

Copyright Reform Act

Prepared on behalf of



Streamlining Music Licensing to Facilitate Digital Music Delivery

March 31, 2011

by

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This Report is one of a series related to the Copyright Reform Act, a project created on behalf of Public Knowledge as a client of the Samuelson Law, Technology & Public Policy Clinic at U.C. Berkeley School of Law and the Stanford Cyberlaw Clinic.[†]

Public Knowledge is a Washington, D.C., based public interest organization that works to protect the rights of citizens and consumers to communicate and innovate in the digital age. Ensuring these rights requires a copyright law that does not unduly restrain everyday communications or new sources of creativity, and one that can account for current and future changes in technology.

[†] This Report was developed by Samuelson Law, Technology & Public Policy Clinic, including faculty Jennifer Lynch and Jennifer M. Urban and student Daniel S. Park. The Copyright Reform Act is in large part due to the excellent work of Stanford Cyberlaw Clinic students Jake Freed, Charlin Lu, and Marc Williams. We wish to thank Jonathan Band, Bruce Joseph, Paul Levy, Fred von Lohmann, Aaron Perzanowski, Jason Schultz, and Tara Wheatland for their thoughtful feedback on the CRA and/or these Reports. The opinions herein should not be attributed to them; and mistakes, of course, remain our own.

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I. INTRODUCTION

In this Report, sixth in our series, we discuss the challenges created by the jumble of rights-holders, regulations, and licensing regimes governing digital music delivery, and propose some targeted reforms to streamline the licensing and distribution of digital music.

The American public increasingly consumes music by downloading and streaming it over the Internet,¹ and for good reason: digital music delivery offers access to a greater variety of copyrighted music;² enables tailored listening;³ facilitates new methods of searching for and discovering music;⁴ and supports downloading individual tracks, which generally has become users' preferred unit of consumption.⁵ And users have proven their willingness to purchase music digitally: Apple's iTunes, the nation's largest music retailer,⁶ last year announced having sold its ten billionth song after fewer than seven years of operation.⁷

Although the music industry has been in turmoil for the last few years over the analog-to-digital transition,⁸ digital music delivery offers copyright holders the opportunity to take advantage of new and developing markets and distribution channels.⁹

¹ Mike Melanson, *Report: Digital Music Sales Will Surpass CDs in 2012*, READWRITEWEB (Jan. 14, 2010), http://www.readwriteweb.com/archives/report_digital_music_sales_will_surpass_cds_in_201.php (predicting that U.S. digital music sales will overtake physical sales in 2012).

² R. Anthony Reese, *Copyright and Internet Music Transmissions: Existing Law, Major Controversies, Possible Solutions*, 55 U. MIAMI L. REV. 237, 238 (2001) (“[C]onsumers are not limited to choosing among the items that a physical record store can stock or a mail-order catalog can list.”).

³ For example, Pandora, an on-demand internet radio service, selects what it streams to the user based on an analysis of the user's preferences. PANDORA RADIO, www.pandora.com (last visited Mar. 28, 2011).

⁴ Searching by musical phrase is a relatively recent development. Shazam is an example of a smartphone mobile application that, once activated, can recognize a song that is playing within audible range of the phone. SHAZAM, www.shazam.com (last visited Mar. 28, 2011).

⁵ See *The Future of Journalism: Hearing Before the Subcomm. on Commc'ns., Tech., and the Internet of the Sen. Comm. on Commerce, Sci., and Transp.*, 111th Congr. (2009), http://www.google.com/googleblogs/pdfs/google_mayer_testimony_050609.pdf (testimony of Marissa Mayer describing the new “atomic unit of consumption” for music as having gone from the album to the song, just as the atomic unit of consumption for the news has shifted from the newspaper to the article).

⁶ Bryan Gardiner, *Apple Grabs No. 1 Music Retail Position From Wal-Mart*, WIRED (Apr. 3, 2008), <http://www.wired.com/gadgetlab/2008/04/apple-grabs-no/>.

⁷ John Paczkowski, *iTunes: 10 Billion Songs Sold In Less Than Seven Years*, ALL THINGS DIGITAL (Feb. 24, 2010), <http://digitaldaily.allthingsd.com/20100224/apples-itunes-thanks-10-billion/>.

⁸ See, e.g., Melanson, *supra* note 1 (on the whole, U.S. music sales are declining); David Goldman, *Music's Lost Decade: Sales cut in half in 2000s*, CNNMONEY.COM (Feb. 3, 2010), http://money.cnn.com/2010/02/02/news/companies/napster_music_industry/.

⁹ See Reese, *supra* note 2 (describing how with Internet distribution, it is now possible for consumers to pay small amounts to hear a song on demand, a practice that did not exist before).

In fact, in 2009, the growth of digital music sales in the United Kingdom for the first time offset the decline in CD and DVD physical sales because of the successful licensing of new digital music services, as well as international growth.¹⁰

Despite the many benefits digital music delivery provides to both users and copyright holders, digital music delivery services constantly struggle with navigating the labyrinth of music licensing.¹¹ As the Register of Copyrights, Marybeth Peters, noted in a statement to Congress on digital music licensing in 2005, “online music services that wish to obtain licenses to make available as many nondramatic musical works as possible find it impossible to obtain the necessary reproduction and distribution rights.”¹² Not much, if anything, has changed since then. For many interested and invested in digital music delivery, the goal has been to create a “celestial jukebox”¹³ that would allow access to as many songs from as many artists as possible. However, two main problems have kept this goal out of reach. First, the lack of robust collective licensing administration for mechanical licenses¹⁴ requires licensees to seek separate licenses for each nondramatic musical work they wish to use. This makes negotiating and obtaining those licenses difficult, if not impossible. Second, the murkiness of the law surrounding the rights implicated by digital music delivery means licensees may end up paying twice for the right to digitally transmit a single work (a practice often referred to as “double dipping”).¹⁵

The first challenge for digital music rights licensees is in trying to identify, locate, and negotiate with the holders of mechanical rights. Unlike performance rights for musical compositions—virtually all of which are licensed through one of the three performing rights organizations (PROs), including the American Society of Composers, Authors, and Publishers (ASCAP); Broadcast Music, Inc. (BMI); and SESAC¹⁶—the mechanical rights necessary for digital music delivery are not centrally administered.

¹⁰ Graeme Evans, *Digital Music Sales Boost Royalties*, THE INDEPENDENT (Mar. 15, 2010), <http://www.independent.co.uk/arts-entertainment/music/news/digital-music-sales-boost-royalties-1921425.html>.

¹¹ See generally *Music Licensing Reform: Hearing Before the Subcomm. on Courts, the Internet, and Intellectual Prop. of the H. Comm. on the Judiciary*, 109th Cong. 15 (July 12, 2005) (statement of Marybeth Peters, Register of Copyrights, U.S. Copyright Office), available at <http://www.copyright.gov/docs/regstat071205.html> [hereinafter Peters, *Music Licensing Reform Statement*].

¹² *Id.*

¹³ See Paul Goldstein, *Copyright's Highway* (1994). Goldstein used the term “celestial jukebox” to describe a system that would “in a moment scan hundreds of databases” to give “tens of millions of people access to a vast range of films, sound recordings, and printed material.” *Id.* at 22.

¹⁴ Mechanical rights include the rights to reproduce and distribute a nondramatic musical work. See, e.g., *ASCAP Licensing: Common Licensing Terms*, ASCAP.COM, <http://www.ascap.com/licensing/termsdefined.html>.

¹⁵ See, e.g., Peters, *Music Licensing Reform Statement*, *supra* note 11.

¹⁶ See *infra* Section II.

The Harry Fox Agency (“HFA”) is the authorized licensor for the reproduction and distribution rights of a relatively large number of musical compositions¹⁷ and is currently the only centralized distributor of these rights. However, HFA’s catalog does not cover all nondramatic musical works.¹⁸ HFA appears to offer a type of blanket license for its catalog,¹⁹ but some features of the HFA process complicate licensing.²⁰ Furthermore, without entities to offer blanket licenses for the rights to *all* musical works, a digital music delivery service often faces the daunting task of privately negotiating licenses on a song-by-song or owner-by-owner basis.²¹ For online music services aiming to make available as many songs as possible, the transaction costs of this licensing regime can be cost-prohibitive.

Even when rights-holders can be located, digital music licensees face a second challenge: determining which rights must be licensed. The Copyright Act does not clearly define whether the acts of downloading and streaming each implicate both the reproduction and performance rights.²² For example, HFA has sought royalties for the reproduction right in the buffer copies created incidental to the process of music streaming, despite the copies’ transience.²³ Additionally, PROs have argued that services providing music downloads should not only pay royalties for reproduction and

¹⁷ THE HARRY FOX AGENCY, FAQ, <http://www.harryfox.com/public/FAQ.jsp> (last visited Mar. 28, 2011).

