

REFORMING SECTION 115 OF THE COPYRIGHT ACT FOR THE DIGITAL AGE

HEARING BEFORE THE SUBCOMMITTEE ON COURTS, THE INTERNET, AND INTELLECTUAL PROPERTY OF THE COMMITTEE ON THE JUDICIARY HOUSE OF REPRESENTATIVES ONE HUNDRED TENTH CONGRESS FIRST SESSION

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MARCH 22, 2007
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REFORMING SECTION 115 OF THE COPYRIGHT ACT FOR THE DIGITAL AGE

THURSDAY, MARCH 22, 2007

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

The Subcommittee met, pursuant to notice, at 10 a.m., in Room 2141, Rayburn House Office Building, the Honorable Howard Berman (Chairman of the Subcommittee) presiding.

Present: Representatives Berman, Conyers, Boucher, Wexler, Watt, Cohen, Johnson, Schiff, Lofgren, Coble, Feeney, Goodlatte, Chabot, Cannon, Keller, Issa, Pence, and Smith.

Staff present: Perry Apelbaum, Chief of Staff/General Counsel; Joseph Gibson, Minority Chief Counsel; Rosalind Jackson, Professional Staff Member; David Whitney, Minority Counsel; and Shanna Winters, Subcommittee Chief Counsel.

Mr. BERMAN. Welcome. We will open the hearing now.

The hearing of the Subcommittee on Courts, the Internet, and Intellectual Property will come to order.

I will recognize myself for an opening statement.

I would be remiss to begin any music licensing hearing without acknowledging that reforming section 115 may not be the top priority of many in this room. After all, small webcasters are scrambling to assess the viability of their current business models after the recent rate determination by the Copyright Royalty Board.

In addition, the recent announcement of the XM-Sirius merger has exposed the glaring inequities of the Copyright Act in its application to different technologies: Internet, cable, satellite and, of course, the over-the-air broadcasters.

This raises the question: Should I and interested colleagues reintroduce a version of the PERFORM Act, and is it finally time for a performance right to extend to rusty old radio?

These developments highlight a quintessential issue for this Subcommittee: Should we proceed with comprehensive reform of music licensing or deal with it in a piecemeal fashion? For the sake of this hearing, the Subcommittee will limit its focus to section 115.

Many times over the past several years, this Subcommittee has explored the need for reforming the section 115 compulsory license for musical works. All interested parties agree that it is broken and that the licensing structure that was developed to deal with the distribution of piano rolls, while updated, still does not provide a

fluid mechanism for a new physical and digital music delivery models.

Complaints about section 115 range from its administrative burdens relating to the complexities of the notice requirements to the legal ambiguities relating to the definition of digital phonorecord delivery, DPD, or more broad, where or if a performance ends and reproduction begins.

However, no consensus exists for how to fix section 115. At the macro level, parties agree that rampant piracy over peer-to-peer networks creates a dire need to address digital music licensing reform. In 2005, alone, nearly 20 billion illegal file swaps and downloads occurred.

This piracy harms an industry that provides jobs in my district and throughout the country, and it hurts all the parties involved, from the songwriter, to the recording artist and to all the businesses that service the industry.

In a post-Grokster environment, we have a unique opportunity to channel consumers away from illegal P2P networks, toward legitimate online music distribution services.

But the window is closing. In 2006, digital music sales totaled \$2 billion, up from \$1.1 billion in 2005. Consumers downloaded an estimated 795 million songs, up 89 percent from the 2005 figures. Currently, there are 4 million tracks available for downloading, facilitated by 500 online music services, available in over 40 countries. Further fueling the growth of digital downloads, portable music player sales increased 43 percent, to \$120 million in 2006. In addition, ringtones, once dismissed as nothing more than a passing fad, have become a \$3 billion worldwide market.

This is all good news. However, despite their meteoric growth, legal online music services still represent the equivalent of a fly on the back of the online piracy elephant. Yesterday's *Wall Street Journal* described how digital music has failed to compensate for lost sales of CDs and that according to BigChampagne, 1 billion songs a month are traded on illegal file-sharing networks. I will let you figure out what BigChampagne is.

Therefore, since there is broad consensus that inefficiencies in section 115 hinder the rollout of new legal music offerings, we must turn our focus to the question of how to reform section 115. I fear that if we do not address particularly reforms to section 115 soon, legitimate music services will not be able to compete with free or provide consumers with their choice of music any time, any place and in any format, while at the same time ensuring that creators receive adequate compensation.

There have been multiple suggestions for reforming the compulsory license, including, one, designating an agent to collectively manage reproduction and redistribution rights; two, collectively licensing performance, distribution and reproduction rights for a music rights organization; three, amending 115 to ease just the administrative burden and legal uncertainty; and, four, repealing section 115 and allowing the marketplace to regulate licensing.

Last year, the former Chairman of this Subcommittee, Congressman Lamar Smith, made a valiant effort to resolve the issue. Perhaps back then the interested parties lacked the motivation to act. Clearly, all parties would benefit from section 115 reform.

For example, the business survival of the digital media association members' depends on the success of legitimate online music services. In addition, the proliferation of additional legal music offerings will provide vital new sources of royalties for members of the National Music Publishers Association and songwriters. Finally, RIAA members will also benefit through the distribution of their works in secure, new formats.

Since the Subcommittee last met on this issue, there have been several developments. First, the Copyright Office determined that ringtones fall within the scope of the 115 license, though the determination is on appeal. Also, ASCAP and digital music services are facing off in a Federal court in New York over whether a download of a musical work implicates a public performance, and copyright royalty judges are about to set a discovery schedule in the section 115 rate proceeding.

I don't deny that several obstacles seem to remain in the way of full-scale realization of music distribution possibilities. Whatever the outcome of the reforms we ultimately adopt, our focus needs to remain on facilitating the licensing of distribution and reproduction rights so that consumers can receive music in the manner they want, while at the same time providing rightful compensation to the creators of music.

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

I look forward today to hearing from our witness, Marybeth Peters, and would now recognize our distinguished Ranking minority Member, my friend Howard Coble, for his opening statement.

Mr. COBLE. Thank you, Mr. Chairman.

Mr. Chairman, as you know, because of term limits, I was removed from this Subcommittee for the past 4 years. It is indeed good to see old friends in the room today, including the distinguished Register and her able staff who is covering her back as we speak.

Mr. Chairman, article 1, section 8 of the Constitution grants Congress this power: To promote the progress of science and useful arts by securing for limited times to authors and inventors the exclusive right to their respective writings and discoveries.

In 1909, the 61st Congress decided to exercise this power by enacting a compulsory license that authorized anyone to reproduce and distribute piano rolls for use in the home entertainment centers of their day, player pianos, providing they paid a royalty of 2 cents to the owner of the copyright in the musical work, which typically was the songwriter or a music publisher.

The antecedent of section 115 of the Copyright Act, which is the subject of our hearing today—this license was intended to balance the interests of copyright owners in controlling and receiving compensation from the use of their writings and the interests of consumers and music distributors who wanted to make available the widest variety of musical compositions at the lowest cost to the public.

The development of new technologies and mediums for the physical distribution of music, such as phonographic records and cassette tapes, as well as a recognition of the woefully inadequate

compensation provided to copyright owners by the 2-cent statutory royalty, led to amendments to the law in 1976.

In 1995, the Congress again revisited the license by enacting the Digital Performance Right in Sound Recordings Act, or DPRA. At that time, Congress sought to anticipate the transition from the physical distribution of products, such as albums, CDs, and tapes that contained music to the digital delivery of music files by computer and the Internet, by making clear that copyright owners were to benefit from the payment of royalties for digital deliveries of phonorecords.

Notwithstanding these amendments, there is substantial evidence that section 115 is, in the words of our distinguished Register, Ms. Peters, dysfunctional. The Copyright Office reports that the license appears to be seldom used by licenses, the administration of the license is fraught with inefficiencies, ambiguities and difficulties and recommends the license needs to be structurally changed and amended to clarify which licensees are required for the transmission of music if Congress is to improve its operation.

Indeed, the view that the license is dysfunctional is widely shared by those in the music publishing, reproduction and distribution industries. It is, furthermore, the opinion of the present and former leaders of this Subcommittee, who worked diligently and introduced the Section 115 Reform Act of 2006, which is commonly referred to as SIRA.

Though marked up by the Subcommittee last June, you will recall, Mr. Chairman, several outstanding issues conspired to prevent that measure from being formally enacted prior to the adjournment of the Congress for that year.

I believe the Members of this Subcommittee and the parties interested in modernizing the music licensing systems owe a debt and gratitude to our former Chairman, Representative Smith, the distinguished gentleman from Texas, and the current Chairman, Representative Berman, the distinguished gentleman from California, for their commitment and leadership in seeking to change or to make section 115 relevant in the age of digital music.

Finally, while there is an Amen chorus that the license is broken and requires repair, the composers, music publishers, record companies, digital distributors and consumers, who all have a legitimate stake in rebalancing section 115, all sing different tunes about how precisely it should be accomplished. The process that led to the introduction and markup of the Section 115 Reform Act brought many of these parties closer together.

I look forward to hearing the testimony from Ms. Peters today, Mr. Chairman, as you indicated, and to learning more about proposals to clarify the rights that need to be licensed, as well as approaches for streamlining the rights approval process.

This concludes my remarks, and I thank the Chairman.

[The prepared statement of Mr. Coble follows:]

PREPARED STATEMENT OF THE THE HONORABLE HOWARD COBLE, A REPRESENTATIVE
IN CONGRESS FROM THE STATE OF NORTH CAROLINA, AND RANKING MEMBER, SUB-
COMMITTEE ON COURTS, THE INTERNET, AND INTELLECTUAL PROPERTY

**STATEMENT OF THE HONORABLE HOWARD COBLE
RANKING MEMBER
SUBCOMMITTEE ON COURTS, THE INTERNET
AND INTELLECTUAL PROPERTY
OVERSIGHT HEARING ON
"REFORMING SECTION 115 OF THE COPYRIGHT ACT FOR
THE DIGITAL AGE"
MARCH 22, 2007**

Thank you, Mr. Chairman. I move to strike the last word. Article I,
Section 8 of the Constitution grants Congress the power:

"To promote the Progress of Science and useful Arts, by securing
for limited Times to Authors and Inventors the exclusive Right to
their respective Writings and Discoveries."

In 1909, the 61st Congress decided to exercise this power by
enacting a compulsory license that authorized anyone to reproduce and
distribute piano rolls for use in the home entertainment centers of their
day – player pianos, providing they paid a royalty of 2-cents to the
owner of the copyright in the musical work, which was typically the
songwriter or a music publisher.

The antecedent of Section 115 of the Copyright Act, which is the subject of our hearing today, this license was intended to **balance** the interests of copyright owners in controlling and receiving compensation from the use of their “Writings” and the interests of consumers and music distributors who wanted to make available the widest variety of musical compositions at the lowest cost to the public.

The development of new technologies and mediums for the physical distribution of music, such as phonographic records and cassette tapes, as well as a recognition of the woefully inadequate compensation provided to copyright owners by the 2-cent statutory royalty led to amendments to the law in 1976.

In 1995, Congress again revisited the license by enacting the “Digital Performance Right in Sound Recordings Act” or DPRA.

At that time, Congress sought to anticipate the transition from the physical distribution of products such as albums, CD's and tapes that contain music to the digital delivery of music files via computer and the Internet by making clear that copyright owners were to benefit from the payment of royalties for "digital deliveries of phonorecords."

Notwithstanding these amendments, there is substantial evidence that Section 115 is, in the words of Ms. Peters, the Register of Copyrights and our witness today, "dysfunctional." The Copyright Office reports that:

the license appears to be seldom used by licensees;
the administration of the license is fraught with inefficiencies, ambiguities and difficulties; and
recommends the license needs to be "structural[ly] change[d]" and amended to clarify "which licenses are required for the transmission of music" if Congress is to improve its operation.

Indeed, the view that the license is dysfunctional is widely shared by those in the music publishing, reproduction and distribution industries. It is also the opinion of the present and former leaders of this Subcommittee who together introduced the "Section 115 Reform Act of 2006," which is commonly known as SIRA last year.

Though marked up in the Subcommittee last June, several outstanding issues conspired to prevent that measure from being formally enacted before Congress adjourned for the year.

I think the Members of this Subcommittee and the parties interested in modernizing the music licensing system owe a debt of gratitude to our former Chairman, Rep. Smith, and current Chairman, Rep. Berman, for their commitment and leadership in seeking to make Section 115 relevant in the age of digital music distribution.

While there is an “Amen chorus” that the license is broken and requires repair - the composers, music publishers, record companies, digital distributors and consumers who all have a legitimate stake in “re-balancing” Section 115 all sing different tunes about how precisely it ought to be accomplished.

The process that led to the introduction and markup of the “Section 115 Reform Act” brought many of these parties closer together.

I look forward to receiving the advice of Ms. Peters and to learning more about proposals to clarify the rights that need to be licensed as well as approaches for streamlining the rights approval process.

That concludes my opening remarks, I thank the Chairman.

Mr. BERMAN. Thank you very much, Mr. Coble.
Chairman Conyers?

Mr. CONYERS. After these two great descriptions of what we are here for, I will put my statement in the record.

[The prepared statement of Mr. Conyers follows:]

PREPARED STATEMENT OF THE HONORABLE JOHN CONYERS, JR., A REPRESENTATIVE IN CONGRESS FROM THE STATE OF MICHIGAN, CHAIRMAN, COMMITTEE ON THE JUDICIARY, AND MEMBER, SUBCOMMITTEE ON COURTS, THE INTERNET, AND INTELLECTUAL PROPERTY

Let me begin by thanking my good friend from California, the Chairman of the Subcommittee, for convening today's hearing. I'd also like to take this opportunity to recognize the presence of our sole witness, Marybeth Peters. I believe this is the third time that Ms. Peters has agreed to testify before the Subcommittee on this issue, in as many years. And, I'd just like to personally thank her for her continued willingness to help out, as we search for a solution to this difficult and complex problem.

In just a few years, copyright holders have gone from being just victims of large-scale Internet piracy to embracing the Internet to market their works. Copyright owners, including record companies and songwriters, responded to consumer demands by working with Internet sites like iTunes to provide digital content to consumers. In essence, they are taking advantage of the very technology that threatens their livelihood.

Despite this turnaround, though, we are still hearing that music is not widely available online and that the reason is the difficulty in getting licenses from music publishers over the musical compositions. Companies seeking the licenses claim the procedures are outdated and the law is not clear on which online music services require which licenses. There are even suggestions that Congress should alter the licensing scheme into a "blanket" license so that users of compositions pay royalties into a pool and the Copyright Office divvies up the money amongst the publishers.

Let me state that I am one Member who would be concerned with proposals limiting the ability of songwriters and publishers to negotiate licenses for their compositions. Despite the fact that they actually create and write the songs we listen to, songwriters and publishers receive what appear to be the lowest royalties in the music industry.

Publishers should not be penalized for protecting their property rights in the same way every other industry has done: the record companies have sued individuals for copyright infringement and file sharing companies have sued record companies and others for copyright violations.

Simple economics would dictate that it is in the publishers' self-interest to license their work to anyone who can protect it from piracy and who can pay the royalties. Simply put, music publishers and songwriters have no incentive to keep music off the Internet, but limiting their rights even further could create disincentives.

In short, I hope we can let the market work before we introduce more regulations into an already heavily-regulated content industry. The last thing we want to do is create further obstacles to creativity.

Mr. BERMAN. This is really a three-witness hearing, Marybeth Peters, the register, Mr. Coble and myself.

And the Ranking Member of the Committee, Mr. Smith?

Mr. SMITH. Mr. Chairman, I do have an opening statement I would like to make.

Mr. BERMAN. Yes, you are recognized.

Mr. SMITH. Mr. Chairman, first of all, I appreciated your comments a while ago about our efforts last year, and of course I hope those efforts will lead to results sometime soon this year.

