berkeley Tech. L.J.* 781, 788 (2005).

²⁰⁹ See First, *supra* note 16, at 10-16 (describing the history of online music ventures).

210 First, *supra* note 16, at 10-11.

211 See First, *supra* note 16, at 11.

212 First, *supra* note 16, at 1.

213 See First, *supra* note 16, at 2 (“[T]he formation of these producer joint ventures was not justified by any efficiencies and ... their formation was anticompetitive.”); see also Mukai, *supra* note 208, at 797-805 (discussing the “upstream” and “downstream” anticompetitive threats posed by joint ventures).

214 This traditional type of joint venture has been proposed by numerous scholars and licensing organizations as a method for reforming the current music licensing structure. See, e.g., Cardi, *supra* note 8, at 888 (“[C]entral licensing agents might consist of joint ventures between the various industry interests.”); Lynn Hirschberg, *The Music Man*, N.Y. Times, Sept. 2, 2007, at MM26, available at <http://www.nytimes.com/2007/09/02/magazine/02rubin.t.html> (describing an all-streaming music distribution platform that Rick Rubin, co-head of Columbia Records, envisions as the future of the music industry).

215 See Srivastava, *supra* note 130, at 442-43 (arguing that record label joint ventures would “have a limited library of songs” unless complete collusion was adopted, which would undoubtedly lead to “fixing prices”).

216 This is not unlike online flight bookings (among other services), where ticket purchases can be made through a site like Expedia, or can instead be made directly through most of the airlines themselves.

217 Imagine, for instance, that instead of Apple, record labels had jointly created the iTunes music store. If Rhapsody, AOL Music, or any other online music distributor sought to obtain sound recording licenses from those same labels to create their own digital music service, there would be no incentive for the labels to license their works and in turn help create online competition. Because there is no compulsory licensing process for sound recording master use licenses, record label joint ventures could significantly restrict the online music distribution market. See First, *supra* note 16, at 26 (“Firms in control of essential inputs do not usually want to help create competitors.”).

218 See Cardi, *supra* note 8, at 871.

219 See, e.g., *A & M Records v. Napster, Inc.*, 114 F. Supp. 2d 896, 923 (N.D. Cal. 2000), aff’d in part, rev’d in part, 239 F.3d 1004 (9th Cir. 2001) (“Napster, Inc. argues that [plaintiff record labels] seek to aggrandize their monopoly beyond the scope of their copyrights by (1) restricting the flow of unsigned artists’ music, which competes with their own, and (2) controlling the distribution of music over the Internet.”); see also Natke, *supra* note 6, at 500 (“Holdout behavior is one of many problems created by overlapping rights in the digital era.”).

220 Kohn & Kohn, *supra* note 21, at 410-12.

221 See Kohn & Kohn, *supra* note 21, at 14-22 (discussing the often difficult task of determining who manages the musical work and sound recording rights); see also Cardi, *supra* note 8, at 875 (“[T]o the extent that the exclusive rights of a particular song are not administered by a major record label, HFA, or a PRO, the streaming service must track down the appropriate music publisher or recording company to negotiate additional licensing agreements.”).

222 See 17 U.S.C. §106(1)-(3) (2006); see also Cardi, *supra* note 8, at 849 (“Unlike the copyright in musical works, none of the listed rights in sound recordings are subject to compulsory licensing.”).

223 See Natke, *supra* note 6, at 500 (describing holdout behavior as an instance where a licensing entity “asks for an outrageous sum for a license” leaving the user vulnerable to an action for infringement should he or she not agree); see also Srivastava, *supra* note

130, at 436-37 (“[Holdout behavior] creates an anti-commons problem where any one of the five distributors can hold out and compel the online vendor to agree to unfavorable terms.”).

224 See, e.g., Music Reports, Inc., <http://www.musicreports.com> (last visited Oct. 28, 2009); W.G. Slantz, <http://www.wgslantz.com> (last visited Oct. 28, 2009).

225 See *supra* Figure 1.

226 See Kohn & Kohn, *supra* note 21, at 14-27 (describing the arduous process of tracking down music copyright owners).

227 While online musical work and sound recording databases exist, they are largely incomplete, divided, and functionally cumbersome. See, e.g., International Standard Musical Work Code, <http://www.iswc.org> (last visited Oct. 28, 2009); International Federation of the Phonographic Industry, <http://www.ifpi.org> (last visited Oct. 28, 2009). The Clearinghouse, in contrast, would link both musical work and sound recording performance and mechanical/master use rights automatically and concurrently during the licensing process. This would facilitate one-stop shopping and reduce consumer transaction costs even further.

228 Because mechanical and master use rights are issued on an individual basis, inconsistent durations do not pose similar licensing complications. To the extent that performance or mechanical/master use license terms conflict, the nature of common commercial exploits should compel licensors, if they have not already, to adopt substantially uniform licensing contracts.

229 See *supra* notes 72, 73, and 84 and accompanying text.

230 It is likely that such compromises have already been made on a large scale in the name of increased digital licensing transactions. Without such compromises, digital music distributors like iTunes and Rhapsody would not exist today.

231 It is important to distinguish this model of governance from that of SoundExchange, in which board members determine how royalties will be distributed. There is no “pot” from which royalties are divided under the Clearinghouse proposal. Rather, the Clearinghouse’s board of directors could negotiate to decide, for example, which licensors are implicated in a noninteractive digital music stream.

232 PROs, HFA, and record labels might compromise and adopt a “symmetrical” exemption, which exempts both incidental performances made in the course of downloading music and incidental reproductions made in the course of streaming music. See Gorman & Ginsburg, *supra* note 37, at 692-93; see also U.S. Copyright Office, *supra* note 84, at xxvi-xxvii.

233 See Merges, *supra* note 157, at 4.