¹⁸ Some figures show HFA’s catalog at about sixty to sixty-five percent of available works. See ‘*Section 115 of the Copyright Act: In Need of an Update?*’ Hearing Before the Subcomm. on Courts, the Internet, and Intellectual Property of the H. Comm. on the Judiciary, 108th Cong. (Mar. 11, 2004) (Statement of Jonathan Potter, Executive Director, Digital Media Ass’n), available at <http://judiciary.house.gov/legacy/potter031104.htm>. HFA’s catalog may have grown since 2004. In a report issued in 2009, HFA stated that as of the end of 2008 “the company represents over 37,000 publishing clients, with nearly 2.3 million songs available for licensing.” See *HFA Collects almost \$307.1 Million in Royalties for its over 37,000 Affiliated Publishing Clients in 2008*, HFA Soundcheck (May 2009), available at <http://www.harryfox.com/public/SoundcheckIndex.jsp>. It further noted “[o]f the over 2.44 million mechanical licenses HFA issued in 2008, 84% were for digital formats, which include permanent digital downloads.” However, it is unclear what percentage of the market HFA’s catalog covers.

¹⁹ See *HFA Collects almost \$307.1 Million in Royalties for its over 37,000 Affiliated Publishing Clients in 2008*, *supra* note 18 (discussing a “bulk permanent download licensing program, a standardized method of submitting large quantities of license requests by exchanging digital files”).

²⁰ See discussion *infra* Section II.

²¹ See Skyla Mitchell, *Reforming Section 115: Escape From the Byzantine World of Music Licensing*, 24 CARDOZO ARTS & ENT. L.J. 1239, 1258–59 (2007) (citing Peters, *Music Licensing Reform Statement*, *supra* note 11). Licensees could opt to use the mechanical compulsory license under § 115 instead of privately negotiating license terms with rights-holders, but this approach has many burdens as well, which are discussed further in Section II, *infra*.

²² See generally, *United States v. Am. Soc’y of Composers, Authors & Publishers*, 485 F. Supp. 2d 438, 446 (S.D.N.Y. 2007).

²³ See W. Jonathan Cardi, *Über-Middleman: Reshaping the Broken Landscape of Music Copyright*, 92 IOWA L. REV. 835, 862 (2007).

distribution rights, but for the public performance right as well, even when the downloaded file is not audibly played.²⁴ These practices—which some have termed “double dipping” because they compensate rightsholders twice for the same use—have not yet been sanctioned by a court but have nonetheless influenced the pricing of licenses.²⁵

As a result of both double-dipping and the lack of central distributors of blanket licenses to mechanical rights, the monetary and transaction costs of licensing are high and result in unnecessary and sometimes insurmountable challenges to the development of digital music delivery services.²⁶ Copyright holders suffer as well, as they have a reduced ability to license their copyrighted works through new distribution channels and markets. Indeed, their livelihoods would benefit greatly if it were straightforward to sell music using comparable alternatives to illegal peer-to-peer filesharing—in short, they should support legal services that are easy to use, are reasonably priced, and carry a wide selection of copyrighted music.²⁷

To facilitate the development of digital music delivery services, we propose two reforms that will streamline the licensing of rights to reproduce and distribute digital music:²⁸

- ***The creation of digital music rights organizations (“DMROs”)***: These organizations would consolidate licensing for the reproduction, distribution, and public performance rights to nondramatic musical works, making it easy to find and obtain licenses. Under the proposal, DMROs are required to offer blanket licenses to their entire catalogs of works, to offer “gap” licenses that cover any works not found in other catalogs, to employ reasonable and nondiscriminatory licensing terms, and to establish and maintain a searchable online database of the works they are authorized to license.
- ***The clarification of the rights associated with digital transmissions***: The Copyright Act should be amended to make clear that (1) any incidental copies made to facilitate music streaming—a digital performance of a

²⁴ *Am. Soc’y of Composers, Authors & Publishers*, 485 F. Supp. 2d at 446.

²⁵ See, e.g., U.S. COPYRIGHT OFFICE, DMCA SECTION 104 REPORT, at 140 (2001), available at http://www.copyright.gov/reports/studies/dmca/dmca_study.html.

²⁶ Peters, *Music Licensing Reform Statement*, *supra* note 11.

²⁷ See DONALD S. PASSMAN, ALL YOU NEED TO KNOW ABOUT THE MUSIC BUSINESS (7th ed. 2009) (predicting that the best alternative to pirates would be an easily organized playlist that will instantly deliver any song in real time across platforms); Mitchell, *supra* note 21, at 1260; Cardi, *supra* note 23, at 837–38; Peters, *Music Licensing Reform Statement*, *supra* note 11.

²⁸ Our proposed statutory language for these reforms is available in full in Appendix A, *infra*.

nondramatic musical work—does not infringe the reproduction right, and (2) a music download—also known as a digital phonorecord delivery—does not implicate the right of public performance of the musical work.

In Section II we explain how the convoluted nature of music licensing, the lack of a central distribution channel for processing mechanical rights for digital music delivery, and certain aspects of copyright law serve as obstacles to the development of digital music delivery services. Section III details our first proposed reform, the creation of competitive DMROs, which will lower the transaction costs associated with licensing by serving as centralized licensing agencies that provide blanket licenses. Section IV describes our second proposed reform, which takes aims at “double-dipping” and overpaying for licenses by clarifying distinctions between the rights associated with downloading and streaming. In Section V, we ground our reforms in the broader context of past and present calls for reform by scholars, commentators, and government officials. However problematic music licensing has become in the context of digital music delivery, it has proven difficult to fix. We believe we have identified a subcategory of the problem that is amenable to reform. The changes we propose would strengthen our vibrant music industry, facilitate the development of new digital music delivery services and markets, and augment the public’s access to copyrighted music.

II. THE COMPLEXITY OF MUSIC LICENSING TODAY

The costly administrative burden of licensing has obstructed the development of new methods of delivering music digitally. The music licensing problem largely results from complexity: music licensing involves many rights and many rights-holders, who can be difficult both to identify and to negotiate with. In this Section, we explore how copyrights are divided among different entities in the music industry, thereby creating highly complex licensing schemes.

Navigating music licensing today is a tortuous process: there are multiple rights and multiple rights-holders associated with almost any commercially available song.²⁹ If, for example, an Internet music download service was to enable users to download copies of the song “Ev’ry Time We Say Goodbye,” written by Cole Porter and performed by Ella Fitzgerald,³⁰ as well as to allow users to preview the song via a streaming transmission that did not leave a copy of the song on the user’s hard drive,³¹ the music service would need to obtain the following rights: (1) the master license to the sound

²⁹ Mitchell, *supra* note 21, at 1252; *see also* Reese, *supra* note 2, at 839.

³⁰ We are building from an example provided by Professor Anthony Reese in his 2001 article on Internet music transmissions. *See* Reese, *supra* note 2, at 242.

³¹ Apple’s iTunes, for example, provides these download and preview services to users. APPLE iTUNES, <http://www.apple.com/itunes> (last visited Mar. 28, 2011).

recording³² of Ella’s singing; (2) the public performance right to digitally transmit the sound recording;³³ (3) the right to publicly perform Cole Porter’s nondramatic musical work; and (4) the rights to reproduce and distribute Cole Porter’s nondramatic musical work. The first three rights—for the sound recording rights and the public performance right to the musical work—are generally not difficult to acquire. The trouble arises when a licensee seeks to negotiate rights to reproduce and distribute the musical work; thus these are the rights our first proposed reform addresses.

The first and second licenses for the sound recording rights are easily found. These are generally owned by record labels rather than the performing artist or songwriter.³⁴ The record labels offer licenses to the reproduction and distribution rights in almost all sound recordings.³⁵ The entity called SoundExchange handles the digital public performance right in sound recordings,³⁶ and thus almost all the sound recording rights are aggregated within easily identified organizations.

The third license in the hypothetical above—for the public performance right in a musical work—is also easy to obtain. The copyright in the musical work covers the underlying composition of a song—the sequence of lyrics, notes, and rhythms put together by a songwriter.³⁷ The rights to the musical work, unlike those of a sound recording, are jointly owned by the song’s composer and lyricist, who will often assign their rights to a music publisher.³⁸ These publishers then authorize performing rights

³² Sound recordings are recorded musical performances or works that result from the fixation of a series of musical, spoken, or other sounds that are embodied in a material object. 17 U.S.C. § 101; Joshua Keesan, *Let it Be? The Challenges of Using Old Definitions for Online Music Practices*, 23 BERKELEY TECH. L.J. 353, 354 (2008).

³³ Note, however, that there are exemptions to the right of public performance by digital transmission of sound recordings. A service that provides nonsubscription, noninteractive broadcast transmissions, such as an airwave radio station licensed by the Federal Communications Commission, is exempt. *See* 17 U.S.C. §§ 114(d)(1)(A), 114(j)(3). There are also compulsory licenses available for other types of noninteractive transmissions, subject to limitations such as playing for no more than four tracks by the same artist in three hours. 17 U.S.C. § 114(d)(2)(C)(i), 114(j)(13). For interactive transmission services, or for services that do not comply with requirements of a compulsory license, the public performance right must be obtained. *See* Reese, *supra* note 2, at 246–49, for further explanation.