Mr. Chairman, thank you for convening this hearing on section 115 of the Copyright Act and the status of proposals to adapt it to the realities of today's digital marketplace.

Last June, this Subcommittee began the process of bringing the law that governs the music industry, a multibillion dollar enterprise, into the digital age with the introduction and markup of the

Section 115 Reform Act of 2006, or SIRA. Prior to the introduction of SIRA, the Subcommittee had conducted seven hearings over the past two Congresses on aspects of the copyright law that relate to music licensing and digital technology.

SIRA was introduced to focus attention on the need to modernize the mechanical license that governs the making and distribution of phonorecords in the U.S. The need for a comprehensive rewrite of this compulsory license has been apparent for some time. Imperfect and in many ways anachronistic, the license is nevertheless one that has generally been accepted by those who have been engaged in composing, publishing or producing phonorecords for many years.

In its current form, though, the license fails to adequately encourage the cultivation and development of a robust, legitimate, on-line digital music market, something that is necessary for the future health of composers, publishers, record companies, recording artists and consumers. The development of a legal marketplace will improve the consumer experience by enabling music lovers to purchase and enjoy music when and where they want.

Tens of millions of American consumers already embrace technologies that enable them to enjoy music in new, exciting and previously unimaginable ways. As the number and variety of online music services expands, Congress has the responsibility to ensure the law is modernized in a manner that strikes the appropriate balance between the rights of copyright owners, the economic necessities of the marketplace and the interest of consumers.

SIRA was an important first step in beginning this process. The requirement to update our Nation's music licensing laws grows more urgent every day.

Mr. Chairman, as you noted a while ago, proof of this statement was on the front page of yesterday's *Wall Street Journal*, which published an article that described a "seismic shift in the way consumers acquire music," and stated overall, "Sales of all music, digital and physical, are down 10 percent this year and that CD sales have plunged a startling 20 percent over the last year."

To be sure, there are a number of factors that have contributed to this dramatic decline. However, Congress and the music industry have the power to advance the adoption of a modern, sensible and efficient music licensing system that rewards creators and facilitates the ability of legitimate licensees to acquire the legal rights that they need to reproduce, distribute and perform music.

I am encouraged that we have the opportunity to build on SIRA's foundation and hopefully succeed in enacting a bipartisan measure that updates and reforms our Nation's music licensing laws.

The critical question that will need to be addressed by the music industry this Congress is whether it will find common ground and take the steps necessary for the development of a 21st century music licensing system.

In closing, Mr. Chairman, I want to thank you and the Ranking Member of this Subcommittee for your recognition of the importance of this issue and the decision to schedule this oversight hearing so early in the congressional session.

Mr. Chairman, I ask unanimous consent that the *Wall Street Journal* article that you and I have referred to be made a part of the record.

Mr. BERMAN. It will be so documented.

[The information referred to is available in the Appendix.]

Mr. SMITH. And, furthermore, Mr. Chairman, I want to apologize for having to leave almost immediately in order to get to the House floor. As you know, the Judiciary Committee has a bill that is coming up, and I need to tend to that. But I know this is going to be an interesting hearing, and I look forward to reading Marybeth's testimony and to learning more about this subject.

And I yield back the balance of my time.

[The prepared statement of Mr. Smith follows:]

PREPARED STATEMENT OF THE HONORABLE LAMAR SMITH, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF TEXAS, RANKING MEMBER, COMMITTEE ON THE JUDICIARY, AND MEMBER, SUBCOMMITTEE ON COURTS, THE INTERNET, AND INTELLECTUAL PROPERTY

**Statement of Judiciary Committee Ranking Member Lamar Smith
Subcommittee on Courts, the Internet and Intellectual Property
“Reforming Section 115 of the Copyright Act for the Digital Age”
March 22, 2007**

Mr. Chairman, thank you for convening this hearing on Section 115 of the Copyright Act and the status of proposals to adapt it to the realities of today’s digital marketplace.

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The need for a comprehensive rewrite of this compulsory license has been apparent for some time.

Imperfect and, in many ways, anachronistic, the license is nevertheless one that has generally been accepted by those who have been engaged in composing, publishing, or producing phonorecords for many years.

In its current form, though, the license fails to adequately encourage the cultivation and development of a robust legitimate online digital music market – something that is necessary for the future health of composers, publishers, record companies, recording artists and consumers.

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The requirement to update our nation's music licensing laws grows more urgent each day.

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To be sure, there are a number of factors that have contributed to this dramatic decline. However, Congress and the music industry have the power to advance the adoption of a modern, sensible and efficient music licensing system that rewards creators and facilitates the ability of legitimate licensees to acquire the legal rights that they need to reproduce, distribute and perform music.

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The critical question that will need to be addressed by the music industry this Congress is whether it will find common ground and take the steps necessary for the development of a 21st century music licensing system.

In closing, I want to thank the Chairman and Ranking Member of the Subcommittee for their recognition of the importance of this issue and the decision to schedule this oversight hearing so early in the session.

Mr. BERMAN. See, in the old days, we wouldn't have been able to continue while a Judiciary bill was going on on the House floor. Thank you very much, Mr. Smith.

Do any other Members wish to make opening statements?

Okay. Then I will introduce our witness, known to anybody who has been around here a while. She is Marybeth Peters, the register of copyrights. Ms. Peters has been register since 1994. Previously, she served as the policy planning advisor to the former register.

In addition to her leadership of the Copyright Office, Ms. Peters serves on the Intellectual Property Advisory Committees of several law schools and is a member of the Board of Trustees of the Copyright Society of the United States of America.

Ms. Peters received her undergraduate degree from Rhode Island College and her law degree from George Washington University. She is not simply important because of her position but she is truly an expert on this subject.

Ms. Peters, it is good to have you here again. Your written statement will be part of the record in its entirety, and we would appreciate you being able to summarize your testimony in around 5 minutes.

We welcome you. Please begin.

TESTIMONY OF MARYBETH PETERS, REGISTER OF COPYRIGHTS, U.S. REGISTER OF COPYRIGHTS, WASHINGTON, DC

Ms. PETERS. Let me start by saying, Chairman Berman, Ranking Member Coble and Members of the Subcommittee, thank you for inviting me to testify on reforming the compulsory license dealing with the reproduction and distribution of non-dramatic musical works by means of physical phonorecords and digital phonorecord deliveries, section 115 of the Copyright Act, a topic that has been on the Subcommittee's agenda and my office's agenda for more than 3 years.

During this period, I have testified four times, three of them before this Subcommittee, and I am going to use the same word that you used, Mr. Berman, that there have been valiant efforts by you and Mr. Smith and by the Subcommittee staff over the past 3 years, valiant efforts by the parties and even by my office to reach consensus on reform.

Yes, we were close, but at the end of the day, legislation was not enacted. Today, my message is, the situation is worse, new issues are arising, and the likelihood of reaching consensus has lessened considerably, yet reform of section 115 is urgent. So my focus today is on what potentially is achievable.

Now, over the past 3 years, I have offered a number of solutions—at different times, different solutions. My preferred solution has always been abolition of the license. However, I am not advocating abolishing the license today. That would bring chaos. So whatever we do to reform needs to be achievable, and we can look at maybe the reform as transitional if in fact the goal, ultimately, and you agree, is to get rid of the license.

Before going on, let me give a little bit of background, and you both referred to it, Mr. Coble and Mr. Berman, in your opening remarks. In 1995, the compulsory license was amended in anticipation of the introduction of digital music services. It was expanded

to cover digital phonorecord deliveries. However, no one anticipated what would come. No one anticipated peer-to-peer, Napster and the like. Nor could anyone foresee the issues that such technologies would raise.

The Copyright Office, through its regulatory powers, has updated its regulations in response to industry petitions to make the compulsory license work better, and we may continue to do so, but regulatory action won't solve the problem. Substantive legislative reform is needed.

I want to highlight two possible solutions. First, it could be wholesale sublicensing with a safe harbor provision for sublicensors or an amendment to section 115 to mirror the blanket compulsory license in section 114, which is the section which deals with digital performances of sound recordings.

Under either option, however, the issue of clarifying the rights is essential. More about rights later.

Let me start with sublicensing, which exists today in the marketplace. Online music companies can go to one entity, typically the record label, and receive all of the rights they need to operate a music service. Sublicensing works and with the addition of minimal statutory changes could work even better. I don't expect that every party will endorse additional sublicensing provisions, but this approach would solve the problem.

Sublicensing makes sense from a practical perspective, because music services already have to deal with the record labels. So long as the record label passes on the proper royalty amount to the publisher that they have collected and the music services get the rights they need and money flows back in a timely fashion, then the parties will get the benefit of the compulsory license.

The second legislative option is to adopt the 114 model in section 115. This would require greater changes in the law, but much of the language to create a 115 license already exists in 114.

Under the 114 framework today, one entity with respect to webcasters, SoundExchange, collects all the royalty income on behalf of all rights holders and then distributes that money to them. It is an efficient system that both licensees and licensors support, despite the outcry over the recent rate decision. It is not necessarily over the process, per se. It is the rate.

As I have noted earlier, solving the rights issue is really necessary, and the question here is, what is the problem with the rights. Licensing is divided into two separate markets. One is public performance; one is reproductions and distributions.

This pits two different middlemen for the same copyright owner against each other. Each wants and each demands a piece of the action, whatever that action might be. But whether or not two or more separate rights are truly indicated and deserving of compensation is a question that is before a variety of bodies at this point.

But on top of whether or not they are truly implicated, there is the belief that it is inefficient to require a licensee to seek out two separate licenses from two separate sources in order to compensate the same copyright owner for the right to engage in a single transmission of a single work. So clarification of what rights are implicated and whether those rights have liability is critical.

If the goal, and I think this is the goal, is to shift users away from piratical services to legitimate services, we must have a statutory framework that enables music services to flourish. As I think all of us who have spoken this morning have said, the current framework for online services isn't just outdated, it is broken. It needs to be fixed.

I look forward to working with all of you in trying to figure out a solution that will work for the digital marketplace, that will compensate songwriters, and that will compensate publishers. The key is not to deny rights holders the ability to get a fair bargain. It is really to enable music services so money will flow back.

Thank you.

[The prepared statement of Ms. Peters follows:]

PREPARED STATEMENT OF MARYBETH PETERS

Statement of

**Marybeth Peters
The Register of Copyrights**

Before the

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

**110th Congress, 1st Session
March 22, 2007**

Hearing on "Reforming Section 115 of the Copyright Act for the Digital Age"

Chairman Berman, Ranking Member Coble, and Members of the Subcommittee, thank you for inviting me to testify before you today on Section 115 of the Copyright Act and how best to reform it. Section 115 provides a compulsory license for the making and distribution of physical phonorecords and digital phonorecord deliveries. This Subcommittee has had a number of hearings over the past three years concerning Section 115 to identify its problems and explore potential solutions. During this time, industry groups that were originally divided about the need for reform have now all agreed that reform is necessary, although they have never been able to agree on how to accomplish this goal.

Let me say at the beginning of my testimony that I believe that reform of the digital music licensing system is the most important music issue currently before Congress. It is an important issue not only to digital music services who want to offer robust music services utilizing thousands of legal copies of musical works, but it is also important to the songwriters and copyright owners who deserve compensation when others use their works. If music licensing reform is successful, consumers will be able to access more legal music online, through

a variety of competing services, and be less tempted by piratical services that today can already offer every song ever written for free.

History of Section 115

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

Twice since its inception in 1909, Congress has amended section 115, first in 1976, when Congress enacted the 1976 Copyright Act - a wholesale revision of the copyright law, and again in 1995, with the passage of the Digital Performance Right in Sound Recordings Act of 1995, Pub. L. No. 104-39, 109 Stat. 336 (1995), to accommodate the delivery of music by means of a digital transmission. The changes adopted in 1976 were implemented to ease the burdens placed on the copyright owners, clarify ambiguous provisions and establish a mechanism to adjust the royalty rates over time, whereas the changes made in 1995 were in response to the emergence of new digital technology that, for the first time, provided a quick and inexpensive way to deliver music directly to the consumer's computer. To accommodate these new delivery methods,

Congress modified section 115 to provide expressly for the reproduction and delivery of a phonorecord by means of a digital transmission. Congress took these steps in order to reaffirm the mechanical rights of songwriters and music publishers in on-line environment.

My Office has also updated the regulations that govern the functioning of the existing statute, most recently in June 2004. Regulatory changes, however, cannot address the inherent problems with the statutory license, and the Section 115 compulsory license remains a dysfunctional option for licensing the reproduction and distribution of musical works. Hence, its primary purpose today is to provide a ceiling for the royalty rate used in privately negotiated licenses.

However, that could change and the Section 115 license could become a useful tool for delivering music in a digital environment, if changes can be made to transform the license from a historical relic into a viable mechanism for licensing music on-line. In order for Section 115 to be workable for songwriters, music publishers, online music companies, and consumers, Congress must take action and make the necessary structural changes.

The Need for reform

Recognizing the importance of enabling legal music services to compete with illegal sources of on-line music, Congress has tried to update our laws to combat illegal sources of music on several occasions and the courts have expanded the theory of secondary liability expressly to cover activities that induce others to infringe.¹ Congress has also held oversight

¹ *MGM Studios, Inc. v. Grokster, Ltd.*, 243 F. Supp. 2d 1073 (C.D.Cal. 2003), aff'd, 380 F. 3d 1154 (9th Cir. 2004), cert. Granted, 545 U.S. 1032 (2004), vacated and remanded by, 545 U.S. 913 (2005).

hearings on how to make legal services more able to compete with illegal sources. A primary focus of Congressional inquiry has been the reform of Section 115.²

The need for reform became crystal clear during a hearing on March 11, 2004, before this Subcommittee.³ Interested parties testified about the difficulties they have encountered in licensing the use of nondramatic musical works under the antiquated statutory scheme. They voiced complaints about the notice requirements, lack of clarity over what activities are covered by the license, which rights are implicated, and problems with use of a per-unit penny-rate royalty. A key issue identified by the music services involved the use of business models, e.g., streaming, that required the user to pay one agent for the publishers and songwriters to clear the reproduction and distribution rights (often referred to as the mechanical right) and then to pay a second agent for the same copyright owners to clear the public performance right for use of the same musical works. While it was widely recognized that the performance right could be cleared easily with blanket performance licenses from the three performing rights societies, it became

² See *Oversight Hearing on "Copyright Office Views on Music Licensing Reform": Hearing Before the Subcomm. on Courts, the Internet, and Intellectual Property of the House Comm. on the Judiciary, 109th Cong. (2005)*(statement of Marybeth Peters, Register of Copyrights) (available at <http://www.copyright.gov/docs/regstat062105.html>). See also *Music Licensing Reform: Hearing Before the Subcomm. on Intellectual Property of the Senate Comm. on the Judiciary, 109th Cong. (2005)* (statement of Marybeth Peters, Register of Copyrights) (available at <http://www.copyright.gov/docs/regstat071205.html>), *Section 115 Reform Act (SIRA) of 2006: Hearing Before the Subcomm. on Courts, the Internet, and Intellectual Property of the House Comm. on the Judiciary, 109th Cong. (2005)*(statement of Marybeth Peters, Register of Copyrights) (available at <http://www.copyright.gov/doc/regstat051606.html>).

³ *Section 115 of the Copyright Act: In Need of an Update?: Hearing Before the Subcomm. on Courts, the Internet, and Intellectual Property of the House Comm. on the Judiciary, 108th Cong. (2004)*(statement of Marybeth Peters, Register of Copyrights) (available at <http://www.copyright.gov/docs/regstat031104.html>). The difficulties involved in licensing musical works have been apparent since before the hearing in 2004. For example, in December 2001, I testified before you on a report I had delivered to you pursuant to Section 104 of the Digital Millennium Copyright Act, Pub. L. 105-304 (1998), in which I addressed some of the issues involved in music licensing that you and I have been grappling with over the subsequent years. *Digital Millennium Copyright Act Section 104 Report: Hearing Before the Subcomm. on Courts, the Internet, and Intellectual Property of the House Comm. on the Judiciary, 107th Cong. (2001)*(statement of Marybeth Peters, Register of Copyrights) (available at <http://www.copyright.gov/docs/regstat121201.html>). See also *Digital Millennium Copyright Act Section 104 Report (2001)* (available at http://www.copyright.gov/reports/studies/dmca/dmca_study.html).

apparent that no similar mechanism existed to clear the reproduction and distribution rights with equal ease.