³⁴ Keesan, *supra* note 32, at 354 (citing DONALD S. PASSMAN, *ALL YOU NEED TO KNOW ABOUT THE MUSIC BUSINESS* 309 (6th ed. 2006)).

³⁵ *See* 17 U.S.C. § 106 (describing the rights of a copyright owner).

³⁶ SOUNDEXCHANGE, <http://www.soundexchange.com> (last visited Mar. 28, 2011). The Copyright Office has designated SoundExchange as the sole collective to distribute royalties from digital audio transmissions of sound recordings under 17 U.S.C. § 114(g)(2). *Notice of Designation as Collective Under Statutory License*, U.S. COPYRIGHT OFFICE, available at <http://www.copyright.gov/carp/notice-designation-collective.pdf> (last visited Mar. 28, 2011). Note that the public performance right in sound recordings is limited to digital transmission. 17 U.S.C. § 106(6).

³⁷ Keesan, *supra* note 32, at 354.

³⁸ *Id.*

organizations (“PROs”)³⁹ to license the public performance right in the musical works—a right that essentially accords the ability to play or transmit a song to the public, for example, by playing a song in a bar. As noted above, there are three PROs—ASCAP,⁴⁰ BMI,⁴¹ and SESAC.⁴² These three organizations have virtually total coverage; by going to them, a licensee can obtain the public performance right to nearly any musical work.⁴³

The fourth license in the hypothetical above—covering the rights to reproduce and distribute the nondramatic musical work—is the most difficult to come by, and in fact the task of clearing these licenses has been described as “almost Sisyphean.”⁴⁴ These rights—known together as the “mechanical rights”⁴⁵—control the ability to make and sell copies of musical works, known as phonorecords or digital phonorecords, and are typically held by music publishers.⁴⁶ Currently there are no central distribution channels set up to administer mechanical rights as the PROs do for public performance rights. The closest parallel is the Harry Fox Agency, which is the primary licensing organization for mechanical rights to musical works⁴⁷ and has informally consolidated rights for approximately sixty to sixty-five percent of the market.⁴⁸ Yet even when HFA is authorized to license the rights to a given musical work, the licensing process is arduous

³⁹ PROs are defined in 17 U.S.C. § 101, with their properties detailed in 17 U.S.C. § 114. In the Copyright Act they are referred to as performing rights societies (“PRSs”), but they are more commonly known as PROs.

⁴⁰ ASCAP, <http://www.ascap.com/> (last visited Mar. 28, 2011).

⁴¹ BMI, <http://www.bmi.com/> (last visited Mar. 28, 2011).

⁴² SESAC, <http://www.sesac.com/> (last visited Mar. 28, 2011).

⁴³ Keesan, *supra* note 32, at 356.

⁴⁴ *See* Cardi, *supra* note 23, at 876.

⁴⁵ The term “mechanical rights” arises from the early twentieth century, when Congress decided that the perforated player piano roll constituted a mechanical reproduction of a nondramatic musical work over which copyright owners had distribution and reproduction rights. 1909 Copyright Act, ch. 320, § 1(e), 35 Stat. 1075, 1076 (1909). Those rights were subject to use by others under a compulsory license. H.R. REP. NO. 60–2222, at 6 (1909). *See also* Mitchell, *supra* note 21, at 1241–43 (describing in greater detail the development of mechanical rights and the compulsory mechanical license). Mechanical rights exist for sound recordings as well, but are directly available from record labels via “master use licenses” and are not the subject of our reform. *See* Keesan, *supra* note 32, at 355 & n.12.

⁴⁶ *See, e.g.,* Jonah M. Knobler, *Public Performance Rights in Music Downloads: United States v. ASCAP and Beyond*, 11 NO. 12 J. INTERNET. L. 1 (2008).

⁴⁷ *HFA and Nielsen Broadcast Systems “Top 10 Publisher Chart” Published Exclusively in the February 27, 2010 Issue of Billboard*, HARRY FOX AGENCY (Feb. 19, 2010), <http://www.harryfox.com/public/userfiles/file/PressReleases/BDSHFAPublishersChart.pdf>. HFA is a subsidiary of the National Music Publishers’ Association (“NMPA”), an organization dedicated to the protection of music copyrights for music publishers. *See* www.nmpa.org/aboutnmpa/hfa.asp (last visited Mar. 28, 2011).

⁴⁸ *See* Statement of Jonathan Potter, *supra* note 18.

and lacks transparency.⁴⁹ According to licensees' complaints, HFA's approval process is burdensome because rather than providing a standard form license, HFA requires any potential licensee to submit an application describing its intended use of the license.⁵⁰ The process is also opaque and lengthy and frequently results in unexplained or unreasonable denials.⁵¹ Additionally, while HFA maintains a searchable database of songs,⁵² it does not guarantee that database's accuracy, so licensees have no way of knowing if a music publisher has opted out of HFA's coverage, which it can do at any time.⁵³

If HFA does not have the rights to a musical work, the licensing process is even more complex. As there are no other organizations that compete with HFA in mechanical rights licensing, licensees must first find and then negotiate with one of the thousands⁵⁴ of independent music publishers who may own the rights. And some have noted that about twenty-five percent of copyright owners cannot even be located.⁵⁵

The burden of clearing music licenses affects both large-scale, "celestial jukebox"-like music services as well as individual cover artists working on a relatively small scale.⁵⁶ But for a digital music delivery service attempting to license the rights to

⁴⁹ *Id.* (noting that unlike the PROs, which post their licenses forms publicly online, "HFA often refuses to license, or its member publishers do not permit it to license, or licensing is endlessly delayed"). *See also* Cardi, *supra* note 23, at 843 n.40 ("The language of the HFA form mechanical license is ambiguous at best").

⁵⁰ Statement of Jonathan Potter, *supra* note 18 (noting that he had "personally been told by a senior HFA executive that if an innovative business developer wants a license, she must be prepared to demonstrate the strength of the idea, the financial strength of the company, and to negotiate a royalty rate").

⁵¹ *Id.*

⁵² This database, called "Songfile," is available at <http://www.harryfox.com/public/songfile.jsp> (last visited Mar. 28, 2011). However, a licensee cannot purchase mechanical rights through the database. *Id.*

⁵³ *See Songfile, Public Terms of Use*, HARRY FOX AGENCY, <http://www.harryfox.com/songfile/termsofuse/publictermsofuse.do> (last visited Mar. 28, 2011) (stating "Please note that data contained in HFA's song database has been provided to HFA by publishers, licensees and others. HFA DOES NOT WARRANT THE ACCURACY OR COMPLETENESS OF THIS DATA. In some cases, copyright ownership information shown for a song may not reflect actual copyright ownership of a song, or may no longer be current. Songs listed in HFA's database may not be fully represented, or represented at all, by HFA, and may not be licensable through HFA."). Sometimes HFA itself cannot locate the music publishers that once gave it authorization to license on their behalf. *See Help Us Find Publishers*, HARRY FOX AGENCY (last visited Mar. 28, 2011), <http://www.harryfox.com/public/HelpUsFindPublishers.jsp>.

⁵⁴ Statement of Jonathan Potter, *supra* note 18 (noting that without HFA covering sixty to sixty-five percent of the market, licensees would need to negotiate "direct licenses with 10,000 publishers").

⁵⁵ *See id.*

⁵⁶ *See* Cardi, *supra* note 23, at 876. In fact, the complex nature of music licensing has itself generated an industry of its own—the "music clearance industry"—dedicated to tracking down music publishers. *Id.* at 875 (citing AL KOHN & BOB KOHN, *KOHN ON MUSIC LICENSING* 412 (3d ed. 2002) (describing the music clearance industry as "yet another mouth to feed at the administrative trough.")).

use as many songs as possible, the transaction costs and administrative burden of tracking down rights on a song-by-song or owner-by-owner basis, and then negotiating separately for each set of rights, is simply cost-prohibitive.

The Copyright Act offers licensees the option to use a compulsory mechanical license that may benefit some licensees because it foregoes the need for private negotiation with rights-holders.⁵⁷ However, this license does not benefit most large-scale digital music licensees—although § 115 allows users to proceed without rights-holders' approval,⁵⁸ it still requires licensees to locate copyright owners to serve them advance notice.⁵⁹ It also imposes cumbersome accounting burdens on licensees, such as needing to send monthly statements of use and royalty checks.⁶⁰ And even though users of the § 115 compulsory mechanical license could file with the Copyright Office if unable to find the names and addresses of copyright owners, they would be required to pay a significant administrative filing fee per composition.⁶¹ For large-scale digital music distribution, paying such fees for every individual work makes compulsory licensing prohibitively expensive.