Recognizing the need to explore these issues further, the leadership of this Committee asked me in July of 2004 to bring together representatives of the National Music Publishers' Association, Inc. ("NMPA") and its subsidiary The Harry Fox Agency, Inc. ("HFA"); the Recording Industry Association of America ("RIAA"), and the Digital Music Association ("DiMA") to see if agreement could be reached on a general framework of reform. Although the parties willingly participated and agreed to consider a blanket licensing approach, reaching consensus on the details proved impossible.

Subsequently, at the request of this Subcommittee, I prepared model legislation for reform of Section 115 that was centered around the creation of Music Rights Organizations ("MROs"). The hallmark of the proposal was the creation of licensing organizations that would offer blanket licenses covering both the mechanical and the performance rights needed to transmit digitally the musical works in the MRO's repertoire. Essentially, the MROs would offer "one-stop shopping" to the extent the licensee could get a single license covering a multitude of musical works even when the performance, reproduction and distribution all take place in the course of a single transmission.

The proposal, however, was not embraced by the affected parties. Instead, they returned to the drawing board and, in late 2005 and early 2006, they participated in a broader series of discussions on how to reform Section 115 hosted by the Subcommittee. From these discussions, a number of issues were resolved through various compromises that resulted in the introduction of H.R. 5553, the Section 115 Reform Act of 2006 ("SIRA") on June 8, 2006 by Mr. Smith and Mr. Berman. This legislation was marked up in this Subcommittee on the same date, and was

incorporated into a larger package of bills that was originally scheduled for full Committee markup last September.

Key Issues

In reviewing the possible options for reform of Section 115, there are four key issues that must be addressed in any legislation: 1) Scope of the license and clarification of rights; 2) Collection and distribution of royalty fees; 3) Efficiency of the licensing process; and 4) Rate setting procedures.

1. Scope of the Statutory License and Clarification of the rights

One of the major frustrations facing online music services today, and what I believe to be the most important policy issue that Congress must address, is the lack of clarity regarding which licenses are required for the transmission of music. Let me explain why I believe this to be the case.

Today consumers can listen to music streamed over the Internet or, rather than purchase a physical CD, they can order a digital copy from iTunes or a similar service for about 99¢. While a stream of music can be viewed primarily as a public performance, it is necessary to make server, cache, and other intermediate copies⁴ of the sound recording and the musical work⁵ embodied therein in order to facilitate the delivery of the performance. Similarly, the purchase of a digital phonorecord delivery of the same recording can be viewed primarily as a mere reproduction and delivery of a copy for private use, but this is not a settled area of the law.

⁴ Technically, these are phonorecords rather than copies, *see* 17 U.S.C. § 101 (definitions of "copies" and "phonorecords"), but terms such as "buffer copy" and "server copy" are commonly used to refer to these reproductions.

⁵ A "musical work" refers to a composition (e.g., the specification of notes and lyrics, such as a written page of music) while a "sound recording" refers to the fixation of a particular performance of a composition such as on an audio compact disc.

Publishers maintain that any transmission of a sound recording involves a public performance of the musical work embodied therein and the issue is now being considered by the rate court in the Southern District of New York.

But why is this important? If both the mechanical and the performance rights are implicated and the money goes to the same copyright holders, why not make a single payment to one agent for the digital transmission of the work? The answer is that the current music licensing structure does not allow for that option. In the United States, the performance right is licensed by three performing rights organizations: the American Society of Composers, Authors and Publishers ("ASCAP"), Broadcast Music, Inc. ("BMI"), and SESAC, Inc. Collectively, the repertoires administered by these three performing rights organizations account for virtually all musical compositions in the marketplace. However, consent decrees have limited some of these organizations abilities to license both the performance and the mechanical rights. As a result, the mechanical right is licensed under the provisions of the Section 115 statutory license, or directly through the publisher or an agent acting on behalf of the publisher. The largest agent acting in this capacity is The Harry Fox Agency, which has authority to issue mechanical licenses for more than 1.6 million songs on behalf of more than 31,000 publishers worldwide.⁶

The reality of digital transmissions, though, is that in many situations today it is difficult to determine which rights are implicated, and to what extent. Hence, there is a need to clarify the rights involved with different types of digital transmissions in order to determine whether a royalty is owed and at what rate. For example, do the intermediate copies made by routers and computer caches during the delivery of a work to a consumer qualify as "digital phonorecord

⁶ IIFA Reports 2006 Collections, Susan Butler, N.Y. Billboard Magazine Online (March 16, 2007).

deliveries?" Moreover, would such copies be compensable under a Section 115 license or should such copies be exempted under the law because they have no inherent value except to facilitate the already-licensed transmission of a public performance of a musical work? Finally, clarification of whether the delivery of a reproduction of a musical work for use by the consumer is also a public performance is needed to determine whether a separate license fee must be paid to the performing rights organizations.

As we have seen, licensors have rarely turned down the opportunity in the digital age to seek royalties, even when the basis for their requests is weak at best. Online music companies rightly complain that they need certainty over what rights are implicated and what royalties are payable so that they can operate without fear of being sued for copyright infringement. Although the term "rights clarity" may sound obscure, the issue is at the heart of any music licensing reform effort. Moreover, if the statutory license is to be functional, it is important to identify which reproductions are covered by a Section 115 license and to insure that all necessary reproductions for making a digital transmission can be easily licensed either under Section 115 or under a separate statutory license.

Yet today, music services have forged ahead and have begun offering legitimate music services to everyone's benefit even though the rights questions remain unresolved. In doing so, they are exposed to demands from the agents for both the mechanical and the performance rights and are threatened with lawsuits if they do not acquiesce. And, in fact, music services and the performing rights organizations are engaged in active litigation in the Southern District of New York. In that case, the parties are seeking a determination as to whether a digital phonorecord delivery is also a public performance. Common sense and sound policy counsel that the transmission of a reproduction of a musical work without any rendering of the recording at the

time of delivery should implicate only the reproduction and distribution rights. But the law is ambiguous on this point and the parties are at odds, so they turn to the courts for an answer.

In the meantime, music services operate under the threat of further suits and without any guidance on how to proceed. A far simpler and more direct approach to the problem would be for Congress to amend the law to clarify which rights are implicated in the digital transmission of a musical work. For example, it may well be advisable to amend the law to clarify what constitutes a public performance in the context of digital transmissions, or to provide that when a digital transmission is predominantly a public performance, any reproductions made in the course of transmitting that performance will not give rise to liability. By the same token, it may well be advisable to clarify that when a digital transmission results in the receipt of a copy that may be performed on more than one occasion after its receipt, there is no liability for any public performance that might be embodied in the transmission (because the transmission is a reproduction and distribution for which the copyright owner is being compensated). Alternatively, you should consider creating a licensing structure that covers all the rights involved in the digital transmission of music. While either solution would bring stability to the marketplace and set the stage for the development of more and varied on-line music services, it is critical that the question be addressed as an initial matter before attempting to resolve the other issues associated with music licensing.

2. Collection and Distribution of Royalties

Under the current Section 115 license, licensees must serve notice upon and pay each copyright owner or his or her designated agent directly for the use of his or her musical works. The need for each licensee to identify, serve notice, and pay the individual copyright owners creates major inefficiencies for the licensee especially when the identity of the copyright owner

is not readily known or ascertainable. One way to eliminate these inefficiencies is to specify one or perhaps more agents whose responsibility it would be to collect and distribute royalties. Such a system has already been established under the Section 114 statutory license. Royalties under the Section 114 license, which are owed to the copyright owners of sound recordings rather than that of musical works, are paid to SoundExchange, an agent appointed by the rate setting body to receive the royalties and then disburse them to the copyright owners.

Adoption of this collecting model would, however, give rise to important administrative issues that would need to be addressed. First is the question of administrative costs and what these costs cover. Ideally, an agent should be allowed to deduct only those costs associated with the collection and distribution functions accorded to it by law. Such organizations should not have wide discretion to tap the royalty pools to fund lobbying efforts, lawsuits not directly associated with the collection and distribution of the royalties or tangential licensing practices not associated with the statutory license. Second, the law should include authority for the appointing body to oversee the activities of the agent, including rulemaking authority to establish regulations governing the type and amount of information that must be submitted to determine the extent of use of specific musical works. Third, the law should include guidance on how the royalties will be distributed among the beneficiaries. The agent should not have discretion on how to allocate the funds to copyright owners who have not actively chosen the agent to represent their interests. And finally, provision should be made to govern the retention and use of royalties for works of copyright owners who cannot be identified or located and to insure transparency of all activities.

Should Congress choose to adopt such a licensing scheme, interested parties will have more to say about the organizational structure of the governing board. While this is indeed an

important issue, suffice it to say that the law should require the governing body to include representatives of all stakeholders – that is, music publishers and songwriters -- in such proportions that a reasonable balance can be maintained among the varied interests of the respective stakeholders.

3. Efficiency of the licensing process

In addition to delineating the rights involved in a digital transmission, creation of a blanket licensing scheme predicated on the filing of a single notice would be a workable model to create efficiencies for all stakeholders. Licensees would be able to minimize their transactions to clear the rights to use the music, copyright owners would receive full compensation for use of their works, and consumers would benefit from the development of new and robust legitimate music services that offer not only current hits but virtually any music that consumers want. I have suggested this approach on a number of occasions and still believe that it is an approach worth pursuing. Users have also suggested amending Section 115 to allow for quarterly payment of royalty fees in place of the current requirement to make monthly payments as a way to streamline the payment process. Given that most licensees in the marketplace appear to operate on a quarterly basis, a simple change to the accounting period would make the statutory license more workable for those who cannot negotiate licenses in the marketplace. Undoubtedly there are other measures that can be adopted to minimize the costs associated with the administration of a statutory license and careful consideration should be given to any such proposal.

4. Rate setting procedures

Currently, rates set pursuant to Section 115 reflect a unit price for each reproduction and distribution, a pricing structure which suits the making of physical phonorecords. However, it

should be noted that certain music services offer a variety of options for enjoying music at a fixed monthly subscription rate, rather than charging a per stream or per download rate. Such services have stated that it will have difficulty in utilizing a statutory license that requires payment on a per unit rate and would prefer a percentage of revenue option.

While I have testified that the current Section 115 does not specifically require a per unit rate, parties have expressed concern that the rate setting body would continue to set a per unit rate as has been the practice throughout the history of the license. Consequently, it may be advisable to adopt amendments that would clarify that the rate setting body has the flexibility to set a schedule of rates depending upon the services offered by the business and the manner in which it prices its offerings, while ensuring that copyright owners are fairly compensated. In any event, authority to set rates for a modified Section 115 license should remain with the Copyright Royalty Judges, the entity created by Congress to establish rates and terms for the statutory licenses in the copyright law, and they should have some discretion to establish interim rates when new services become operational.

Legislative Options

The fundamental question is how to structure an effective and efficient licensing system. First, because there are inherent difficulties in crafting an entirely new licensing system, you should start by asking what is the minimal amount that needs to be done to alleviate the problems that face the music services under the current licensing structure and focus on making these changes. No doubt interested parties will use this opportunity to approach this Subcommittee and ask that it include a number of issues marginally related to the reform of Section 115. That appears to have been the case last year with respect to the Section 115 Reform Act. However, I

would urge this Subcommittee to focus on a narrow bill that addresses only the most important core issues. Consideration of other issues will only delay this important reform effort.

To reach this objective, I suggest two substantively different options: either create a Section 114 style blanket license or provide for wholesale sublicensing with a safe harbor provision for the sublicensors. Both approaches would create a workable licensing system that would allow music services to make digital transmissions of all available musical works. The first, however, requires a substantial restructuring of the Section 115 license whereas the second sublicensing option requires only minimal modifications to achieve its objective.

Option 1: A Section 114 style licensing system for digital transmissions

Section 115 provides a statutory license to utilize a nondramatic musical work to make and distribute phonorecords of sound recordings, but it does so on a song-by-song basis. Section 114, on the other hand, offers a blanket license covering the public performance right for sound recordings embodied in digital transmissions. Moreover, the Section 114 license is simpler to administer. It requires the filing of a single notice of use with the Copyright Office, and it authorizes the Copyright Royalty Judges ("CRJs") to set rates and terms of payment for use of the license, one of which is the designation of an agent to collect and distribute royalty fees. Rights owners, artists, and online companies have been supportive of this model since the agent designated by the CRJs, SoundExchange, strives to identify and pay all rightholders, and it is my understanding that its actions are generally regarded as transparent.

The problems associated with clearing the mechanical rights for musical works are fundamentally the same as those associated with clearing the performance rights for sound recordings. Hence, adoption of a Section 114 style license for Section 115 would solve most of the difficulties associated with clearing the rights to make and distribute the musical works

needed to facilitate a digital transmission or to make a digital phonorecord delivery. It would provide one-stop shopping to the music services both for the license and for the payment of the royalty fees. In addition, it would eliminate uncertainty with respect to the rates that apply to the use of music, provided that the license allows the CRJs to set rates for new business models as they emerge. The system would also offer substantial advantages to the rightsholders. Under a blanket license system, there are economies of scale that reduce the administrative costs associated with the collection and distribution of the royalties. Moreover, a blanket license increases the possibility that a creator's works will be used because the works are readily available and no special effort is required to locate the rights holder and clear the license.

Option 2: Sublicensing

Currently, record labels may sublicense the mechanical rights to musical works under a privately negotiated license, provided that it is a term of the license, or apparently through Section 115.⁷ It appears that this sublicensing can work efficiently since it conveys all of the rights necessary for download services to operate legally. Moreover, record companies have presumably cleared the rights to use the underlying musical work in their sound recordings either through private licenses or use of Section 115. For this reason, it makes sense for music services to look to the record companies to clear the rights to use both the sound recording and the musical work embodied therein.

⁷ See 17 U.S.C. § 115(e)(3)(I) and S. Rep. 104-128 at 43 (1995). The Senate report language makes clear that the purpose of this provision was to allow record companies to sublicense the mechanical rights. Specifically, it states that "[t]he changes to S. 227 are intended to allow record companies to license not only their own rights, but also, if they choose to do so, the rights of writers and music publishers to authorize digital phonorecord deliveries. If a record company grants a digital transmission service a license under both the record company's rights in a sound recording and the musical work copyright owner's rights, the record company may be liable to the extent determined in accordance with applicable law."

Record companies, however, have been unwilling to sublicense all music services because of the exposure they assume under such arrangements. Record companies are concerned that should a sublicensee fail to make timely payments for use of a musical work, the record company may be responsible for those payments. Nevertheless, sublicensing is an efficient way for online music services to obtain all the rights needed to make and distribute phonorecords in today's digital marketplace and some thought should be given to creating incentives for the record companies to increase their willingness to sublicense more services. For example, the sublicensing provision could be amended to create a safe harbor for those companies that sublicense the mechanical rights to a digital music service and the safe harbor should cover sublicenses negotiated in the marketplace as well as those obtained under Section 115. Under such a provision, which would require minimal amendments to existing law, record companies would be responsible for clearing the rights and administering the sublicense, including the collection and distribution of the royalties for the reproduction and distribution of the musical works. However, the record companies would not be legally responsible to copyright owners in the event of a music service's failure to make the required payments. Rather, the music service would retain responsibility for making the appropriate royalty payments in a timely manner and would be the subject of any infringement action arising from an uncompensated use.

Should such an approach be considered, the law would also have to impose certain requirements upon the record company to govern whether (and if so, to what extent) record companies would be permitted to make any deductions for administrative costs involved in sublicensing, and whether the royalties for the statutory license should reflect those costs so that they are borne by the licensees rather than the copyright owners or the record companies.

Each of these two options could resolve one of the two key problems I have identified with music licensing today: the difficulty online music services have in clearing the rights to very very large numbers of musical works in a system which currently requires licensing on a work-by-work basis. However, neither option addresses the other key problem: the sometimes apparently duplicative claims by two different agents of the same copyright owner -- that two different licenses--one for public performance and one for reproduction and distribution--must be obtained in order to make a digital transmission of a musical work. I have already suggested some ways to resolve this problem, but further thought needs to be given to how to correct what has become a dysfunctional model for licensing music rights.

Other Options for Consideration

Over the past three years, I have offered and commented on a number of different options in addition to the two identified above, ranging from an outright repeal of Section 115 to the creation of a Music Rights Organization ("MRO") system which would combine all necessary rights for digital transmissions into a single blanket license issued by the entity authorized to license the public performance right of the musical work. However, there was an outcry from all sections of the music industry over the disruption they believed would occur under these two options. Nevertheless, I continue to believe an MRO option is worth considering. While music publishers have historically been well-served by the allocation of licensing authority to performance rights organizations for performance rights and to publishers and other agents for reproduction and distribution rights, that division of labor is archaic, inefficient and unfair (at least to licensee) in this age of digital transmission of music. As the lines between performance and distribution have become blurred, the opportunities for confusion and even abuse have become intolerable. It is noteworthy that music publishing is the only industry in which this has

become a problem, and the reason clearly is that music publishing is the only copyright industry in which such a division of licensing authority has predominated. However, I recognize that the political difficulties that the proposal faced in 2005 are likely to reappear should the Subcommittee revisit my MRO proposal.

Similarly, last year's Section 115 Reform Act tackled most of the difficult core issues associated with music licensing in today's world and offered workable answers, e.g., blanket licensing, coverage of the intermediate copies and hybrid offerings, a rate setting mechanism, and a means to administer the license with the authorization of the creation of designated agents.⁸ Nevertheless, controversy over tangential issues and the details concerning implementation resulted in lack of consensus. For this reason, I have suggested a narrower and more focused approach to reforming Section 115 to deal only with the specific problems identified with the functionality of the license.

Regardless of which option you chose to pursue and whether it is one I have identified, Congress must solve the rights clarity issue in order for any legislation to succeed in creating a viable licensing structure for the music industry.

I look forward to working with this Subcommittee to see that Section 115 reform legislation is enacted into law as soon as possible. Thank you again for the opportunity to appear before you today.

⁸ It did not, however, address claims by performance rights organizations that the performance right must be licensed by services that offer downloads of music.

Mr. BERMAN. Thank you very much.

I will recognize myself for 5 minutes for some questions, and then we will move ahead.

I know the Copyright Office expressed unease about last year's bill. So if Congress were to pursue legislation similar to SIRA, what policy considerations should we be concerned with?

Ms. PETERS. I think we went on record with some of our concerns, and I will just outline one of them. One of them, actually, I think, is solvable. I think we actually even came forward with a way to do it, and it really deals with streaming and specifically whether or not when streams are involved there is in fact a distribution of a phonorecord.

We believe that especially on-demand streams could well substitute for the sale of a phonorecord, and, therefore, the value of an on-demand stream is higher than pure streaming. So we agree that that is a compensable act that really has a high value.

Our disagreement was calling it a distribution of a phonorecord. For us, it really was a public performance. So this issue was about terminology, and I think that that is fixable.

There were some other issues that dealt with the administration of the license that get into the nitty-gritty of a designated agent and what the transparency of that organization is and how it runs. And we can give you further details if you want.

Mr. BERMAN. So, basically, what you are saying really is, it is not a fight about so much—I mean, there will be differences of opinion about compensation, but it is a fight about how you analyze and the terminology used to describe it.

Ms. PETERS. Well, our concern was the way that it was described in that bill.

Mr. BERMAN. Right.

Ms. PETERS. My issue about rights clarification, I think, has ratcheted up a little bit since SIRA basically was on the table. I think the proceeding in the rate court in the southern district of New York with regard to whether or not compensatable performances are involved in downloads is a big issue right now.

Mr. BERMAN. Okay. One of the webcasters' concerns in the context of section 115 reform is how to treat ephemeral recordings used to facilitate the transmission of music. Here is what has been cited as your position on this issue.

Ms. PETERS. You are talking about a footnote.

Mr. BERMAN. Footnote 434.

Ms. PETERS. Four-thirty-four.

Mr. BERMAN. But I am only going to read part of it here.

“As we indicated in 1998 to the affected parties, we saw no justification for the disparate treatment of broadcasters and webcasters regarding the making of ephemeral recordings, nor did we see any justification for the imposition of a royalty obligation under a statutory license to make copies that have no independent economic value and are made solely to enable another use that is permitted under a separate compulsory license.”

There is a lot of controversy about this footnote. What did the office mean to say in footnote 343 of your section 104 report?

Ms. PETERS. As opposed to what we didn't mean.

Mr. BERMAN. And maybe I beat Mr. Boucher to this question, I don't know.

Ms. PETERS. When we were doing what is known as the 104 report, we were looking at various exemptions, and, really, this issue came up with respect to the fact that section 112(a) basically gave broadcasters a free ride. And so it came up in the context of 112(a). And then what we basically said is, in principle, we believe that people who perform like activities should be treated essentially the same way. And because the focus was on that broadcaster you shouldn't have to pay at all, we basically said, to equalize them, then maybe they shouldn't have to pay at all.

However, what you really need to step back and say is, what is the value of those ephemeral copies. And it may be that there is value and you flip it the other way. But our main point, and I agree we took a position that said, don't pay at all. Basically, make E, which deals with webcasting and sound recordings, the equivalent of A, which deals with broadcasters and no liability, the same.

I am here today to basically say, I can see the arguments with regard to server copies in some instances, and so the issue is one of value. If there is value and it should be licensed, there should be payment, but whoever is involved should be treated exactly the same way. Don't have disparity.

Mr. BERMAN. I will restrain myself from getting into the issue of the free ride for broadcasters, and I will—

Ms. PETERS. So will I.

Mr. BERMAN. This is a 115 hearing, and I will recognize the Ranking Member, Mr. Coble, for 5 minutes.

Mr. COBLE. Thank you.

Thank you, Mr. Chairman and Ms. Peters. As has been said, it is good to have you with us this morning.

Ms. Peters, the goal of the music industry is to increase its revenue at a time when sales of CDs are falling and consumers are choosing to acquire music by other means. Some might even believe that we are attempting to swim upstream against the tide here, but let me ask you this: Do you think that success in reforming section 115 will actually result in reversing these trends and growing the pie for those involved in creating, producing and distributing music?

Ms. PETERS. I believe that reform will help. Ultimately, it is the consuming public that makes the decision in the marketplace, but I do believe that the more legitimate services that you have, and that means enabling the digital music services to have as much music as possible to make available to consumers, moves us in the right direction. It is very difficult to compete against free.

A second part of all of this is the consumer. We have to do a better job of explaining why promoting creativity, promoting songwriters, and promoting not only the people who write the songs but also the people who bring the songs to us. That has to be appreciated. So it is kind of a dual track, but this is certainly the first step.

Mr. COBLE. Let me put a simplified question to you that may not involve a simplified answer. What do you consider to be the chief obstacle or impediment to reform, A, and, B, how do we overcome it?

Ms. PETERS. The chief obstacle, in my view, is there are at least three major parties involved all of whom have their own—and I understand it—issues and way they want to see this resolved. Trying to reach consensus isn't going to happen because their own interests differ significantly. So it really is, I think, Congress' responsibility to step back and say, what is the best balance?

You cited the Constitution. What encourages creativity the most and distribution of product for the benefit of the American people? And I think there are some hard choices that you have to make. You are going to have to decide on what the path is and what a fair balance is.

Obviously, if the answer were easy, we would have solved it 3 years ago. And people in my office will smile, we have been meeting with various parties asking, what the situation is and where are you going. I had a reaction the other day. I went, "Ahh," I threw up my arms. I said, "I don't know what to do. This is so complicated."

So it is difficult, but choose a path. Choose a 114 blanket license or choose the path and then keep that path narrow to accomplish ease of administration of the mechanical compulsory license so that digital music services can bring the largest amount of content to the people so that they can compete with free, unauthorized services.

Mr. COBLE. Well, it is easier to propound a simple question, and I think you responded as well as you could. I thank you for that.

Ms. Peters, given that the 115 license is seldom used, that technology is moving faster than the legislative process and that industry stakeholders have been unable or unwilling to agree on one comprehensive reform proposal, should our Committee consider simply sunseting the license just as the distant signal satellite license, the 119 license expires every 5 years unless expressly reauthorized by the Congress? What say you to that?

Ms. PETERS. If what you are saying is, leave the license as it is and sunset it, I don't think it works. The problem is now you have got to enable music services now. You have got to figure out how to keep services in business and let them expand and grow to serve consumers' needs. So you can't leave it as it is.

Actually, I was suggesting that if you fix it and do a short-term fix, and then sunset it. But I don't think a solution is leave it as it is and in 5 years sunset it. I support sunseting it, but the experience with sunsets hasn't been good. They don't go away.

Mr. COBLE. And I see a red light. I see Mr. Berman is looking at me, so I yield back.

Mr. BERMAN. So, basically, you are saying we are going to have to make tough decisions?

Ms. PETERS. I am saying that I think the time has come——

Mr. BERMAN. I hate when that happens. [Laughter.]

Ms. PETERS. So do I.

Mr. BERMAN. Although, I don't know, the sunset means we have to make tough decisions over and over again.

Ms. PETERS. That is exactly right.

Mr. BERMAN. Since I don't know exactly where people came in, I am just going to go in the order of seniority and recognize the gentleman from Virginia, Mr. Boucher, for 5 minutes.

Mr. BOUCHER. Mr. Chairman, thank you very much.
And, Ms. Peters, welcome back to the Subcommittee.

Ms. PETERS. Thank you.

Mr. BOUCHER. We enjoy your biannual, it not annual, appearances here.

I think that we all agree on the urgent need for section 115 reform, and you have certainly well-stated that in your opening statement, and I thank you for that carefully prepared presentation.

Last year, unfortunately, as we sought to process that reform, we had a consensus that was pretty close on most of the key provisions, as you also indicated in your statement. But then at the last minute, as the measure came to the Subcommittee for final consideration, there were added some extraneous and very controversial provisions, namely provisions that would have disabled the portable device that XM Satellite Radio is beginning to market and also a provision that would, as I recall, have added a digital audio broadcast flag.

That latter provision is not mature and, frankly, has not been through the same kind of vetting process that the video broadcast flag went through with an independent group comprised of various stakeholder engineers making sure the standard was workable and efficient. That hasn't happened for the audio flag.

And for the audio flag, it may not be necessary for Congress to act at all, because one company, essentially, controls the intellectual property, iBiquity, that is being used by the digital radio broadcasters. So, I mean, with an agreement with that company and all the external stakeholders, it could be implemented without Congress even having to act.

All of that aside, my question to you is this: I very much hope that in the interest of getting an effective section 115 reform passed in this Congress, that all of those who might be tempted to burden this bill with these extraneous and controversial provisions or other matters that would be controversial and might weigh it down would refrain from doing so. Because if we pass a section 115 reform, everybody who has a copyright interest is going to benefit. The labels benefit, the performers benefit, the songwriters and publishers benefit.

And I think that *Wall Street Journal* article that Congressman Smith presented, which I also read yesterday, makes the case as clearly as any of us possibly can, that the lawful distribution by streams and downloads of music on the Internet has got to be made more feasible, and the legal underbrush that is causing that system, as you said, to be broken simply has got to be cleared away. We can do that pretty effectively with the 115 reform.

So the first question I have for you is, do you have any comment on the appropriateness of let's don't burden this reform with some of these extraneous and controversial provisions that are really not necessary to reforming section 115?

Ms. PETERS. The answer is, yes, don't burden with extraneous provisions. I guess the issue is, what is extraneous and what really is critical, and we may have some disagreement on some of that.

But, no, that is—

Mr. BOUCHER. Well, we don't need an audio flag for HD radio.

Ms. PETERS. No, I agree. We don't have to—

Mr. BOUCHER. And we don't need to disable the portable devices that XM is putting out to do this, do we?

Ms. PETERS. Not through 115, but the question is—

Mr. BOUCHER. Thank you. That pretty well answers—

Ms. PETERS. But the question is—

Mr. BOUCHER. Thank you. That is a great answer. Why don't we leave it at that?

Ms. PETERS. No, no. I meant, the question is, what is 115 going to cover? Activity is either an infringement or it isn't. Section 115 should focus on what kind of activity you want to promote through a compulsory license.

Mr. BOUCHER. All right. Let's leave it with that.

Now, my second question is this: I actually like that footnote a lot, and I am very familiar with that footnote, and I think you clearly got it right when you said that these incidental copies—the buffer copies, the cache copies, the ephemeral copies—that are necessary in order to effectuate a transmission that itself is licensed really have no independent value. You can't sell these for anything. They are only essentially made in the marketing of something for which copyright royalties are paid under another license.

And so why not say that these items simply do not have independent value? It is hard for me to imagine that they do. And I, frankly, a little bit surprised this morning to hear you suggest that maybe they do after all and that your footnote was not properly stated.

So tell me this: How can they possibly have independent value when they all do is effectuate a transmission that itself is licensed?

Ms. PETERS. I am not a guru in the marketplace. I stand by the statement with regard to incidental, temporary copies. The question that has come up, and where we actually have seen deals, we have seen contracts where there is separate money for a server copy, just raises for me a question on whether or not there is value.

Mr. BOUCHER. Well, Ms. Peters, is it possible those deals were made because of the legal uncertainty with regard to whether or not this would be termed to be a copy unless we clearly declared that they had no independent value? I think the answer is, yes.

Ms. PETERS. It could be.

Mr. BOUCHER. Thank you.

Ms. PETERS. I don't know the answer to that question.

Mr. BOUCHER. Thank you, Mr. Chairman. I yield back.

Mr. BERMAN. I recognize the gentleman from Florida, Mr. Feeney.

Mr. FEENEY. Well, thank you.

And thanks for your testimony. My colleague asked questions and answered them for you, but I am a little new to this issue, so I am going to ask you for some advice.

This is one of those areas where Congress tries to regulate an industry that technology is changing so dramatically that legislation is obsolete before it is effective. And would we be better off, given the state of things—I mean, nobody could have predicted 15 years ago, or for that matter 5, the status of BlackBerrys or iPods or downloading music on our computers, and given that we can assume that nobody can predict 5 or 15 years from now what the technological opportunities for consumers will be, would we be bet-

ter off, for example, going to a principles-based set of standards and letting the courts figure it out?

Another alternative would be—you know, throughout states in this country we regulate utilities, for example, electric, water, sewer. Could we create a utility-type regulator of experts that would meet, if necessary, 5 days a week, 4 weeks a month to settle some of these issues that are rapidly changing?

Would either of those be a better alternative than Congress trying to anticipate market technology changes?

Ms. PETERS. Let me start with the second. I would hate to see creative product treated as a utility. I would hate to see a song or motion picture or a piece of artwork treated as a utility. So I am not going to go down that road. I would not suggest that. I think these are efforts of some of the most talented people in the United States and throughout the world, and each one is different and each one has value.

It is true that some of the difficulties that we have had with the law is when you use language that is very specific, sometimes to create certainly at a particular moment in time, that that language doesn't transition well toward change. And it is true that adopting basic principles whereby things like, if in fact a copy is made only to enable a licensed performance, then basically there should not be liability. That kind of a principle can adapt with change.

And in fact in compulsory licenses, with regard to rate settings and terms, there already is a structure, a copyright royalty structure, and those people are equipped to deal with what are the services that are in the license and to set rates and terms. So I think that that is a better way to go. Stay away from copyright as a utility.