The costs of overly difficult licensing have not rested solely with licensees; copyright owners share the costs of administrative overhead, which includes the costs of lobbying before Congress and the allocation of royalty payments among constituents.⁶² And perhaps more important, though less quantifiable, are the costs incurred by the conflicting interests between the rights-holders, who want to maximize their profits, and the administrators of the music clearance industry, who want to ensure their institutional survival.⁶³

With the complexity of licensing mechanical rights burdening licensees and rights-holders alike, the industry is ripe for reform.

⁵⁷ 17 U.S.C. § 115.

⁵⁸ PASSMAN, *supra* note 27 (noting that copyright owners prefer that users do not resort to using the statutory license because it is difficult for owners to track).

⁵⁹ 17 U.S.C. § 115(b).

⁶⁰ 17 U.S.C. § 115(c); Cardi, *supra* note 23, at 843.

⁶¹ See U.S. COPYRIGHT OFFICE, *Circular 73* (Jan. 2008), <http://www.copyright.gov/circs/circ73.pdf> (explaining the need to file with the Copyright Office); U.S. COPYRIGHT OFFICE, *Licensing Division Service Fees* (Aug. 1, 2009), <http://www.copyright.gov/fls/sl04l.pdf> (listing the fees for various licensing activities, including a sixty-dollar fee for the notice of intention for reproduction and distribution under § 115 of the first title of a phonorecord, and twenty dollars for each title thereafter).

⁶² Cardi, *supra* note 23, at 876.

⁶³ *Id.* at 877.

III. SIMPLIFYING MUSIC LICENSING BY CREATING DIGITAL MUSIC RIGHTS ORGANIZATIONS

Our first proposed reform would create new consolidated licensing shops⁶⁴—digital music rights organizations (DMROs)—that would make it much easier for licensees to procure mechanical licenses for the development of digital music delivery services. This proposal is strongly influenced by Register of Copyrights Marybeth Peters’ recommendation to reform § 115 by creating music rights organizations, modeled after existing PROs, that would handle the licensing activities for all nondramatic musical works.⁶⁵ Peters noted PROs work very well within their sphere.⁶⁶ PROs are effective means of licensing the rights to a large number of works, because they collectively cover every musical work and they offer blanket licenses under nondiscriminatory terms.⁶⁷

The new DMROs would meet several goals and be subject to several requirements. They would (1) offer blanket licenses for the reproduction, distribution, and public performance rights associated with digital music delivery; (2) provide “gap” licenses that allow licensees to license some songs not offered by another DMRO without having to purchase a license for the DMRO’s entire catalog; (3) adhere to reasonable and nondiscriminatory licensing terms; and (4) maintain searchable databases of works available to be licensed. The Copyright Reform Act (CRA) sets forth operating procedures and requirements for DMROs, as described in the subsections below.⁶⁸

A. DMROs Shall Act as Licensing Clearinghouses

The CRA would establish and authorize DMROs to license the reproduction, distribution, and public performance rights associated with digital music delivery. Because DMROs would become the exclusive means by which a copyright owner can license these rights for the purposes of a digital transmission of his or her works,⁶⁹ a licensee would need to approach only organizations meeting DMRO requirements—likely a much less daunting prospect than the attempts to individually identify scattered rights-holders that are required today. Because DMROs are required to offer both

⁶⁴ Peters, *Music Licensing Reform Statement*, *supra* note 11.

⁶⁵ *Id.*

⁶⁶ *Id.* at 7–8.

⁶⁷ Cardi, *supra* note 23, at 845 (“[PROs] owe their continuing existence to their ability to serve as central clearinghouses for bulk performance licensing and their corresponding ability to provide economies of scale through what is known as a ‘blanket license.’”).

⁶⁸ The Copyright Reform Act, in Appendix A, *infra*, describes requirements of DMROs, and also gives the Department of Justice enforcement power to ensure that DMROs comply with the requirements.

⁶⁹ The copyright holder would also be able to license digital transmission directly, but would be restricted to using DMROs when seeking an agent to license the rights for her. As a practical matter, most copyright holders looking to distribute their works would use a DMRO to achieve better exposure to potential licensees, similar to why rights-holders use PROs and HFA.

blanket licenses covering their entire catalogs, and “gap” licenses covering music in their catalogs that is not available under other DMROs’ blanket licenses, licensees would be able to obtain only one, or only a few, licenses to cover all works they need. And because DMROs would compete, both for licensors and for licensees, they would have incentives to streamline and simplify their processes further, and to innovate in their services to copyright holders and licensees alike.

Our proposal is influenced by the structure and operation of PROs, which have served licensees well in providing coverage of the performance rights to virtually all nondramatic musical works and in making blanket licenses readily available.⁷⁰ DMROs will be guided by similar principles to serve with similar effectiveness. Because demand for their services is high, our proposal encourages their development by ensuring that the difficulty of starting up a DMRO, or acquiring status as one for an existing agency, remains low and by establishing only reasonable requirements on their operation.

Blanket Licenses. As noted above, the CRA lays out four main requirements for DMROs that will encourage competition while minimizing transaction costs and streamlining licensing requirements for digital music delivery. The first and perhaps most fundamental requirement established by the CRA is that DMROs provide blanket licenses that entitle licensees to reproduce, distribute, and publicly perform the entire catalog of copyrighted nondramatic musical works the DMRO is authorized to offer. This important function, common to PROs, creates economies of scale that minimize per-transaction licensing costs and is therefore critical to streamlining the music licensing world.⁷¹ Not only are DMROs modeled after PROs, but PROs are encouraged to become DMROs, as well. Because PROs already offer performance licenses for virtually all nondramatic musical works, they have the infrastructure in place to begin licensing mechanical rights as well.⁷² Consolidation of rights licensing will also lead to rates that more accurately reflect the value of the service in the marketplace.⁷³

⁷⁰ Peters, *Music Licensing Reform Statement*, *supra* note 11.

⁷¹ Cardi, *supra* note 23, at 869. Note that because our proposal encourages competition between DMROs, and because we anticipate that it may take some time before DMROs are fully capable of providing truly one-stop shop services, licensees seeking full industry coverage may need to obtain blanket licenses from multiple DMROs. This should not present too much of a transactional hurdle, as licensees already manage this state of affairs with PROs for the performance right in a “satisfactory” manner. See Peters, *Music Licensing Reform Statement*, *supra* note 11, at 7.

⁷² Peters, *Music Licensing Reform Statement*, *supra* note 11. Peters also notes that “the responses from the performing rights societies and others [to collective licensing proposals] have certainly raised a genuine prospect that there might be a multiplicity of MROs and that some or many music publishers might withdraw from the existing performing rights societies under the system described in the discussion draft.”

⁷³ Cardi, *supra* note 23 (discussing Augustin Cournot’s economic model, which showed that “a single monopolist producing [a good derived from two parts] will charge a lower price than the sum of the prices charged by complementary duopolists selling the component parts”). Consolidation may raise potential antitrust issues that are outside the scope of this whitepaper’s discussion. Currently the PROs operate

Our proposal would also allow rights-holders to authorize multiple DMROs to license the same copyrighted nondramatic musical work. Although PROs currently do not allow a rights-holder to authorize multiple PROs to license the same performance right,⁷⁴ we believe that requiring non-exclusivity would facilitate competition between DMROs and strengthen the rights of copyright owners. If rights-holders are not locked into license agreements with single DMROs, they will have increased bargaining power to obtain fairer deals.

However, providing for non-exclusivity may create some overlap between the catalogs of different DMROs. Therefore, the CRA's second requirement is that DMROs offer "gap licenses" to cover only those works to which the licensee does not yet have a license. Licensees seeking blanket licenses from DMROs that have overlapping catalogs may worry about paying multiple times for the same rights. The gap license requirement would prevent this problem by allowing licensees to license only part of the DMRO's catalog at a rate reasonably discounted to reflect the smaller set of songs sought by the licensee.

Reasonable and Nondiscriminatory Terms. The third requirement is that DMROs offer the licenses under reasonable and nondiscriminatory terms. Under this requirement, DMROs may vary the terms of licenses between different licensees based only on contingent material differences in the scope of the licenses sought. In other words, a DMRO may not arbitrarily set different license rates for different entities unless it has a reasonable basis to do so because of actual differences in license scope—a means of preventing a problem that arose with the HFA in terms of its arbitrary categorical license terms.⁷⁵ The CRA establishes that DMROs may only vary terms with regard to the particular uses of the licensed nondramatic musical works, the particular nondramatic musical works to be licensed, the frequency of use, the number of subscribers served by the licensee, or the duration of the license.

Search Options. Finally, DMROs would be required to establish and maintain online, searchable databases of all nondramatic musical works in their catalogs. This

under a consent decree from the United States Department of Justice. *See* United States v. Am. Soc'y of Composers, No. 41-1395 (S.D.N.Y. June 11, 2001), *available at* <http://www.ascap.com/reference/ascapafj2.pdf>; United States v. Broad. Music, Inc., No. 64-3787 (S.D.N.Y. May 1, 2009). We take no position on whether or how that consent decree could or should be modified to allow for the creation of DMROs, although the CRA does contain an antitrust exemption. Appendix A, Copyright Reform Act, § 8(f) *infra*. We note that we assume the Department of Justice would be involved with this determination. *See* Peters, *Music Licensing Reform Statement*, *supra* note 11.