Mr. FEENEY. Well, I didn't mean to regulate—

Ms. PETERS. I am teasing. It is all right.

Mr. FEENEY [continuing]. The quality. But in terms of the—

Ms. PETERS. No, I know. I know what—actually, I have heard that many times, that everybody treats music like a utility.

Mr. FEENEY. The Securities and Exchange Commission for 80 years in this country has regulated corporate governance without any serious long-term impact on freedom or capitalism or creativity, although we have some minor problems now and then, and that is a different Committee.

You mentioned in your testimony the suggestion that we might create a music rights organization to combine both the mechanical and the performance rights, and you mentioned the benefits of one-stop shopping. But there are some potential harms with this approach too. Would you elaborate on what the downside or adverse consequences are?

Ms. PETERS. I mean, the truth of the matter is that that was a proposal that we, the Copyright Office, put forward. There was a hearing on that proposal where I was the only witness, and I can say that there was no support from anyone on that proposal.

The downside is the reality of today's world, the reality that the way that music has traditionally been licensed has different organizations that do that. They are well-established and the thought of basically combining rights and having one organization handle both is not a welcomed thought to those organizations.

Mr. FEENEY. And, finally—well, I see my—I will yield back the balance of my time.

Mr. BERMAN. I thank the gentleman.

The gentleman from Florida, Mr. Wexler?

Mr. WEXLER. Mr. Chairman, I just got here after the—

Mr. BERMAN. Okay. My problem is, I wasn't keeping track of when people got here.

Mr. WEXLER. I defer to whoever was here before me.

Mr. BERMAN. Okay.

Then Mr. Watt, the gentleman from North Carolina?

Mr. WATT. Thank you, Mr. Chairman.

Thank you for your testimony.

I am new to the Subcommittee and we never got a shot at this issue the last time in the full Committee, so I have two questions that I would like to get your responses to.

It sounds like you were very, very close to an agreement, at least that would have solved some of these issues, in the last term in Congress.

Ms. PETERS. I would say you were close to an agreement. It was Congress, not us.

Mr. WATT. Then I will rephrase it to say, it sounds like we were close—

Ms. PETERS. You were, you were, yes. Okay. Yes.

Mr. WATT [continuing]. To an agreement in—or they were close in the Subcommittee—

Ms. PETERS. Right. Yes. Yes.

Mr. WATT [continuing]. To an agreement that would have resolved this. What changes in the marketplace have taken place since that near agreement that need to be taken into account, if any?

And you, I think, indicated in your testimony that you perceive that it is more difficult to do it now than it was then. What are the things that make it more difficult from your perspective, and how might we work through those?

And then, finally, what advice would you give a new Member of this Subcommittee about what role he might play in advancing this process to a conclusion?

Ms. PETERS. That is a good question. Let me start with—

Mr. BERMAN. Go along with the Chairman is a good answer. [Laughter.]

Ms. PETERS. Well, you have your answer. Okay. Your Chairman has spoken.

Mr. BERMAN. I am just kidding. I am just kidding.

Mr. WATT. Sounds like I either need to follow the Chairman or follow Boucher, and neither one of those seems like a real good choice to me. [Laughter.]

Ms. PETERS. That is amazing.

Mr. BERMAN. I can understand why.

Ms. PETERS. Let me start with what has changed. I am not sure what we heard, basically, is that our new business models that bring about a necessity to adjust the road that I basically suggested we go down, a blanket license or sublicensing. We heard that increasingly it is—a compulsory license kicks in after a copy-

right owner has authorized, so the copyright owner is in the driver's seat for the very first recording of a song.

Mr. WATT. Was the sublicensing that you are talking about in the last legislation?

Ms. PETERS. It is actually in the 1995 legislation. But when this compulsory license kicks in is after there actually has been—

Mr. WATT. You are talking to me about something—let me go back and maybe frame the question.

Ms. PETERS. Okay.

Mr. WATT. If we were starting exactly where we left off the last time, not new things, what are the market changes that would create impediments to moving to conclusion, the changes that have taken place, and what change would you make from that basic structure?

Ms. PETERS. I don't think it is marketplace change, per se, but it is organizations who are dealing with the marketplace who believe that the existing marketplace is causing new difficulties in the licensing. And what I was getting at was this license never dealt with the first recording of a song. Now we are hearing that we really need to solve the problem of the first recording of a song.

We have heard that although the law essentially allows one owner to license for all owners, that the practice is not to do that in the music area and that each owner is now only authorizing their piece. So the question is, how many owners are there. In the past, there may have been two, maybe three. We recently heard 17. When you get 17 owners and each one has to license the piece, if that is the trend, that makes it more difficult. So it is those kinds of things. It is really how the players are now dealing with transactions that are causing some of the strains.

And I don't have advice on how you deal with it, other than to say that if you were dealing with two owners and now you are dealing with 17, it is more complicated. If you were dealing with subsequent recordings and now the issue is the initial one, it is a much bigger issue for a compulsory license.

Mr. BERMAN. The gentleman's time has expired.

The gentleman from Utah, Mr. Cannon?

Mr. CANNON. Thank you, Mr. Chairman.

And welcome back to the Committee, Ms. Peters.

Ms. PETERS. Thank you.

Mr. CANNON. I don't want to be offensive to anybody else who is appearing before this or any other Subcommittee that I serve on, but you are my favorite witness, and it is amazing to me that you know so much and you have such breadth and depth on this subject.

I apologize that I have been in and out and doing other things, and this has been asked, I think, perhaps in other ways, but you have been quoted historically as saying that getting rid of the compulsory license would cause chaos in the industry. Could that be done with a phase-out at 6 months or a 1-year phase-out, and does that make sense to do?

Ms. PETERS. I am not the best person to answer that question. It really is—

Mr. CANNON. You should leave that judgment up to us, Ms. Peters—

Ms. PETERS. Well, no, it is the part—

Mr. CANNON [continuing]. About your qualifications, because you have already made it.

Ms. PETERS. Although we have said that the compulsory license is rarely used, that doesn't mean that it really doesn't form the backdrop of licensing activities. So when you take that backdrop away, what happens? And I have heard from the parties that it would create increased chaos, but I think that that is an area that you certainly could raise with the affected parties.

Mr. CANNON. There are technologies out there that are emerging that would do a great deal more than what we are actually currently doing in practice. We have a bunch of high-tech companies that are, among other things, using music for things that music has never been used for and, therefore, it is hard to say what the purpose is or how to charge that.

So, for instance, if a company allows or creates for a family to put together a family album and that family may be five kids and two parents and grandparents and hopefully grandkids and great-grandkids, in Utah, that could actually be quite a number.

Ms. PETERS. Yes.

Mr. CANNON. With everybody having a copy, the question is, how do you license that? And, currently, I am thinking of a particular company that does this, and if they had to license every song that they use, and in fact that is what they have been doing and they are very frustrated, they are in a world where there is no traditional model for licensing and so they have to negotiate them. And they are negotiating in the context of a model that nobody understands the scope of. Whereas, I think that—

Ms. PETERS. That is the issue.

Mr. CANNON. Right. So do we help solve that issue by getting rid of the compulsory license and letting other models emerge that will be creative about how we license?

Ms. PETERS. I will tell you that I think the person who you are referring to, and certainly the Digital Media Association will tell you that the easiest way to sell it to them right now is a blanket license or sublicensing.

Mr. CANNON. But the trouble with a blanket license is, how do you deal with the complexities of the ultimate use of the material?

Ms. PETERS. You let the copyright royalty judges set rates for the various types of uses.

Mr. CANNON. Right. That will really enhance the rate at which we—

Ms. PETERS. And two of them are here, you know.

Mr. CANNON. That would really enhance the rate at which we get new uses for licenses.

Ms. PETERS. It is very difficult in a world that changes this quickly. And the good news is that more and more music is being used in more and more ways.

Mr. CANNON. And the people that create the music ought to get paid more and more money for it if we can figure out how to do that.

Ms. PETERS. Well, they certainly ought to get paid for it as it is being used, yes.

Mr. CANNON. Right. But really, currently, there are huge chunks. I am not sure what the value of those chunks is right now, but over time, that value, I think, grows, becomes dominant, but we are not getting there because of the rigidity of the current system that we have.

Ms. PETERS. I agree.

Mr. CANNON. Thank you. So does that mean that we should get rid of the compulsory license?

Ms. PETERS. I have always been an advocate of the marketplace and that when marketplace has to work, it does, and systems come into play. I am just not sure of an industry that has operated for so long in a particular fashion and their ability to transition over. However, I am aware that the predominant position of the music publisher, not the songwriters, who feel that they don't have enough bargaining power to come out well in this is to abolish the license.

Mr. CANNON. Right. I just might note that the *Wall Street Journal*, as of March 21, has a headline, "Sales of Music, Long in Decline, Plunge Sharply."

Ms. PETERS. Plunge, yes.

Mr. CANNON. This is maybe at the point where we actually have to do something about it.

You are always a delight, and thank you.

Mr. Chairman, I yield back.

Ms. PETERS. Thank you.

Mr. BERMAN. I thank the gentleman. Russia, 1993, might be a good case study in quickly getting rid of something.

The gentleman from Tennessee, Mr. Cohen?

Mr. COHEN. Thank you, Mr. Chairman.

Like Mr. Watt, I am new to the Committee and new to much of the subject matter. But unlike Mr. Watt, I feel a great deference and appreciation for the wisdom and sarcasm of the Chairman. [Laughter.]

Mr. BERMAN. I can tell he is a freshman. [Laughter.]

Mr. COHEN. But rising rapidly. [Laughter.]

Mr. BERMAN. I will just sit here and bask. [Laughter.]

Mr. COHEN. Help me with the difference. There is a definition of musical work and there is a definition of sound recording. Help me with those, the distinction.

Ms. PETERS. Okay. Musical work, there is a songwriter, there is a composer, there is somebody who basically today probably with electronic equipment can play the piano, they can basically capture digitally as an audio file or they could as the old composer, sit down with the music note taker and sketch out the song. The song, the notes, the lyrics that may accompany them, that is the musical composition. That is the foundation that starts it all.

In today's world, the way you exploit a musical composition is by getting someone to make a recording of the former, and the fixation of the performance—the performer, the other musicians, the contributions of any sound engineers—that performance is, when it is fixed, is a sound recording.

So think songwriter, music; performer, sound recording.

They are two separate rights. Sound recordings came into the Federal copyright system in 1972. Before that, they weren't there. Music has been there since 1831.

So it is the song and then the performance. There is one song, there are many different performances of that song. Each performance can result in a separate sound recording if it is fixed in a file.

Mr. COHEN. I appreciate that. I understand the differences now. And the musical works are licensed right now for the over-the-air broadcasters; is that right? They have to pay for that, but they don't have to pay for the recordings?

Ms. PETERS. The musical composition has a variety of rights. One stream is making these phonorecords, making CDs, MP3 files. That is the reproduction and distribution rights.

The probably more important right in today's world, I will argue, where you make more of your money is every time a musical composition is publicly performed that means through the radio, through the television, in a bar, many bars, some bars—I want to clarify that—some restaurants, there is a payment for that public performance, ASCAP, BMI, SESAC licensed public performance. They license them on a blanket basis. That works well.

On the delivery services, where you are authorizing downloads, like Apple iTunes, it is the reproduction distribution of phonorecord downloads. You are getting a physical object.

I know, it is complicated.

Mr. COHEN. It is complicated, but you are helping me a lot, and I have a kind of suggested question, which I think it is no secret we have these, that the musical works may be licensed to be performed by over-the-air broadcasters. Sound recordings do not have the opportunity to generate any licensing income from the use of recordings on the radio. And it may be what the Chairman—

Ms. PETERS. That is true.

Mr. COHEN [continuing]. Was suggesting we not get into with the radio, but as we consider this, do you think we should consider granting a full performance right in sound recordings?

Ms. PETERS. I have always supported a full performance right in sound recordings. And when the law was changed in 1995 to give them a limited sound recording performance right, I accepted it saying, "God, we broke the barrier and there is a recognition," but was very upset that it wasn't broader.

If you look at a performance, one of the key things is it performed. And if in fact you are not basically giving them the right to control performance, you are giving them less than totally valuable rights. So, of course, I support that.

Mr. COHEN. Thank you.

And seeing the red light is up and I have no longer time, I will yield the remainder of my time.

Ms. PETERS. Anything I can do to help you with—

Mr. BERMAN. I thank the gentleman. I want to make it clear that I only suggested not getting into that issue at this hearing. I did not suggest not getting into that issue.

Mr. COHEN. Next hearing.

Mr. BERMAN. The gentleman from Florida who was here earlier, Mr. Keller?

Mr. KELLER. Well, thank you, Mr. Chairman.

I want to thank you for coming before us again. You heard Chris Cannon say that you are his favorite witness, but you see it is the rest of us that are sticking around. Just point that out. [Laughter.]

Mr. BERMAN. So this is everyone-savage-their-colleague week. [Laughter.]

Mr. KELLER. Just teasing.

From time to time, this Subcommittee has received complaints about problems that music users have had in acquiring a license for subscription services, ringtones, DVDs or other new types of products and services, and these problems seem to arise because there are always questions about how section 115 should be applied to new technologies.

As we look at section 115 reform, are there things that we can do to minimize these kinds of disputes in the future so that new kinds of products don't get delayed by legal uncertainty?

Ms. PETERS. Well, this really goes to my issue about clarifying rights. When there may be a right that is implicated, the question then is, which of those rights really need compensation and which of those rights might be exempt? I was suggesting earlier that if you adopted a basic principled approach, it may be easier to figure out whether new activities would be covered or not.

For me, the biggest problem is, I will use the download situation. Today, I go into a store, if they are still around, and I buy a CD. It is very clear that what I have purchased is a CD and the rights that had to be cleared in order to produce that CD, the reproduction and the distribution right.

If today, instead, I decide to go online to Apple iTunes to get the same CD, assuming I could do that, or to get tracks from that CD, in essence, I am going to end up with the same thing. I am going to end up with a physical thing—this time it is going to be a digital file—so that I can listen to that in my home whenever I want to.

But what is different is there is a transmission, and the question is, the transmission that is the equivalent to my walking in the store, is that a public performance for which there should be compensation? That kind of issue needs to be clarified.

Mr. KELLER. Thank you. Some have asserted that section 115 might require payment of twice the mechanical royalties if the same recording is included on one disc in two different formats, such as stereo and surround sound. Is that your view? And if so, and if the disc can't be sold for twice the price, is that something that we should be addressing?

Ms. PETERS. That was one of the issues that was on the original list of things that we were told needed to be resolved. That is more a physical object issue rather than an online purchase issue.

If you start going down and solving all of those problems, I think you are going to not be able to get a bill through. There are a whole bunch of issues that are like that.

Mr. KELLER. You testified earlier that the reform of the digital music licensing system is the most important music issue currently before the Congress. How hopeful are you that this issue can finally be resolved this Congress? What specific steps do you think we should be taking? And then, finally, do you think we should move forward despite the lack of consensus right now in the music industry on a single reform proposal?

Ms. PETERS. Most people who know me know that I am the eternal optimist, so I will say that, in my typical fashion, I believe that it is achievable. Likely? I don't know. It certainly hasn't been solved in 3 years, but the focus in 3 years was to get the parties to reach consensus.

So the question is, do you have the stamina to basically say, "This is something we want to do," and move it forward? I think it can be moved forward, but it really does take political will and it does take this Committee getting involved and deciding what it thinks is best, the Members think is best.

Mr. KELLER. Well, thank you.

And, Mr. Chairman, I yield back the balance of my time.

Mr. BERMAN. I thank the gentleman.

And I recognize the gentleman from Georgia, Mr. Johnson.

Mr. JOHNSON. Thank you, Mr. Chairman. I will decline, at this point, from exercising my power of wit. [Laughter.]

And so I won't try to be a part-time comedian like I have heard some of the others doing today.

That was not an insult, that was a joke. [Laughter.]

Mr. BERMAN. It doesn't take much to exceed what has gone on before you. [Laughter.]