⁷⁴ Peters, *Music Licensing Reform Statement*, *supra* note 11, at 7.

⁷⁵ *See* Statement of Jonathan Potter, *supra* note 18 ("HFA is capable of providing a license that has rights equivalent to §115 rights, but it also can and does offer more rights or less rights when it suits its own institutional interests or those of its member publishers").

requirement already reflects common practice among PROs⁷⁶ and addresses a complaint that licensees have brought against HFA.⁷⁷

B. To Promote Competition Between DMROs, Compulsory Mechanical Licenses for Digital Phonorecord Deliveries Should Be Repealed

To ensure that rights-holders receive fair compensation for their works, our proposal encourages competition between DMROs. To allow DMROs to compete freely, we propose amending the § 115 compulsory mechanical license so that it no longer applies to digital phonorecords.⁷⁸ Instead, we encourage a market-based approach in which private negotiations and self-regulation will set license rates.

Today, the compulsory mechanical license enables any user to reproduce and distribute a nondramatic musical work without the copyright owner's consent if that user follows certain statutory requirements.⁷⁹ However, the § 115 compulsory license and the statutory rate for it set by the Copyright Royalty Judges ("CRJs") are rarely used, in part because of the administrative burden created by these statutory requirements and in part because the ceiling on licensing rates created by the statutory rate is significantly higher than most privately negotiated rates.⁸⁰

A market-based scheme licensing scheme for copyrighted works is likely to achieve better results than statutory compulsory licensing, and it is perhaps for this reason that compulsory licenses have been eliminated from the copyright laws of every country in the world except for the United States and Australia.⁸¹ Licenses issued by PROs for

⁷⁶ Cardi, *supra* note 23; Statement of Marybeth Peters, *supra* note 11.

⁷⁷ Statement of Jonathan Potter, *supra* note 18.

⁷⁸ Our proposal leaves undisturbed the application of § 115 compulsory licenses to non-digital phonorecords.

⁷⁹ 17 U.S.C. § 115. These requirements include providing advance notice of a use, paying royalties to the owner, and sending monthly and annual statements describing the use. *See also* Section II *infra*.

⁸⁰ The CRJs themselves have called the § 115 license a "useless license," though they acknowledged the statutory rate's "ghost-in-the-attic effect on all those who live below it." Mechanical and Digital Phonorecord Delivery Rate Determination Proceeding, 74 Fed. Reg. 4510, 4513 (Jan. 26, 2009) (codified at 37 C.F.R. pt. 385), available at <http://www.loc.gov/crb/fedreg/2009/74fr4510.pdf>; Mitchell, *supra* note 21, at 1243 (citing 2 MELVILLE B. NIMMER & DAVID NIMMER, NIMMER ON COPYRIGHT § 8.23(E) (2005)). *See also* Mike Masnick, *RIAA Pushes Through Internet Radio Royalty Rates Designed To Kill Webcasts*, TECHDIRT, (Mar. 5, 2007), <http://www.techdirt.com/articles/20070304/223155.shtml> (describing the CRJs' decision to increase the statutory rate for the public performance rights to sound recordings by more than double in the span of a few years, per a proposal put forth by SoundExchange). For past and current statutory royalty rates for the mechanical license for nondramatic musical works, *see* COPYRIGHT OFFICE, *Mechanical License Royalty Rates* (Jan. 2010), <http://www.copyright.gov/carp/m200a.pdf>.

⁸¹ *Section 115 Compulsory License: Hearing Before the Subcomm. on Courts, the Internet, and Intellectual Prop. of the H. Comm. on the Judiciary*, 108th Cong. (2004) (statement of Marybeth Peters, Register of Copyrights), available at <http://www.copyright.gov/docs/regstat031104.html>.

the performance right to nondramatic musical works are privately negotiated and have proven highly effective—the Register of Copyrights has acknowledged the innovative steps that PROs have taken in private negotiations and self-regulation.⁸² Once DMROs are established and follow this approach it will increase competition, simplify transaction costs, and benefit rightsholders.

IV. CLARIFYING THE RIGHTS IMPLICATED BY DIGITAL MUSIC DELIVERY

The exclusive rights in the Copyright Act were written for the analog age and lack clarity with respect to downloading and streaming activities—a critical deficiency that hinders the development of digital music delivery services. This lack of clarity has led to over-compensation of rights-holders and creates additional burdens on licensees.⁸³ To alleviate these problems, we recommend reforming the statutory language to clarify that: (A) incidental copies created to facilitate digital performances of a nondramatic musical work (digital music streaming) do not infringe the reproduction right; and (B) digital phonorecord deliveries (digital music downloads) only implicate the reproduction and distribution rights of a nondramatic musical work, and not the public performance right.

A. Incidental copies made to facilitate digital music streaming do not infringe the reproduction right.

To prevent double paying for rights needed to stream music and to promote innovation in new business models for digital music, we recommend that Congress amend the Copyright Act to clarify that copies made to enable a digital public performance of a nondramatic musical work (music streaming) do not infringe the reproduction right. These copies are transient and are made solely to facilitate already-licensed digital performances. Therefore, requiring separate licensing and payment for the reproduction right in addition to the performance right means licensees are, in effect, paying double for the same use. This “double-dipping” over-compensates rights-holders and over-burdens licensees. It also may prevent wide dissemination of copyrighted works and stifle innovation if licensees find it cost-prohibitive to make copyrighted works publicly available.

Copyright provides rights-holders with a set of exclusive rights, each of which may be separately licensed or transferred, and each of which may be divided into smaller, transferable subsets.⁸⁴ For example, an owner of the copyright in a musical work may

⁸² *Id.*

⁸³ See Mark A. Lemley, *Symposium: Copyright Owners' Rights and Users' Privileges on the Internet: Dealing With Overlapping Copyrights on the Internet*, 22 U. DAYTON L. REV. 547 (1997) (discussing the burden on licensees to determine the application of rights).

⁸⁴ In the 1976 Act, Congress definitively moved away from the 1909 Act's envisionment of a single, indivisible copyright to commercially exploit a work and embraced the concept of a bundle of exclusive rights, each of which could be divided endlessly. 17 U.S.C. § 201(d)(1); Mark A. Lemley, *supra* note 83, at 569. Some commenters have argued that the most sensible approach is to give copyright owners an

split her exclusive right to reproduce the work and license out the right to reproduce the work in CD form and the right to reproduce the work in MP3 form to separate entities. Furthermore, a user whose use implicates multiple exclusive rights of a copyrighted work must license each right individually.⁸⁵

In digital contexts, however, it can be difficult to identify which rights are implicated by a given use.⁸⁶ Online music streaming services transmit music electronically, allowing recipients of the transmission to hear the music as it is being transmitted. In this sense online streaming is like a radio station's broadcast—neither the streamed performance nor the radio broadcast performance creates a copy of the song that the listener may play later.⁸⁷ Because online streaming services publicly perform musical works and sound recordings by transmitting music electronically, they typically license the performance rights in the sound recordings and musical works.⁸⁸

However, online streaming differs from a radio station broadcast because to facilitate the process of streaming and allow the song to be played smoothly (as it would be in the radio broadcast), a listener's device must create buffer copies of the song.⁸⁹ As

indivisible, all-encompassing right to commercially exploit a work. *See, e.g.*, Lydia Pallas Loren, *Untangling the Web*, 53 CASE W. RES. L. REV. 673, 717 (2003) (proposing that all the exclusive rights of § 106 be consolidated into a single “right to commercially exploit the copyrighted expression”).

⁸⁵ *Cardi*, *supra* note 23, at 852 (giving the example of how Apple's iTunes, which allows users to play clips of songs and download the songs permanently, requires Apple to license both the performance and reproduction rights).

⁸⁶ With one exception, the exclusive rights of § 106 were written long before legislators contemplated extensive digital music delivery. *See* 17 U.S.C. § 106(6). In fact, the origin of mechanical rights for nondramatic musical works can be traced back to congressional concern over the making of player piano rolls. *See* Mechanical and Digital Phonorecord Delivery Rate Determination Proceeding, *supra* note 80, at 4512 (citing Congress's response, H.R. REP. NO. 60–2222, at 9 (1909), to *White-Smith Music Publishing Co. v. Apollo Co.*, 209 U.S. 1 (1908)).

⁸⁷ By not leaving a permanent copy of the music behind on the receiving device, digital performances stand in contrast with digital phonorecord deliveries, commonly known as music downloads, which are characterized by leaving copies on recipients' devices that can be played back later on demand. Digital phonorecord deliveries, as defined in the Copyright Reform Act, *infra* Appendix A, involve full downloads, limited downloads, or any other type of digital transmission that results in non-incidental reproductions of a nondramatic musical work on the receiving end of the transmission.

⁸⁸ DMCA REPORT, *supra* note 25, at 143 (noting “The economic value of licensed streaming is in the public performances of the musical work and the sound recording, both of which are paid for.”); *id.* at 140 (noting “the sole purpose for making these buffer copies is to permit an activity that is licensed by the copyright owner and for which the copyright owner receives a performance royalty.”).

⁸⁹ *Id.* at 107–08 (noting “Inconsistencies in the rate at which audio packets are delivered over the Internet are thus evened out, so that the software can render the information at a constant rate”). The use of a digital device for almost any purpose—including the provision of digital music performances—requires the processing of information by the creation of temporary “buffer” copies. *Id.* *See also* Brief of Amicus Curiae Law Professors in Support of Defendants-Counterclaimants-Appellants and Reversal, *The Cartoon Network LP v. CSC Holdings, Inc.*, 536 F.3d 121 (Civ. No. 07–1480) (2d Cir. June 8, 2007).

the Copyright Office has noted, these copies “generally are made automatically, and transparently to the user—i.e., without the user being aware that copies are being made.” And as the songs are played, the information needed to play the songs “is discarded and new information is put into the buffer as it is received.”⁹⁰ Nevertheless, although these copies are transient, some have argued that they are compensable reproductions.⁹¹ This argument rests on the lack of clarity in statutory language defining a “reproduction” and the lack of uniformity among courts in deciding whether temporary copies implicate the reproduction right at all.⁹²

These transient buffer copies should not implicate the reproduction right because they have a singular purpose: to enable digital music performances.⁹³ As the Register of Copyrights noted, “No further use can be made of the buffer copy because it is not retained: at the end of the transmission the consumer is left with nothing but the fond memory of a favorite song.”⁹⁴ This makes the buffer copy a necessary, legitimate, and socially-beneficial use of copyrighted works. And for this reason, the Registrar of Copyrights proposed in 2001 that Congress amend 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.”⁹⁵

The fair use doctrine provides additional legal support for a policy that protects buffer copies from liability. On balance, the four fair use factors—particularly the first—weigh in favor of fair use.⁹⁶ Buffer copies in a digital performance do not supersede the use of the underlying copyrighted musical work;⁹⁷ instead they serve a transformative

⁹⁰ DMCA REPORT, *supra* note 25, at 108.

⁹¹ *See* Cardi, *supra* note 23, at 863.

⁹² Courts have held that temporary RAM copies in a computer are reproductions that can infringe a copyright, *see* MAI Sys. Corp. v. Peak Computer, Inc., 991 F.2d 511 (9th Cir. 1993), but have also held that buffer copies, if sufficiently transient, are not fixed enough to be considered copies at all. *See* Cartoon Network LP, LLLP v. CSC Holdings, Inc., 536 F.3d 121, 127 (2d Cir. 2008).

⁹³ DMCA REPORT, *supra* note 25, at 140–41.

⁹⁴ *Id.*

⁹⁵ *Id.* at 142–43. The Register has on several occasions supported the policy of protecting buffer copies from liability for infringement. Peters, *Music Licensing Reform Statement*, *supra* note 11; Mechanical and Digital Phonorecord Delivery Rate Determination Proceeding, *supra* note 80 (complying with the Register of Copyrights’ decision that, in its rate-setting determination for the mechanical compulsory license, the CRJs strike the statement that “[a]n interactive stream is an incidental digital phonorecord delivery”).

⁹⁶ *See* DMCA REPORT, *supra* note 25, at 140 (providing an analysis of the four fair use factors).

⁹⁷ *Folsom v. Marsh*, 9 F. Cas. 342 (No. 4901) (C.C.D. Mass. 1841) (focusing fair use inquiry on whether a use merely “supersedes the objects” of the copyrighted work); DMCA REPORT, *supra* note 25, at 136 (noting the buffer copy “is not a superseding use that supplants the original. It is a necessary incident to carrying out streaming.”).

purpose and an entirely different function from the original: buffer copies transform the aesthetic or entertainment aspects of a musical work into temporary bits of data readable only by computers for the purpose of moving that data.⁹⁸ As buffer copies have no value outside of their ability to enable streaming, they have no effect on the market for the copyrighted work.⁹⁹ Most importantly, such copies provide a significant social benefit by allowing the quick and easy transmission of digital files.¹⁰⁰ As a result, both law and policy strongly support the need for statutory reforms that would clarify that incidental copies made for digital performances do not infringe the reproduction right.¹⁰¹

Our approach, like the approach proposed by the Register of Copyrights,¹⁰² is tailored specifically for incidental copies made for *digital* performances, and not for any broader purpose. Our approach to incidental copies, more generally, is discussed in our fifth CRA Report, addressing a broader exemption.¹⁰³ We also do not address other types of incidental uses, such as the incidental captures described in the first Report in the CRA series, on fair use.¹⁰⁴ In this Report, we propose a targeted legislative response to a

⁹⁸ See *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 579 (1994) (focusing fair use inquiry on the transformativeness of the new use). Although the Copyright Office opined that buffer copies were not transformative, see DMCA REPORT, *supra* note 25, at 135, courts have recently found similar uses transformative. See, e.g., *Perfect 10 v. Amazon.com*, 508 F.3d 1146 (9th Cir. 2007) (citing *Kelly v. Arriba Soft*, 336 F.3d 811, 818–19 (9th Cir. 2003), and noting “even making an exact copy of a work may be transformative so long as the copy serves a different function than the original work.”); *A.V. v. iParadigms, LLC*, 562 F.3d 630, 639 (4th Cir. 2009) (citing *Perfect 10* and holding “[t]he use of a copyrighted work need not alter or augment the work to be transformative in nature. Rather, it can be transformative in function or purpose without altering or actually adding to the original work.”).

⁹⁹ DMCA REPORT, *supra* note 25, at 139 (“There is no market for buffer copies other than as a means to block an authorized performance of the musical works.”).

¹⁰⁰ Because fair use is an “equitable rule of reason,” see *Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417, 448–49 & n.31 (1984) (quoting H. REP. NO. 94–1476, pp. 65–66 (1976)), application of the four factors must be considered in light of the significant social benefit of the use. “[T]he fair use doctrine . . . permits and requires courts to avoid rigid application of the copyright statute when, on occasion, it would stifle the very creativity which that law is designed to foster.” See *Campbell*, 510 U.S. at 577 (internal quotations omitted).

¹⁰¹ Statutory clarity is especially important to provide a measure of certainty in the fair use context, as David Nimmer has observed, because fair use is a flexible doctrine that requires courts to perform a case-by-case analyses for any particular claim of infringement, “nobody can know what fair use is until the full process of litigation has run its course.” David Nimmer, *A Modest Proposal to Streamline Fair Use Determinations*, 24 CARDOZO ARTS & ENT. L.J. 11, 16 (2006); see also David Nimmer, “*Fairest of them All*” and *Other Fairy Tales of Fair Use*, 66 LAW & CONTEMP. PROBS. 263, 280 (2003) (“[H]ad Congress legislated a dartboard rather than the particular four fair use factors embodied in the Copyright Act, it appears that the upshot would be the same”).

¹⁰² See DMCA REPORT, *supra* note 25, at 141–46.

¹⁰³ See Dena Chen et al., *Providing an Incidental Copies Exemption for Service Providers and End-Users*, PUBLIC KNOWLEDGE (Mar. 31, 2011), <http://www.publicknowledge.org/cra/>.

¹⁰⁴ See Jennifer Urban, *Updating Fair Use for Innovators and Creators in the Digital Age: Two Targeted Reforms*, PUBLIC KNOWLEDGE (Feb. 13, 2010), <http://www.publicknowledge.org/cra/>.

specific problem that should be immediately corrected. We therefore align ourselves with the proposal set forth by the Register of Copyrights,¹⁰⁵ as well as the approaches taken by many other countries¹⁰⁶ and request legislative action to clarify that any incidental copies made to facilitate a digital performance do not infringe the reproduction right.

B. Digital music downloads do not implicate the public performance right.

Digital music download services have also faced the double dipping problem, albeit in a context mirroring that facing streaming services. Because of this, reform is needed in this area as well. We therefore propose that the Copyright Act be amended to exempt music downloads—technically defined as digital phonorecord deliveries (DPDs)¹⁰⁷—from infringement of the public performance right.

Digital music downloads, unlike music streaming, create a copy of the musical work on the user’s device that the user may play back later. For this reason, music download services license the reproduction and distribution rights for both the sound recording and the underlying musical composition in the work.¹⁰⁸ However, some have argued that DPDs implicate the performance right as well, whether the music is performed publicly or not.¹⁰⁹ This argument rests on a complicated reading of the language of the Copyright Act as well as an interpretation of the technical process by which DPDs arrive on a user’s device.¹¹⁰

Two government studies have concluded the transmission of a DPD is not a public performance. A Clinton Administration whitepaper from 1995 noted, “When a copy of a work is transmitted . . . so that it may be captured in a user’s computer, without the capability of simultaneous ‘rendering’ or ‘showing,’ it has rather clearly not been performed.”¹¹¹ In 2001, the Register of Copyrights stressed in her report on Section 104 that this “performance is merely a technical by-product of the transmission process that has no value separate from the value of the download.”¹¹² She further noted that

¹⁰⁵ See DMCA REPORT, *supra* note 25.