Mr. JOHNSON. And I will take that as an insult. [Laughter.]

Ms. Peters, the Copyright Act has, for decades, defined six separate rights within copyright, including the rights of performance, reproduction and distribution. One could read your testimony to suggest that some of these rights could be combined.

For example, you suggest that the right of reproduction, which may be exploited by a company in order to perform the work, need not be separately licensed and compensated and instead, by law, it be licensed along with the performance right.

Do we possibly diminish the value of each separate right, allowing them to be licensed together?

Ms. PETERS. I am not in any way suggesting that we should be, at this point, combining any rights. Each right is an important right. Each right should be licensed. The question is administration. The question is the way that you go about obtaining the necessary rights. And the point that I have made on a number of occasions is that music is more difficult than other types of works because of the historic way in which it has been licensed. And it worked well in the past, but right now we are feeling the strain.

And so the goal was, is there a more efficient way to accomplish getting the licenses that you need for all of the rights, and the value of the product, you look at the product as a whole, and obviously it is based on getting rights, but the value should always be the full value of what the market will bear for the product. The goal is to simplify the getting of the rights. It is not dealing with the value. Authors, publishers need to get full market value.

Mr. JOHNSON. So what exactly would you propose as far as changing the method of obtaining the rights to performance or reproduction? I assume you—

Ms. PETERS. Well, actually, the performance rights today, other than the question on whether or not they may be implicated, and the courts are looking at some of that, though I suggested that you could take a step in clarifying that, but the performance right, as-

suming that you need it, is very easy to clear. The three performing rights societies give blanket licenses, then negotiate it.

The issue is on the reproduction and distribution of phonorecords, it is on digital delivery of phonorecords and the fact that we don't have the equivalent of these three performing rights societies to cover all songs and all of the rights holders.

Mr. JOHNSON. Why hasn't the marketplace adapted to the changing times? I guess that is hard for you to answer, but apparently the marketplace which used so—I mean, you stated and I am also, I believe that the market responds and should respond, should have the freedom to respond to the changing realities, but apparently that has not occurred.

Ms. PETERS. Well, actually, the market is responding. The reality is that free got a big head start. Napster, which originally wasn't doing legal content, enabled huge unauthorized uploading. And now we are playing catch-up.

But the problem for the digital music services is, in order to compete, because free has everything, they don't have to clear anything, is they can't have, like, some of the songs and compete. They have got to have almost all of the songs to compete.

So the fact that you can clear 50 percent of the songs or 70 percent of the songs is not good enough for them to compete. So how do we make it possible for them to do the things that the performing rights societies do today, which is essentially clear all rights and almost all the songs.

Mr. JOHNSON. And the ability is there, we just don't have the law in place to enable the agency to capture 100 percent.

Mr. BERMAN. I think the answer is, yes, we don't, and that is—

Ms. PETERS. Okay. I will leave it there.

Mr. BERMAN. But the time of the gentleman has expired.

The gentleman from California, Mr. Issa?

Mr. ISSA. I thank the Chairman from California.

It is good to see you again.

Ms. PETERS. It is good to see you too.

Mr. ISSA. You are my favorite witness. [Laughter.]

Ms. PETERS. Well, I am happy. The people in front of me are doing better than the people behind me. [Laughter.]

Mr. ISSA. Now, whether this is the favorite subject of this Committee is a different story. This is not the first time we have brought this up, it won't be the last, but if I can use your presence here to characterize a point.

I come from the patent side, even though I often say I have the Sunny Bono seat, because I am the non-lawyer but the intellectual property owner on the Committee, and in the patent world it is pretty easy for us to understand that anybody who invents, including a team of 10, if you don't have a contract, all 10 have individual rights; they can all sell the invention. They can all make, use or sell. And that is pretty cool. It is a little troublesome for a company that has 12 engineers and you have to get them all contracted or you will lose your rights, but at least it is clear.

It certainly isn't clear here. I am sure if Sonny Bono were here today and we asked, "Well, how did you make sure that the guy running the mikes and doing the mixing, who may have been doing

it for cheap, free or just an opportunity to tour with the band, gave his rights to you,” he would have an answer, and it worked for him.

But it is very clear we don’t have that same level of clarity in copyright.

So what I am hearing here today, what I have heard in previous hearings is, we have a legacy problem. We have a problem we patchworked together from 1831—which, by the way, I wrote that down, because that is not a date I had in my notes—from 1831 we have sort of patchworked together copyright and we have never had the simple clarity that I believe we enjoy in patents about what you get, how you get it, how you control it.

So if I follow your logic—and do I get a straight head shake on that that it is a legacy problem?

Ms. PETERS. Yes. But the one thing I would disagree with is, it wasn’t till new technologies came along. So 1831 until piano rolls wasn’t such a big deal.

Mr. ISSA. Very true. And I got an opportunity to meet Hare Guttenberg the other day, I meet him regularly, he is a member of the European Union parliament. Until his family business got going, probably people who wrote songs didn’t have to worry too much about whether they got money for duplications of it, because you could only handwrite it.

But technology has been on a steady role for, oh, albeit a couple thousand years, and we are where we are, which is you have got broadcasters, if they are terrestrial, under one set of rules; you have the Internet, whether it is 802.11 and it is wireless and it is going through the air or whether it is more conventional wired, another set of rules.

You have got the question of whether or not you are caching or storing on a hard drive in that process, whether you have got a copy or you are just transmitting it. One would say that even on my computer when I am streaming, am I in fact recording it for a period of time because I have to have a buffer.

We can go through endlessly all that, but in the limited time, if I turn it around the other way and say, if this Committee sets its sights on bringing clarity and it says, “Look, you have to own it,” and everybody in the mix owns what they produced until or less they sign it away, if they sign it away exclusively, under what contractual agreement, they have done that. If they don’t sign it away exclusively, but non-exclusively, then they have the right to sell what they own. Well, what they sold is now in a package.

If we set those principles with—that is one set of principles, then I will ask a second question. You are comfortable with that part, that we need to make it that simple.

Ms. PETERS. I think the law itself is pretty okay and simple. What we basically say is, all creators would jointly own, and be licensed by one. Combined the others are subject to a duty of account. What is happening is the opposite. It is subject to an agreement to the contrary. There are all these agreements to the contrary.

Mr. ISSA. And which I do appreciate that.

The last part, though, is because we live in a world of compulsory licenses, don’t we need to produce a uniform compulsory license act that essentially says that when you have a compulsory license it

is 9.5 cents, hypothetically, but since 9.5 cents doesn't get you to 2 cents for a cached copy, there has to be, in fact, some streamlining of that system to say, as you said, unless you otherwise do, but, in a sense, isn't there a mandate that we deal with that so that you can have that flexibility of pricing?

Because it is very clear today that I can sell my song to Sirius or XM, in a sense, but I may or may not be paid or somebody can collect two-thirds of the royalty and say, "Go sue for the other third," and that is happening as we speak.

Ms. PETERS. I guess I am not totally clear with what my answer would be. And it really comes down to compulsory licensing, per se.

Our Constitution, basically, talks about exclusive rights and exercise of exclusive rights. Compulsory license cuts back on that exclusivity, and in an online environment, there is a push by a lot of people to just basically mandate compulsory licensing.

My personal view is that if we go that route, we lose something very valuable. It may be that that is where we end up, but I certainly don't want to be there right now. And I would rather get rid of this license than basically expand it to say, as a compulsory license, it deals with all uses of everything.

Mr. BERMAN. Did you want to just add a final point? The time of the gentleman has expired.

Ms. PETERS. Okay. Anyway—

Mr. ISSA. Your time is unlimited, though, isn't it, Chairman.

Mr. BERMAN. You and I can sit here for the third and fourth rounds.

Mr. ISSA. Thank you, Chairman.

Ms. PETERS. Mr. Issa, I would like to think about it and maybe get back to you. I hadn't really thought all of that through at this point, and I think there are more nuances than I am willing to commit to at this point.

Mr. ISSA. Thank you for your candor.

Thank you, Mr. Chairman.

Mr. BERMAN. The gentleman from California, Mr. Schiff?

Mr. SCHIFF. Thank you, Mr. Chairman.

I want to ask you a couple questions. First, whether you can highlight any specific concerns or comments that you have with regard to last year's SIRA legislation. In particular, do you believe that the authority to set rates for a modified section 115 license should remain with the copyright royalty judges or do you support the proposed structure in last year's bill that provided for private sector negotiations first with arbitration procedures available if those failed?

And the second question is, in discussing the rate-setting procedures, you indicate that it would be wise to provide the rate-setting body with the flexibility to set a schedule of rates depending on the services offered. As you know, some have argued that a per unit rate would be difficult to utilize and would prefer a percentage of revenue option instead. And I would love to get your thoughts on that as well.

Ms. PETERS. Rate and term setting for compulsory licenses are set by copyright royalty judges as the body that is going to do that. The license, basically, suggest that the parties negotiate, and if they can reach agreement, then that is the preferable way. So if

they can reach agreement on what the rate should be, then normally that is blessed, and it is only when there is disagreement that you end up with the body setting rates.

Now, certain parties—

Mr. SCHIFF. So, in effect, you have a system of arbitration already?

Ms. PETERS. Well, no. I was basically saying you actually have a system that encourages voluntary negotiation against the parties, and if they reach the rates, then that is fine. And if there are parties who haven't reached agreement, then that body sets the compulsory license rates. So a compulsory license in nature is compulsory. The license is there, and the rates will be set by the judges, but there is always encouragement of voluntary licenses.

With respect to whether or not you were going to do a percentage of revenue or a—

Mr. SCHIFF. Well, yes, but still on that first point, are you saying then that you prefer to have the present system than have a negotiation followed by an arbitration?

Ms. PETERS. I hadn't really thought about it. I actually think that we have a new system. I think that a lot of work went into that new system, and I stand behind the fact that the system that is in place is a good one. And I hadn't really focused on that this really had an additional arbitration. I need to think about that.

Mr. SCHIFF. And what are your thoughts in terms of per unit rate versus percentage of revenue option?

Ms. PETERS. I think it depends on the circumstance. I think that both options should—you need to, basically, have flexibility to figure out what is best under the particular circumstances. And it is really going to come down to what the proposals are and what the evidence is and what is provided for the royalty judges to decide what they think is the fairest approach. And there is a review process in the court of appeals for the D.C. circuit, but, actually, this new body basically has a reconsideration provision with respect to when they basically put out rates there is a period in which people can petition for reconsideration.

So, I think that sometimes the per transaction rate is the appropriate option, sometimes a percentage of revenue, if you can clearly define what that percentage rate is going to be of.

Mr. SCHIFF. In looking at the subscription music services, though, do you have a sense of what you think is more appropriate? I mean, that is the main context in which this is implicated, isn't it?

Ms. PETERS. I am not sure, but I really do not know what is the appropriate option—I haven't really considered what the evidence is or not. Thank God we are not in that business.

But I have supported flexibility. I have supported that it can be either a penny rate, or it can be a percentage. It is really going to come down what is the best under the circumstances, what works. It is really what works.

Mr. SCHIFF. Thank you, Mr. Chairman.

Mr. BERMAN. Abusing, once again, the Chairman's prerogative, the question then comes is it iTunes revenues or is it iPods revenue, but never mind.

Ms. PETERS. No, that is—

Mr. BERMAN. The gentlelady from California, Ms. Lofgren.

Ms. LOFGREN. Thank you.

Mr. BERMAN. I am sorry, I am sorry.

The gentleman from Ohio, Mr. Chabot?

Mr. CHABOT. Thank you very much, Mr. Chairman.

First of all, let me apologize for not being here earlier in the hearing. I am the Ranking Member of the Small Business Committee, we have a hearing going on down there.

I am new to this Subcommittee. I have been on the Judiciary for 13 years now but not the Subcommittee, and so I wanted to particularly thank you for coming this morning to educate us on this very important issue.

As I was preparing for this hearing, by reading section 115, I couldn't help— [Laughter.]

Well, my staff read it.

Ms. PETERS. All right.

Mr. CHABOT. I read most of it. I couldn't help but think to myself that this is a lawyer's and an infringer's dream statute. There were so many exceptions and references that it is difficult to keep straight what is legal and what is not. Moreover, I had just read in yesterday's *Wall Street Journal* about the continued plight of the music industry with declining sales in the range of 20 percent from last year.

So my question—and I will keep it to just one question, because I have to get back to the Small Business Committee to make sure that the Democrats aren't running amuck down there, just kidding—what role has this statute played, if any, in the decline of the music industry, and how can we tighten this statute up to revitalize the music industry and push back against infringement, which has been such a scourge on the industry?

Ms. PETERS. I can make an argument that when a statute is, like you said, too complex and people can't figure out what you can do and what you can't, that is a problem. Here what we are really talking about is in order to have legitimate services functioning, they need the rights and they need all songs. And the current clearance process, even under the statutory license, doesn't work.

So there is an impediment that needs to be fixed in order, at least with regard to people who want to use a statutory license that now is there, to make that workable. So there is a piece.

Mr. CHABOT. Thank you very much.

Mr. Chairman, I will yield back my time in order to give Ms. Lofgren time.

Mr. BERMAN. The gentlelady from California, Ms. Lofgren?

Ms. LOFGREN. Thank you very much, Mr. Chairman. I know the bells have rung for a vote, so I will be brief.

I would like to thank the Chairman and Ranking Member for this hearing, and I think there is broad agreement that 115 reform is important. And if you look at the headlines, "Sales of Music, Long in Decline, Fall More Quickly," all the parties who have had tiffs and understandably trouble sorting this out have tremendous motivation to get this right.

I agree with the Chairman, he and I have talked, and we always see eye to eye on every single item on copyright. There are issues and reasonable people can differ on the issue of how we deal with

receivers on satellite radio, whether or not there should be broadcast flags. I am sure we, at some point, will get into it, but I am hopeful that we don't get into it in 115, because 115 needs to get done, and wherever people are on the whole argument about copyright, I think there is broad consensus there, and that is a piece of the good news.

Just on cache copies, I want to associate myself with Mr. Boucher's remarks on the validity of your footnote comment. I mean, to charge separately for cached copies is kind of like instead of paying the cab driver for the ride, you are paying for every drop of oil in the engine. It is an impediment to making this thing go. We need to simplify this in a way that will allow people to be paid. And diverting ourselves in that way continues an impediment. We need to simplify, we need certainty so people know who to pay and how much to pay, and we need to have an ability to control ambitions on payment so that we don't eliminate the development of new markets.

Ms. PETERS. Well, SIRA would have actually answered those questions. I would really have covered all activity.

Ms. LOFGREN. I have a question. In your testimony, you admit with some candor that section 114 or the sublicensing solution that you talk about have impediments to enactment. Let me just ask you this, because there are actors who have business models that have grown up around the current situation that this would impact, and none of us are hostile to those associations, they have performed an important role.

Can you envision a way for the existing actors to somehow have a role in what you suggested?

Ms. PETERS. I can't speak for them, but they are all—

Ms. LOFGREN. No, no. Don't speak for them, and you don't even have to do the details. Can you envision such a thing, and we can follow up later with the details if you can.

Ms. PETERS. The truth is, I am not sure. I really am not sure. I would hope the answer was yes, but I don't have a huge amount of comfort that it is yes.

Ms. LOFGREN. I do think that as we address the problems with the current digital music licensing situation, one of the things that we are never able to do on the Committee and that is true of me and I think every Member, is that we can't really imagine the next wave of innovation. And I remember some of the other issues we did and we are talking about Web sites and none of us thought about peer-to-peer.

Ms. PETERS. That is right.

Ms. LOFGREN. Maybe there was somebody in a lab who was thinking about it.

So I am just wondering, do you think that we can develop principles that are less likely to impinge on the development of new technology that will still provide for compensation?

Ms. PETERS. Well, first of all, sublicensing does do that. There are people who really are opposed to that. As for a blanket license, I actually do think you get there and accomplish the same thing too. Because you get the license and you worry more about the niceties of it later.