¹⁰⁶ Cardi, *supra* note 23, at 867 n.154.

¹⁰⁷ 17 U.S.C. § 115(d).

¹⁰⁸ Cardi, *supra* note 23, at 854.

¹⁰⁹ *Id.* at 857.

¹¹⁰ See *id.* (noting that some have argued that the transmission of the music between the service’s server and the user’s device is the “communication of a performance” under the Copyright Act).

¹¹¹ INFO. INFRASTRUCTURE TASK FORCE, INTELLECTUAL PROPERTY AND THE NATIONAL INFORMATION INFRASTRUCTURE: THE REPORT OF THE WORKING GROUP ON INTELLECTUAL PROPERTY RIGHTS 71 (1995) [hereinafter NII WHITE PAPER], available at <http://www.uspto.gov/web/offices/com/doc/ipnii/ipnii.pdf>.

¹¹² DMCA REPORT, *supra* note 25, at 147.

“[d]emanding a separate payment for the copies that are an inevitable by-product of [the download] appears to be double-dipping.”¹¹³ In 2007 the District Court for the Southern District of New York agreed, holding on a summary judgment motion in a case involving a rights dispute between ASCAP and several music download service providers, that a music download does not implicate the public performance right of the musical work.¹¹⁴ The court further held, “We can discern no basis for ASCAP’s sweeping construction of section 101. Moreover, in light of the distinct classification and treatment of reproductions under the act, we agree . . . that Congress did not intend the two uses to overlap to the extent proposed by ASCAP in the present case.”¹¹⁵

The statutory language of § 101 supports the conclusion that DPDs do not implicate the public performance right. Section 101 states that “to ‘perform’ a work means to recite, render, play, dance, or act it, either directly or by means of any device or process . . .”¹¹⁶ However, as the court noted in *United States v. ASCAP*, each of these means of “performing” a work requires some sort of “perceptible rendition” of the work.¹¹⁷ Merely transmitting a music file from one computer to another does not involve a perceptible rendition. Because music transmission cannot be considered a “performance” under the Copyright Act, it should not implicate the public performance right.

Although several independent sources have now concluded DPDs do not implicate the public performance right, we nonetheless seek legislative action to reinforce this conclusion in the statutory language of the Copyright Act. A clear statement within the Copyright Act would create certainty for digital music download service providers, would prevent the double dipping problem for downloads, and would allow new music delivery models to flourish.

V. THESE REFORMS, THOUGH MODEST IN SCOPE, WILL GREATLY IMPROVE MUSIC LICENSING

In this Report, we offer proposals targeting a subset of the problems existing in music licensing that are amenable to reform. They are grounded in well-reasoned analysis by the Copyright Office, district courts, and academic scholars. Our proposals would have a substantial positive effect because they would create a greater level of certainty within the digital music delivery industry, would address the double dipping problem affecting downloads and streaming, and would allow new business models to

¹¹³ *Id.* at 140.

¹¹⁴ *See* *United States v. Am. Soc’y of Composers, Authors & Publishers*, 485 F. Supp. 2d 438 (S.D.N.Y. 2007).

¹¹⁵ *Id.* at 447.

¹¹⁶ 17 U.S.C. §101.

¹¹⁷ *Am Soc’y of Composers, Authors & Publishers*, 485 F. Supp. 2d at 443–44.

flourish. In contrast with the Register of Copyrights' proposal to repeal § 115 entirely and to create music rights organizations that would replace performing rights societies,¹¹⁸ we seek the creation of DMROs only to target digital music delivery—a growing segment of the music industry that we perceive as most in need of protection, and most amenable to change. We anticipate that PROs would be on board with this reform, as we would be allowing them to consolidate licensing authority over new rights, but without significant upheaval of their present practices.¹¹⁹

Likewise, in our reform of the rights implicated by downloading and streaming music, we seek clarification that is strongly supported by case law, principles of statutory interpretation, analogy to the law's application to physical media, and comparison with the law of other jurisdictions.¹²⁰ With these proposals, rather than seeking far-reaching changes to existing copyright law, we look to implement practical changes that could, in the near-term, alleviate some important difficulties inherent in licensing musical rights for digital delivery.

VI. CONCLUSION

By streamlining music licensing, our proposals would secure benefits for almost everyone involved in the music industry, whether they are songwriters, rights-holders, providers of digital music delivery services, or consumers. Songwriters and rights-holders would enjoy greater control over their music, with the ability to choose a fair licensing agent among competing DMROs and the removal of the compulsory mechanical license. Rights-holders would also benefit from the development of digital music delivery services that pave the way for new distribution models, open new markets, simplify royalty collections, and combat piracy by offering services comparable to peer-to-peer file-sharing. In the end, consumers would benefit as well, as their needs are best satisfied by improved digital music delivery and a copyright regime that allows new music delivery business models to develop and flourish.

¹¹⁸ Peters, *Music Licensing Reform Statement*, *supra* note 11; *see also* Keesan, *supra* note 32, at 368 (describing the Copyright Office roundtable in 2007 that proposed creating a single entity to handle *all* Internet-based music licensing—a proposal that was ultimately dismissed as too radical); Reese, *supra* note 2, at 265 (same).

¹¹⁹ *See* Part III, *supra*.

¹²⁰ *See* Part IV *supra*.

Appendix A

SEC. 7. AMENDMENTS TO LIMIT APPLICATION OF THE SECTION 115 COMPULSORY MECHANICAL LICENSE FOR NON-DRAMATIC MUSICAL WORKS TO NON-DIGITAL USES OF SUCH WORKS

- (a) Section 115(a) of title 17, United States Code, is amended—
- (1) in paragraph (1) by striking the phrase “or digital phonorecord deliveries,” and by striking the phrase “, including by means of a digital phonorecord delivery”.
- (b) Section 115(c) of title 17, United States Code, is amended—
- (1) by striking subparagraph (3)(A) and by striking subparagraphs (3)(A)(i) and (3)(A)(ii);
 - (2) in subparagraph (3)(C) by striking “Such terms and rates shall distinguish between (i) digital phonorecord deliveries where the reproduction or distribution of a phonorecord is incidental to the transmission which constitutes the delivery, and (ii) digital phonorecord deliveries in general.”
 - (3) in subparagraph paragraph (3)(D)—
 - (i) by striking “Such terms and rates shall 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.”;
 - (ii) by striking “The royalty rates payable for a compulsory license for a digital phonorecord delivery under this section shall be established de novo and no precedential effect shall be given to the amount of the royalty payable by a compulsory licensee for digital phonorecord deliveries on or before December 31, 1997.”; and
 - (iii) by striking “and under which records of such use shall be kept and made available by persons making digital phonorecord deliveries.”
 - (4) in subparagraph (3)(E)—
 - (i) in subparagraph (3)(E)(i) by striking “Subject to clause (ii), the royalty rates determined pursuant to subparagraph (C) and (D) shall be given effect as to digital phonorecord deliveries in lieu of any contrary royalty rates specified in a contract pursuant to which a recording artist who is the author of a nondramatic musical work grants a license under that person’s exclusive rights in the musical work under

paragraphs (1) and (3) of section 106 or commits another person to grant a license in that musical work under paragraphs (1) and (3) of section 106, to a person desiring to fix in a tangible medium of expression a sound recording embodying the musical work.”; and

(ii) by striking subparagraph (3)(E)(ii) and subparagraphs (3)(E)(ii)(I) and (3)(E)(ii)(II).

(5) by striking subparagraph (3)(F);

(6) by striking subparagraph (3)(G)(i), subparagraphs (3)(G)(i)(I) and (3)(G)(i)(II), and subparagraph (3)(G)(ii);

(7) in subparagraph (3)(H) by striking “except that the owner of a copyright in a sound recording shall not be liable for a digital phonorecord delivery by a third party if the owner of the copyright in the sound recording does not license the distribution of a phonorecord of the nondramatic musical work.”;

(8) by striking subparagraph (3)(I);

(9) in subparagraph (3)(J)—

(i) in subparagraph (3)(J)(i) by striking “including by means of a digital transmission”; and

(ii) in subparagraph (3)(J)(ii) by striking “including by means of a digital phonorecord delivery”

(10) by striking subparagraph (3)(K).

(c) Section 115(d) of title 17, United States Code, is amended by—

(1) replacing the paragraph heading with “Digital Reproductions Governed by Section 115A”; and

(2) replacing the paragraph text with “This section does not govern licenses for digital reproduction and distribution of phonorecords of nondramatic musical works, which are governed exclusively by section 115A of this title.”