Ms. LOFGREN. Mr. Chairman, my time is just about up. The bells are ringing again. Are we able to submit questions for the record?

Mr. BERMAN. What I was going to say, because there are more issues, rather than have a second round now, I would like to suggest in addition to having an important position, a great deal of experience and a great deal of expertise, you are a great educator, and I am thinking of convening a more informal meeting with Members and you just to continue a little bit of this process of understanding this complicated mess called, music licensing—

Ms. PETERS. Whatever you want.

Mr. BERMAN [continuing]. In the future, and certainly there will be a chance to submit questions, for the record, which we hope you answer.

Ms. PETERS. Oh, we will.

Mr. BERMAN. And unless there is a compelling desire to come back for a second round, I think I would rather continue it in an informal basis.

Mr. WATT. Would that be kind of like the president offering those people not being under oath— [Laughter.]

I will withdraw the question.

Mr. BERMAN. With that, the hearing is now adjourned.

[Whereupon, at 11:41 a.m., the Subcommittee was adjourned.]

A P P E N D I X

MATERIAL SUBMITTED FOR THE HEARING RECORD

PREPARED STATEMENT OF THE HONORABLE SHEILA JACKSON LEE, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF TEXAS, AND MEMBER, SUBCOMMITTEE ON COURTS, THE INTERNET, AND INTELLECTUAL PROPERTY

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Chair
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CONGRESSWOMAN SHEILA JACKSON LEE, OF TEXAS

STATEMENT BEFORE THE
JUDICIARY SUBCOMMITTEE ON
COURTS, THE INTERNET AND INTELLECTUAL PROPERTY

OVERSIGHT HEARING:
"REFORMING SECTION 115 OF THE
COPYRIGHT ACT FOR THE DIGITAL AGE"

MARCH 22, 2007

Thank you, Mr. Chairman, for holding this important hearing today. Let me also welcome our witness, Marybeth Peters, the United States Register of Copyrights. The purpose of today's meeting is to explore the need to reform Section 115 of the Copyright Act so that it is responsive to the demands and challenges of the digital age.

Modern technology has changed the way we live, work, create, and recreate. Nowadays iPods, DVD players and recorders, and flat screen televisions are ubiquitous. However, these conveniences pose new problems that were not contemplated when the Copyright Act was passed in 1909. At the start of the 20th century the volume of music was not as vast or available in as many platforms as it is today.

Today, the average citizen rarely buys CDs, and the mention of a "piano roll" will draw blank stares from all but a handful of people; but piano rolls were all the rage in the first decade of the last century. Today, the typical music fan surfs the web to download music - legally and illegally -- and has access to thousands of songs. Music service providers wishing to offer a song must search physical card files and incomplete databases to identify and locate the copyright owner.

It is not unusual for music service providers to resort to hiring investigators to identify copyright owners, and then provide the owner by registered or certified mail a 2-page paper notification form. In today's global society this is not inefficient and impractical. This antiquated system

impedes growth of the digital music market and subjects music providers to potential lawsuits.

For example, parts of the Copyright Act allow anyone to make and distribute a mechanical reproduction of a musical composition without the consent of the copyright owner. But the copyright owner is entitled to royalties. However, I understand that some critics believe that websites like I-tunes and Napster have gone beyond just the mechanical reproduction of music. The question arises as to whether digital music services also owe the copyright owner fees for the performance right. The law is not clear on this point and this ambiguity is one of the most pressing issues regarding Section 115 of the Copyright Act.

My concern is that the uncertainty over whether Section 115 applies to digital music, coupled with very high Copyright Act statutory damages, will result in increased litigation between digital music services and music publishers and discouraged digital music innovation and competition. Section 115 literally provides a license for the specific copy of a song that is actually delivered to a consumer. Thus, on the one hand, it would seem implicit that the license should also extend to copies required to

manufacture and deliver the consumer copy (e.g., server copies or network cache copies).

On the other hand, music streaming services pay performance royalties just like broadcasters, but music publishers are demanding additional royalties for server copies that merely facilitate the delivery of the already-licensed performance. As a result of this legal confusion, some music services are paying double-royalties as litigation insurance; others have been sued. The upshot is that this uncertainty over the applicability of Section 115 to digital music may be inhibiting the growth of the legal, royalty-paying business models that artists, copyright owners and Congress are seeking to promote.

Mr. Chairman, I am interested in hearing Ms. Peters' perspectives on these issues. I am particularly interested in her views regarding the efficacy and feasibility of developing an easy-to-use, easy-to-pay statutory blanket Section 115 license to replace song-by-song licensing that is available for all digital music services.

I am also interested in learning whether Ms. Peters has a position on whether the Copyright Act should be amended to provide that server and

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network cache copies that support licensed streaming or downloading services do not trigger additional royalties.

Music service companies have argued that if the section 115 license is modernized and clarified, digital music companies will dramatically expand their catalogs of legally available music, redouble their innovation efforts, and generate more resources for marketing and promotion resulting in more legal music available online, more consumer choice, and more royalties to creators.

Thank you again for convening this hearing, Mr. Chairman. Welcome Ms. Peters. I yield back the remainder of my time.

PREPARED STATEMENT OF THE HONORABLE STEVE COHEN, A REPRESENTATIVE IN
CONGRESS FROM THE STATE OF TENNESSEE, AND MEMBER, SUBCOMMITTEE ON
COURTS, THE INTERNET, AND INTELLECTUAL PROPERTY

STATEMENT OF REP. STEPHEN I. COHEN
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SUBCOMMITTEE ON COURTS, THE INTERNET, AND
INTELLECTUAL PROPERTY
HEARING ON SECTION 115 REFORM
MARCH 22, 2007

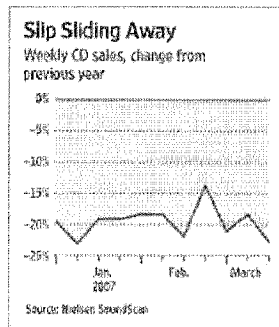
I look forward to hearing from our distinguished witness today. While this will be the first opportunity for me personally to consider the issues surrounding Section 115 reform, I understand that the issue has been before this Subcommittee for several years and that there is a consensus that Section 115 should be reformed to deal with the rise of digital music technology. I am particularly interested in learning about Ms. Peters's recommendations for how Section 115's licensing scheme can be amended to address these issues.

ETHAN SMITH, *SALES OF MUSIC, LONG IN DECLINE, PLUNGE SHARPLY, RISE IN DOWNLOADING FAILS TO BOOST INDUSTRY: A RETAILING SHAKEOUT*, WALL STREET JOURNAL, MARCH 21, 2007 AT A1

Wall Street Journal

Sales of Music, Long in Decline, Plunge Sharply

Rise in Downloading
Fails to Boost Industry;
A Retailing Shakeout
By ETHAN SMITH
March 21, 2007



in a dramatic acceleration of the seven-year sales decline that has battered the music industry, compact-disc sales for the first three months of this year plunged 20% from a year earlier, the latest sign of the seismic shift in the way consumers acquire music.

The sharp slide in sales of CDs, which still account for more than 85% of music sold, has far eclipsed the growth in sales of digital downloads, which were supposed to have been the industry's salvation.

The slide stems from the confluence of long-simmering factors that are now feeding off each other, including the demise of specialty music retailers like longtime music mecca Tower Records. About 800 music stores, including Tower's 89 locations, closed in 2006 alone.

Apple Inc.'s sale of around 100 million iPods shows that music remains a powerful force in the lives of consumers. But because of the Internet, those consumers have more ways to obtain music now than they did a decade ago, when walking into a store and buying it was the only option.

Today, popular songs and albums -- and countless lesser-known works -- can be easily found online, in either legal or pirated forms. While the music industry hopes that those songs will be purchased through legal services like Apple's iTunes Store, consumers can often listen to them on MySpace pages or download them free from other sources, such as so-called MP3 blogs.

Jeff Rabhan, who manages artists and music producers including Jermaine Dupri, Kelis and Elliott Yamin, says CDs have become little more than advertisements for more-lucrative goods like concert tickets and T-shirts. "Sales are so down and so off that, as a manager, I look at a CD as part of the marketing of an artist, more than as an income stream," says Mr. Rabhan. "It's the vehicle that drives the tour, the merchandise, building the brand, and that's it. There's no money."

The music industry has found itself almost powerless in the face of this shift. Its struggles are hardly unique in the media world. The film, TV and publishing industries are also finding it hard to adapt to the digital age. Though consumers are exposed to more media in more ways than ever

before, the challenge for media companies is finding a way to make money from all that exposure. Newspaper publishers, for example, are finding that their Internet advertising isn't growing fast enough to replace the loss of traditional print ads.

In recent weeks, the music industry has posted some of the weakest sales it has ever recorded. This year has already seen the two lowest-selling No. 1 albums since Nielsen SoundScan, which tracks music sales, was launched in 1991.

One week, "American Idol" runner-up Chris Daughtry's rock band sold just 65,000 copies of its chart-topping album; another week, the "Dreamgirls" movie soundtrack sold a mere 60,000. As recently as 2005, there were many weeks when such tallies wouldn't have been enough to crack the top 30 sellers. In prior years, it wasn't uncommon for a No. 1 record to sell 500,000 or 600,000 copies a week.

In general, even today's big titles are stalling out far earlier than they did a few years ago.

The music industry has been banking on the rise of digital music to compensate for inevitable drops in sales of CDs. Apple's 2003 launch of its iTunes Store was greeted as a new day in music retailing, one that would allow fans to conveniently and quickly snap up large amounts of music from limitless virtual shelves.

It hasn't worked out that way -- at least so far. Digital sales of individual songs this year have risen 54% from a year earlier to 173.4 million, according to Nielsen SoundScan. But that's nowhere near enough to offset the 20% decline from a year ago in CD sales to 81.5 million units. Overall, sales of all music -- digital and physical -- are down 10% this year. And even including sales of ringtones, subscription services and other "ancillary" goods, sales are still down 9%, according to one estimate; some recording executives have privately questioned that figure, which was included in a recent report by Pali Research.

Meanwhile, one billion songs a month are traded on illegal file-sharing networks, according to BigChampagne I.I.C.

Adding to the music industry's misery, CD prices have fallen amid pressure for cheaper prices from big-box retailers like Wal-Mart and others. That pressure is feeding through to record labels' bottom lines. As the market has deteriorated, Warner Music Group Corp., which reported a 74% drop in profits for the fourth quarter of 2006, is expected to report little relief in the first quarter of this year.

Looking at unit sales alone "flatters the situation," says Simon Wright, chief executive of Virgin Entertainment Group International, which runs 14 Virgin Megastores locations in North America and 250 world-wide. "In value terms, the market's down 25%, probably." Virgin's music sales have increased slightly this year, he says, thanks to the demise of chief competitor Tower, and to a mix of fashion and "lifestyle" products designed to attract customers.

Perhaps the biggest factor in the latest chapter of the music industry's struggle is the shakeout among music retailers. As recently as a decade ago, specialty stores like Tower Records were must-shop destinations for fans looking for both big hits and older catalog titles. But retailers like Wal-Mart Stores Inc. and Best Buy Co. took away the hits business by undercutting the chains on price. Today such megaretailers represent about 65% of the retail market, up from 20% a

decade ago, music-distribution executives estimate. And digital-music piracy, which has been rife since the rise of the original Napster file-sharing service, has allowed many would-be music buyers to fill their CD racks or digital-music players without ever venturing into a store.

Late last year, Tower Records closed its doors, after filing for bankruptcy-court protection in August. Earlier in 2006, following a bankruptcy filing, Musicland Holding Corp., which owned the Sam Goody chain, closed 500 of its 900 locations. And recently, Trans World Entertainment Corp., which operates the FYE and Coconuts chains, among others, began closing 134 of its 1,087 locations.

But even at the outlets that are still open, business has suffered. Executives at Trans World, based in Albany, N.Y., told analysts earlier this month that sales of music at its stores declined 14% in the last quarter of 2006. For the year, music represented just 44% of the company's sales, down from 54% in 2005. For the final quarter of the year, music represented just 38% of its sales.

Joe Nardone Jr., who owns the independent 10-store Gallery of Sound chain in Pennsylvania, says he is trying to make up for declining sales of new music by emphasizing used CDs, which he calls "a more consistent business." For now, though, he says used discs represent less than 10% of his business -- not nearly enough to offset the declines.

Retailers and others say record labels have failed to deliver big sellers. And even the hits aren't what they used to be. Norah Jones's "Not Too Late" has sold just shy of 1.1 million copies since it was released six weeks ago. Her previous album, "Feels Like Home," sold more than 2.2 million copies in the same period after its 2004 release.

"Even when you have a good release like Norah Jones, maybe the environment is so bad you can't turn it around," says Richard Greenfield, an analyst at Pali Research.

Meanwhile, with music sales sliding for the first time even at some big-box chains, Best Buy has been quietly reducing the floor space it dedicates to music, according to music-distribution executives.

Whether Wal-Mart and others will follow suit isn't clear, but if they do it could spell more trouble for the record companies. The big-box chains already stocked far fewer titles than did the fading specialty retailers. As a result, it is harder for consumers to find and purchase older titles in stores.

STATEMENT RELEASED BY SESAC, INC. ON "REFORMING SECTION 115 OF THE
COPYRIGHT ACT FOR THE DIGITAL AGE"

Statement of SESAC, Inc.

Before the

Subcommittee on Courts, the Internet, and Intellectual Property

of the House Committee on the Judiciary

110th Congress, 1st Session

**COMMENTS ON THE TESTIMONY BEFORE THE SUBCOMMITTEE AT THE
HEARING ON "REFORMING SECTION 115 OF THE COPYRIGHT ACT FOR THE
DIGITAL AGE," held on March 22, 2007**

SESAC, Inc. ("SESAC") submits these comments regarding the testimony of the Honorable Marybeth Peters, United States Register of Copyrights, before the Subcommittee at the March 22, 2007, hearing on "Reforming Section 115 of the Copyright Act for the Digital Age."

SESAC is one of the three performing rights organizations ("PROs") expressly recognized in the Copyright Act. SESAC represents the creators and owners of nondramatic musical works, the statutory term commonly referred to as "songs," through licensing, royalty, collection and distribution services. Established in 1930, SESAC is the second largest PRO in the United States and one of the fastest growing PROs in the world, representing more than a quarter of a million copyrights on behalf of its thousands of affiliated songwriters, composers, and music publishers. SESAC, unlike the other two PROs in the United States, is a small privately held company, as are the vast majority of its affiliated music publishers, including songwriter-owned companies.

The testimony by the Register presents significant issues of music licensing and copyright law that directly effect the interests of SESAC and its affiliated composers and music publishers, who create the music that entertains millions of people and drives the revenues and profits of on-line music services. For this reason, SESAC appreciates the

opportunity to comment on certain conclusions and proposals presented by the Register, particularly as set forth in her written testimony.

As an initial matter, SESAC appreciates the favorable comments made by the Register concerning songwriters, music publishers, and the PROs. In particular, SESAC appreciates the Register's acknowledgement of the "widely recognized" fact "that the performance right [can] be cleared easily with blanket performance licenses from the three performing rights societies." Statement of Marybeth Peters, March 22, 2007 ("Written St."), at 4. Certain other suggestions by the Register, however, are troubling and would be detrimental to the rights of the creators and owners whose songs are the lifeblood of the on-line music services.

I. TRANSMISSIONS TO THE PUBLIC OF MUSICAL WORKS, INCLUDING ON-LINE TRANSMISSIONS SUCH AS DIGITAL DOWNLOADS, ARE PUBLIC PERFORMANCES.