SEC. 8. CREATION OF SECTION 115A: SCOPE OF EXCLUSIVE RIGHTS IN NONDRAMATIC MUSICAL WORKS: LICENSES FOR DIGITAL DELIVERY OF NONDRAMATIC MUSICAL WORKS

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

(b) **AVAILABILITY AND SCOPE OF LICENSES FOR DIGITAL DELIVERY OF NONDRAMATIC MUSICAL WORKS.** – Digital music rights organizations shall grant and administer licenses and collect and distribute royalties payable for the digital delivery of nondramatic musical works licensed under this section.

(1) A lawful authorization of a digital music rights organization to license the right to

(A) reproduce the work in phonorecords under section 106(1);

(B) distribute phonorecords of the work to the public under section 106(3); or

(C) perform a nondramatic musical work under section 106(4)

includes the authorization to license all three of said rights in a nondramatic musical work.

(2) **LICENSING THROUGH A DIGITAL MUSIC RIGHTS ORGANIZATION.**—An owner of a copyright in a nondramatic musical work may designate and authorize one or more digital music rights organizations to license rights under sections 106(1), 106(3), and 106(4) of this title for the digital transmission of a particular nondramatic musical work. Digital music rights organizations are the exclusive means, subject to the qualification in subsection (b)(3) of this section, by which a publishing entity or copyright owner may license the public performance, reproduction, and distribution of nondramatic musical works for purposes of digital transmission of those works.

(3) **DIRECT LICENSING BY COPYRIGHT OWNER.** – This section shall not be read to impair the right of a copyright owner to directly license the rights under sections 106(1), 106(3), and 106(4) of this title in a nondramatic musical work on privately negotiated terms, regardless of concurrent authorization of a digital music rights organization to license these rights for the digital transmission of said nondramatic musical work.

(c) **BLANKET LICENSES.** – A digital music rights organization authorized by the owner of a copyright in a musical composition under this section to license the non-

exclusive rights to reproduce, distribute, and publicly perform nondramatic musical works via digital transmission shall offer a license including all such copyrighted nondramatic musical works it is so authorized to license. A digital music rights organization shall also offer a license for fewer than all the nondramatic musical works it is so authorized to license to licensees who already have a blanket license from another DMRO. A digital music rights organization shall offer either:

- (1) such licenses that collectively include reproduction, distribution, and performance rights for nondramatic musical works; or
- (2) such licenses separately for (a) the rights of reproduction and distribution and (b) the right of public performance, such that a licensee may obtain one license for the reproduction and distribution rights and another license for the public performance right.

(d) DIGITAL MUSIC RIGHTS ORGANIZATIONS.—

(1) QUALIFICATIONS FOR DIGITAL MUSIC RIGHTS ORGANIZATION STATUS. — Status as a digital music rights organization shall be contingent on meeting the following requirements:

(A) NONDISCRIMINATORY AND REASONABLE LICENSING. — A digital music rights organization shall make its catalog of nondramatic musical works available to all applicants for licenses under this section on reasonable and nondiscriminatory terms.

(i) In granting a license under this section, a digital music rights organization may only account for material differences in the scopes of licenses requested by different digital music services with respect to the particular uses of the licensed nondramatic musical works, the particular nondramatic musical works to be licensed, the frequency of use, the number of subscribers served by the licensee, or the duration of the license. If such material differences exist in the scopes of licenses requested by different applicants, a digital music rights organization may establish different terms and conditions for such differing services, provided such different terms and conditions shall be limited to, and shall accurately reflect any such material differences in the scope of the requested license.

(ii) A digital music rights organization shall offer a license for fewer than all the nondramatic musical works it is so authorized to license to licensees who already have a blanket license with other digital music rights organization at a rate reasonably lower than that of the blanket license it offers, with

the difference in rates taking into account the number and particular nature of the nondramatic musical works to be licensed.

(B) PUBLICATION OF CATALOG IN ONLINE DATABASE. – Digital music rights organizations shall maintain and make available to the general public, free of charge, searchable electronic databases of information from which licensees can determine which nondramatic musical works are available for licensing under this section from each digital music rights organization. A digital music rights organization shall be responsible, under this subsection, for including in its database only the nondramatic musical works in the catalog of that digital music rights organization.

(i) Such electronic databases shall be open, machine-readable, and publicly accessible through the Internet on a non-exclusive basis.

(C) ENFORCEMENT. – The Department of Justice may investigate alleged violations of this subsection, if an investigation begins not more than two years after an alleged violation occurred. The Department of Justice shall have the authority, upon a finding of violations of this subsection, to implement sanctions against an offending music rights organization. Sanctions for violations of this subsection may include:

(i) a fine amounting to no more than \$10,000 per individual violation of this subsection; or

(ii) revocation of digital music rights organization status.

The Department of Justice shall establish procedures to carry out the provisions of this subsection, including procedures governing the disqualification and requalification of digital music rights organizations.

(2) COPYRIGHT OWNER NOT DIGITAL MUSIC RIGHTS ORGANIZATION. – An individual owner of a copyright in a nondramatic musical work is not a digital music rights organization under this section by virtue of directly licensing the rights under sections 106(1), 106(3), and 106(4) of this title for the digital transmission of said nondramatic musical work.

(e) RIGHTS IMPLICATED BY THE DIGITAL DELIVERY OF NONDRAMATIC MUSICAL WORKS. – The rights of reproduction, distribution, and public performance in non-dramatic musical works granted by Sections 106(1), 106(3), and 106(4) of this title, respectively, shall be limited in accordance with this section with respect to the digital delivery of non-dramatic musical works.

(1) INCIDENTAL REPRODUCTIONS MADE TO FACILITATE DIGITAL PERFORMANCES OF NONDRAMATIC MUSICAL WORKS. – It is not an infringement of copyright to make incidental reproductions made to facilitate digital performances of nondramatic musical works.

(2) RIGHTS IMPLICATED BY DIGITAL PHONORECORD DELIVERY. – A “digital phonorecord delivery” does not implicate the right of public performance under section 106(4) of this title. Digital phonorecord delivery implicates only the reproduction and distribution rights in the musical work under sections 106(1) and 106(3) of this title. Any audible rendering of the downloaded musical work by the recipient of a digital phonorecord delivery after initiation of the requisite digital transmission is not a public performance under section 106(4) of this title.

(f) ANTITRUST EXEMPTION. – Notwithstanding any provision of the antitrust laws or any judicial consent decrees entered into pursuant to the antitrust laws, any copyright owners of nondramatic musical works may negotiate and agree upon the terms and rates of royalty payments and the proportionate division of fees paid among copyright owners for the licenses to the rights under sections 106(1), 106(3), and 106(4) of this title, as they implicate the digital transmission of nondramatic musical works. Said copyright owners may designate common agents in the form of digital music rights organizations to negotiate, agree to, or receive such royalty payments.

(1) Notwithstanding the antitrust exemption established herein, which shall apply exclusively to the ability of digital music rights organizations to license rights in nondramatic musical works under Sections 106(1), 106(3), and 106(4) this title as they apply to the digital transmission of such works, this section shall not be read to limit civil or criminal antitrust liability in connection with general anticompetitive activity in violation of the antitrust laws of the United States.

(g) DEFINITIONS. – In this section:

(1) the term “digital phonorecord delivery” means a full download, limited download, or any type of digital transmission that results in a non-incidental reproduction of a nondramatic musical work on the device or technology receiving that digital transmission;

(2) the term “full download” means a digital phonorecord delivery of a sound recording of a musical work that is not limited in availability for listening by the end user either to a period of time or a number of times the sound recording can be played;

(3) the term “incidental reproduction” means cache, server, buffer, network and any other type of transient, incidental, or temporary reproduction that is integral and essential to the digital performance of a nondramatic musical work, regardless of whether such reproductions are made on a source device, intermediary device, a recipient device, or otherwise;

(4) the term “limited download” means a digital phonorecord delivery to an end user of a sound recording of a musical work that is only available for listening for—

(A) a definite period of time; or

(B) a specified number of times; and

(5) the term “Digital Music Rights Organization” means a licensing and collection agency representing music publishing entities and owners of copyrights in nondramatic musical works with respect to all licensing activities associated with the digital delivery of nondramatic musical works.

(h) EXISTING LICENSES.—

(1) Any license existing as of [effective date of the Copyright Reform Act] between a copyright owner of a nondramatic musical work or its agent and a licensee with respect to the right to make and distribute phonorecords of such work for the purposes of their digital delivery shall expire according to its terms or on [effective date of the Copyright Reform Act plus two years], whichever is later.

(2) Any licensee that has made DIGITAL phonorecords of nondramatic musical works prior to [effective date of the Copyright Reform Act] pursuant to the compulsory license then set forth in section 115 of this title may distribute such phonorecords for the purposes of their digital delivery prior to [effective date of the Copyright Reform Act plus two years] according to the terms of the compulsory license existing as of [effective date of the Copyright Reform Act].