The Register opines that "[c]ommon sense and sound policy counsel that the transmission of a reproduction of a musical work without any rendering of the recording at the time of delivery should implicate only the rights of reproduction and distribution" (so-called "mechanical rights"), not the public performance right. Written St., at 9. That opinion, however, is simply not supported by Section 101 of the Copyright Act. The proper analysis is clear and straight-forward: In statutory terms, a digital download is a public performance because it is the "rendering" of a musical work by "transmitting" it through a digital "process" by which members of the public "receive" it. Under the definitional provisions of Section 101, the relevant issue is not whether a member of the public listens simultaneously to the digitally transmitted musical work; the relevant issue is whether a member of the public receives the transmission. In short, the critical legal event is when the musical work is received, not when it is perceived. Thus, all on-line

transmissions of musical works – whether denominated as “streams” or “downloads” or something in-between– are public performances under the law.

The suggestion that the licensing of both mechanical rights and public performance rights in the digital transmission of music is “duplicative” (Written St., at 16) incorrectly assumes that the determination of which rights are compensable is necessarily an “either/or” proposition; it is not. The creator of a musical work is granted a bundle of exclusive rights in the work, including both the mechanical right and the public performance right. When two rights are exploited in such transmissions, the creator rightfully should receive fair compensation for both.

II. ANY PROPOSAL TO WEAKEN OR OBLITERATE THE PUBLIC PERFORMANCE RIGHT IN DOWNLOADS WOULD TAKE MONEY FROM MUSIC CREATORS AND OWNERS AND PUT IT INTO THE POCKETS OF THE BEHEMOTH ON-LINE MUSIC SERVICES.

The Register’s proposal, effectively stripping the public performance right from downloads, constitutes not merely a “clarification” of the law but, rather, a radical revision of it. In effect, the Register is saying that songwriters are being paid too much for downloads, that they should accept less remuneration than they currently receive.

Legal analysis aside, the ultimate effect of this proposal would be to take public performance royalties away from music creators and owners – many of whom are truly “mom and pop” operations--and leave those royalties in the hands of the large on-line music services. Diminution of the public performance right is not a “key issue” in reforming Section 115, which deals with the entirely different mechanical right. Section 115 reform need not and should not come at the expense of the public performance right, which is the largest source of income for the creators and owners of musical works.

Particularly troubling is the Register's apparent view of the affected parties' respective motivations. For example, the Register characterizes music licensors as "hav[ing] rarely turned down the opportunity in the digital age to seek royalties," which might not be due them. Written St., at 8. By contrast, the on-line music services are characterized as having "forged ahead and have begun offering more legitimate music services to everyone's benefit," all the while fearing that the creators of the music they exploit will hamper their benevolent efforts by subjecting them "demands" and "threatened...lawsuits if they do not acquiesce." Written St., at 8.

Such a view of the balance of power among the parties would be distorted and unfair. If there is any overbearing Goliath in this scenario, surely it is not the "mom and pop" songwriter whose creations feed the gigantic revenues of these on-line music services.

III. THE BEST METHOD FOR REFORMING SECTION 115 IS THE CREATION OF AN ENTITY TO ADMINISTER A BLANKET MECHANICAL LICENSE FOR DIGITAL TRANSMISSION OF MUSIC.

Instead of going back to square one to reexamine all of the licensing reform proposals to date, SESAC suggests that the starting point for resolution of the mechanical licensing "problem" should be where the conversation left off in the last Congress. Under the last working draft of the proposed Section 115 Reform Act ("SIRA"), reform would have been accomplished by a new entity (along the lines of SoundExchange under Section 114) administering a blanket mechanical license for on-line music services, leaving the three PROs to continue administering their blanket public performance licenses separately.

In short, the focus of reform efforts should be in the area of music licensing—mechanical rights—that most acknowledge should be "fixed," not in the area of music

licensing—public performance rights—that most, including the Register, acknowledge “works.” During the last Congress, the affected parties all appeared to have gotten beyond the issue of one-stop versus four-stop shopping to obtain all necessary blanket licenses for digital music. The creators and owners of musical works, on the one hand, and the on-line music services, on the other hand, essentially agreed on the “four-stop shopping” model as way to reform mechanical licensing and allow on-line music services to easily acquire the necessary rights. As noted at this hearing, it was not disagreement about the proposed four-stop shopping model that prevented SIRA from being enacted; rather, it was other issues that were seemingly extraneous to the underlying licensing provisions.

SESAC strongly urges that a SoundExchange-like blanket licensing system for mechanical rights, separate from but in conjunction with the PROs’ continued blanket licensing of public performance rights, will best protect the value of the creators’ and owners’ musical works and, by the same token, will best protect the on-line music services from the potential liability of which they complain. There is no call or justification for devaluing the public performance right in the name of mechanical licensing reform, much less in the name of “rights clarification.”

SESAC respectfully suggests that the Subcommittee use the apparently noncontroversial licensing provisions of SIRA as the starting point toward achieving the reforms necessary for efficient and cost-effective mechanical licensing for the digital transmission of musical works. SESAC stands ready to continue providing its input on this vital topic and cooperating with the Subcommittee and the affected parties to that end.

JOINT STATEMENT RELEASED BY THE AMERICAN SOCIETY OF AUTHORS, COMPOSERS
AND PUBLISHERS AND BROADCAST MUSIC, INC. COMMENTS ON REFORMING SECTION
116 OF THE COPYRIGHT ACT FOR THE DIGITAL AGE

Joint Statement of

THE AMERICAN SOCIETY OF AUTHORS, COMPOSERS AND PUBLISHERS AND
BROADCAST MUSIC, INC.

Before the

Subcommittee on Courts, the Internet, and Intellectual Property

of the House Committee on the Judiciary

110th Congress, 1st Session

COMMENTS ON THE TESTIMONY BEFORE THE SUBCOMMITTEE AT THE HEARING
ON "REFORMING SECTION 115 OF THE COPYRIGHT ACT FOR THE DIGITAL AGE,"
held on March 22, 2007

The American Society of Composers, Authors and Publishers (ASCAP) and Broadcast Music, Inc. (BMI) submit these comments on the testimony before the Subcommittee at the hearing on "Reforming Section 115 of the Copyright Act for the Digital Age," held on March 22, 2007. BMI and ASCAP are performing rights organizations (PROs). Our operations and role in the licensing of the nondramatic public performance of copyrighted musical works on behalf of our many hundreds of thousands of American songwriter, composer and publisher members and affiliates (and, through affiliation agreements, many hundreds of thousands more of foreign writers and publishers) are well-known to the Subcommittee, and need not be repeated here.

The sole testimony at that hearing was offered by the Honorable Marybeth Peters, United States Register of Copyrights, and we wish to comment on certain portions of that testimony, with emphasis on the Register's written testimony.

At the outset, we would note that we agree wholeheartedly with a great deal of the Register's testimony. Despite the fact that section 115 does not involve the public performing

right, in an effort to help achieve enactment of legislation acceptable to all, we participated in, diligently negotiated, and worked for passage of, the attempt made in the last Congress to enact the Section 115 Reform Act (SIRA), which formed Title I of H.R. 6052. We especially want to commend the Register for her statement at the very start of her written testimony, when she noted that reform of the digital music licensing system is “important to the songwriters and copyright owners who deserve compensation when others use their works.” (Statement of Marybeth Peters, March 22, 2007 [hereafter, “Written St.”], at 1.)

Performing rights royalties form the largest single source of income for songwriters and composers, and for the music publishers who invest in and support their creative efforts. Without full protection of the performing right, our nation’s cultural heritage will be drastically impaired. Our nation’s founders long ago realized that unless the intellectual property rights of creators were secured, progress in culture, learning and knowledge would be impaired. Thus, Congress was empowered to protect the exclusive rights of creators in the Constitution. (U.S. Const., Art. 1, Sec. 8, Cl. 8.) Indeed, as Madison wrote in the Federalist Papers concerning the protection of copyright and the Constitutional clause, “The public good fully coincides . . . with the claims of individuals.” (Federalist Paper No. 43.) Hence, any suggestion that the rights of songwriters and composers should be weakened must be resolutely and steadfastly resisted.

The Register appreciated the importance of the performing right to songwriters and composers, and we in turn appreciate her kind words for our operations; in answer to a question from Representative Cohen, she said:

“The probably, I will argue, more important right in today’s world where you make more of your money is every time a musical composition is publicly performed – that means through the radio, through the television, in many bars – some bars; I’ll clarify that – some restaurants – there’s a payment for that public

performance. ASCAP, BMI, SESAC, licensed public performance; they license them on a blanket basis. That works well.” (Transcript of Register’s Oral Test., 13th unnumbered page.)

Unfortunately, certain statements in the Register’s written testimony submitted to the Subcommittee were, in our opinion, inexplicably inaccurate, contrary to the law, and extremely detrimental to the legitimate interests and rights of songwriters, composers, and music publishers. We therefore submit these comments to set the record straight.

Existing Law Specifies That The Transmission to the Public of a Musical Work is a Public Performance of That Work

The Register’s written statement correctly noted that ASCAP’s rate court is considering whether a performing right exists in a download.¹ Both ASCAP and BMI, as well as virtually every other songwriter and music publisher organization, have given the Court their arguments that existing law grants that right. We need not revisit in detail here our briefs to the Court. (We would be happy to make them available if the Subcommittee so desires.) We need only point the Subcommittee to its own statement, made in its report on the 1995 Digital Performance Rights in Sound Recordings Act – an Act which expressly dealt with the use of music on the Internet. This Subcommittee said then, “Under existing principles of copyright law, the transmission or other communication to the public of a musical work constitutes a public performance of that musical work.” H.R.Rep. No. 104-274, at 22 (1995). This clear expression of Congress’ intent followed an earlier extraordinarily prescient statement by this Subcommittee in its report on the 1976 Copyright Act. That report stated: “A performance may be accomplished ‘either directly or by means of any device or process’ including . . . techniques and systems not yet in use or even invented.” H.R.Rep. No. 94-1476, at 63 (1976). The report language of 1976 and 1995 reflects

¹ United States v. ASCAP – Applications of America Online, Inc., RealNetworks, Inc. and Yahoo! Inc., Civ. Action No. 41-1395 (WCC) (S.D.N.Y.)

the understanding by the Subcommittee over a 20 year period, and (in 1995), dealing specifically with the use of music on the Internet, of the importance of the public performing right and the myriad ways in which it may be exploited, then, and in the future. That future is now upon us, and nothing should be done to undermine that considered understanding.

But contrary to that history, the Register's written statement then said that "this is not a settled area of the law" (Written St., at 6), and that there is a need for "clarification" of this point. Our briefs explain why the language of the statute itself, the legislative history, and case law, all confirm the existence of the performing right in Internet transmissions of music.

Common Sense and Sound Policy Counsel that the Public Performance Right Must Exist in Internet Transmissions if Songwriters, Composers and Music Publishers are to be Fairly Compensated for the Use of Their Intellectual Property

In giving an opinion of what the law should be, the written statement derogates the rights of songwriters and composers by arguing – without any support – that "sound policy" would hold that downloads of music involve only the rights of reproduction and distribution, and not the performing right, in the underlying musical work. This opinion (which has nothing whatsoever to do with reforming section 115, the mechanical compulsory license), is unfortunate for several reasons:

First, if songwriters, composers and music publishers are to be deprived of the full measure of their rights, they will only receive compensation for part of the value of their intellectual property when it is used by the commercial behemoths of the Internet. These commercial entities have achieved their phenomenal growth and financial success through the exploitation of copyrighted works – our members' and affiliates' music.

Second, unlike the rights in sound recordings, which for interactive uses like downloads are exclusive, the rights in musical works are all subject to compulsory licenses. In the case of the reproduction and distribution rights – the “mechanical” rights, the compulsory license is statutory. In the case of the performing rights, neither BMI nor ASCAP can say “no” to any user who wants a license. Users are entitled to licenses on request, and the only question then is what the license fee will be. If the parties are unable to agree on a fee, the ASCAP and BMI “rate courts” will decide the question, and the burden of proving reasonableness will be on the PROs. For this reason, the record labels – which own all rights in sound recordings on an exclusive, noncompulsory basis for interactive uses – can exact 70% and more of the revenues received by Internet services; performing rights and mechanical rights combined will account only for a small portion of that amount. That, we suggest, is because, no matter what the language used to “insure” marketplace prices for compulsory licenses, their very existence results in below-marketplace remuneration. So again, should songwriters, composers and music publishers be deprived of their full panoply of rights, they will receive even less than their fair share.

Third, the written statement picks up the canard that, to be paid for both the mechanical and performing rights in Internet transmissions is “duplicative” – in the specious language of the Internet services, a “double dip.” (See, Written St. at 8, 16.) This is nothing but double talk. It has been an immutable principle of copyright law for at least the past eighty years that a single transaction or use may involve more than one right of the bundle of rights which comprise a copyright. When it does, each use must be accounted for, even if licensed by different entities.

Finally, the written statement, without any support at all, claims that the ability, and need, of songwriters, composers and music publishers to license all their rights and receive something approaching the full measure of the value of their intellectual property somehow has led to the

opportunity for abuse! See, Written St. at 16. How “abuse” has occurred, or even is possible, when music publishers can only receive the amount of the mechanical compulsory license, and users can resort to the BMI and ASCAP rate courts to determine reasonable fees, is a mystery – all the more so because the Register’s oral testimony said, as noted above, that our licensing systems “work well.”

Throughout the world, the performing right in downloads is licensed and paid for by the entities that are claiming that they should not pay for the performing right in the United States.

Performing right royalties are generated from downloaded music transmissions throughout the world. Generally, in the rest of the world one performing right organization licenses the performing right and mechanical right. Because of antitrust concerns in the United States, the current music licensing structure exists through which mechanical rights are licensed through one agent and public performing rights are licensed by the performing right organizations. These same music users pay for both rights, that is, the performing right and the mechanical right, in the rest of the world. While the Register testified that she believes the current system to be inefficient, her suggestion to eliminate the public performing right would penalize the smallest business people in the United States, songwriters and composers, to benefit corporate giants. It is hard to imagine how the current need for a commercial business to obtain two licenses instead of one justifies taking rights and royalties away from songwriters, composers, and the publishers which support them. And elimination of the performing right in downloads could have far-reaching effects should foreign performing right organizations refuse to make payment for the performing right in American musical works when those works are downloaded in other countries.

The Proposal for “Sublicensing” Songwriters and Music Publishers’ Rights Through the Record labels Would be the Equivalent of Putting the Fox in Charge of the Henhouse

The written statement makes the astounding proposal that the rights in musical works, created and owned by songwriters, composers and music publishers, should be “sublicensed” to Internet services by, of all entities, the record labels! Although time and again over the years the sad history of shabby treatment of songwriters, and in many cases also featured as performing artists, and publishers by the record labels is a matter of record -- through devices such as the controlled composition clause and the cap on mechanical royalties -- this proposal truly would put the fox in charge of the henhouse. The notion that entities, which at every turn seek to take unfair advantage of songwriters, composers, music publishers and performing artists, should be made the sole gatekeepers in charge of all rights in music would be laughable if it were not so dangerous. We can say on behalf of our members and affiliates that we would fight such a proposal with every ounce of our strength.

The Way Forward: Protect the Rights of Songwriters, Composers and Music Publishers, and Allow Us to Utilize Simple, Efficient Methods of Licensing Internet Users, So They May Flourish for the Good of All

We suggest that the proper solution to the question of section 115 reform lies not in depriving songwriters, composers and music publishers of their performing rights in Internet transmission. (Indeed, if any Congressional action regarding performing rights is warranted, it is not “clarification” of the law to deprive our members and affiliates of their rights, but confirmation of those rights.) Rather, all agree that the licensing mechanisms for mechanical rights are out-of-date as far as Internet services are concerned. In the last Congress, thanks to the leadership of the present and former Chairmen of the Subcommittee, writers, publishers, and the Internet services all came together to agree on a way forward that would modernize mechanical rights licensing and enable the services to flourish. As the ranking member noted at the hearing, “several outstanding issues conspired to prevent that measure from being formally enacted,” (St.

of Rep. Coble, Oral Tr. at unnumbered p. 2). This Subcommittee, we respectfully suggest, should continue to encourage the sort of initiative that came so close with SIRA in the last Congress. We stand ready to cooperate fully in that effort.

