

Marybeth Peters Is Almost Right: An Alternative to Her Proposals to Reform the Compulsory License Scheme for Music

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I. INTRODUCTION¹

Since Napster made mass digital downloads and online piracy available and accessible in June of 1999,² the music industry has been under attack. This attack on traditional music sales and practices has created intense financial pressures for record companies and artists alike. Other factors affecting the changing landscape of the music business include: piracy; a harsh retail environment; radio consolidation;³

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1. According to the United States Copyright Office website:

Marybeth Peters became the United States Register of Copyrights on August 7, 1994. From 1983 to 1994 she held the position of policy planning adviser to the register. She has also served as acting general counsel of the Copyright Office and as chief of both the Examining and Information and Reference divisions. Peters is a frequent speaker on copyright issues; she is the author of *The General Guide to the Copyright Act of 1976*. She delivered the 2004 Brace Memorial Lecture (at New York University School of Law) and the 1996 Horace S. Manages Lecture at Columbia University School of Law. She serves on the Intellectual Property Advisory Committees of several law schools.

Peters received her undergraduate degree from Rhode Island College and her law degree, with honors, from The George Washington University Law School. She is a member of the bar of the District of Columbia.

United States Copyright Office, *Marybeth Peters, Register of Copyrights, Biographical Information*, available at <http://www.copyright.gov/docs/mbpbio.html> (last visited Oct. 4, 2008).

2. *Napster's High and Low Notes*, BUSINESSWEEK, Aug. 14, 2000, at 113, available at http://www.businessweek.com/2000/00_33/b3694003.htm; see *A&M Records, Inc. v. Napster, Inc.*, 239 F.3d 1004, 1011 (9th Cir. 2001).

3. Radio consolidation is the purchasing of independent and local radio stations by larger corporations. See *Media Ownership: Radio Industry: Hearing Before the S. Comm. on Commerce, Science, and Transp.*, 108th Cong. (Jan. 30, 2003) (statement of Don Henley on Behalf of the Recording Artists' Coalition), available at <http://commerce.senate.gov/pdf/henley013003.pdf>. In his testimony, Don Henley, representing the Recording Artists' Coalition, stated:

As local and independent radio stations were purchased by larger corporations, radio playlists started to contract and become much more uniform. In an effort to gain more control over the music industry, radio conglomerates started to narrow playlists and centralize the radio programming function that had traditionally been done independently by each individual station. Radio consolidation made it increasingly more difficult for an artist to get radio airplay. Radio network programmers became more powerful and demanding. And not only did they erode the vitality of American music, they placed themselves in a singularly powerful position to extract additional concessions from the labels and the artists.

Id.

declining compact disc (CD) sales; challenges to the legitimate digital marketplace; and limited online retail markets.⁴ CD album sales declined 18.8% in 2007 and overall album sales—including digital format sales—dropped to 500 million units, the lowest it had been in twenty-five years.⁵

As album sales decreased, individual digital song sales increased. There were 844.1 million downloaded tracks in 2007—a 45% rise from 2006—and 50 million digital albums sold—a 53.5% increase.⁶ “U.S. album sales sank another 11% during the first half of 2008 from a year earlier, according to Nielsen SoundScan. That included a 16.3% plunge in CD sales.”⁷ Digital track sales have increased, but “the rate of growth has slowed from 48 percent in mid-2007 to 30 percent this year.”⁸ Digital album sales are up 34.4% from January to June 2008.⁹ Third quarter results continue to indicate a downward trend in music sales.¹⁰ As digital sales continue to increase, the controversy surrounding how record companies and artist royalties are distributed increases with them. The standard artist royalty for digital sales is the same as for CD sales: approximately 15% after recoupable costs, depending on the artist’s contract.¹¹ During contract negotiations, many artists, managers, and lawyers argue that a digital sale should be treated as a third-party license because there are no packaging costs, warehousing costs, or shipping costs required for a downloaded song or CD.¹² Third-party li-

4. *Statement of the Recording Indus. Assoc. of Am., Inc., In re Mech. & Digital Phonorecord Delivery Rate Adjustment Proceedings*, No. 2006-3 CRB DPRA (filed Apr. 10, 2007) (testimony of Ron Wilcox, Executive Vice President and Chief Business and Legal Affairs Officer, Sony BMG Music Entertainment), available at <http://www.loc.gov/crb/proceedings/2006-3/riaa-wilcox-amended.pdf> [hereinafter Wilcox Testimony].

5. Ed Christman, *Silverlinings*, BILLBOARD, Jan. 12, 2008, at 5.

6. Antony Bruno, *Downloads to the Rescue: Digital Commerce Hits Record High in '07*, BILLBOARD, Jan. 12, 2008, at 6.

7. Courtney Harding, *Shop, Look, Listen: Nontraditional Retailers Still See Value in CDs*, BILLBOARD, Aug. 2, 2008, at 7.

8. *Midyear Music Biz Report Card*, ROLLING STONE, Aug. 7, 2008, at 12.

9. *Id.*

10. Ed Christman, *Glass Half Full*, BILLBOARD, Oct. 3, 2008, at 6 (“Combined U.S. sales of albums and track-equivalent albums (or TEA, where 10 digital tracks equal an album) totaled 377.4 million units during the nine months ending Sept. 28, down 5.3% from 398.6 million units during the same period last year, according to Nielsen SoundScan. That marked a steeper fall than the 4.7% year-on-year sales drop recorded during the first half of 2008, which was about half the 9.1% decline posted during the year-earlier period.”), available at http://billboard.biz/bbbiz/content_display/industry/e3i2db03fb29d573ec50268520847b9e79f?imw=Y.

11. Antony Bruno, *Strength in Numbers: Moves Are Afoot to Improve Recording Artists' Collective Leverage*, BILLBOARD, July 26, 2008, at 7.

12. *Id.* Consider, for example, this contract provision, currently on file with the author between a major record label and a hip-hop group:

7.02(a) With respect to Electronic Transmissions of Masters hereunder sold or licensed for sale in the United States by [Company] at a price that falls within [Company's] top-line price category applicable to such method of exploitation, your royalty will be a percentage of the applicable Royalty Base Price where such percentage equals the applicable royalty rate set forth in subparagraph 7.01(a) above for the Master concerned (irrespective of whether or not the Record being so exploited constitutes an Album hereunder), and such applicable percentage shall be deemed to be the United States Basic Rate for such method of exploitation. With respect to Electronic Transmissions of Masters hereunder exploited

cense revenues, i.e. film, television, and advertising, are split 50-50, which is significantly more than the album royalty rate.¹³ Record companies have been reluctant to change their accounting practices to share additional revenue with their artists and have always made their profits from the talents of their artists¹⁴ and songwriters.¹⁵

Traditionally, record companies have received their revenue from phonorecord¹⁶ sales and use of the music in film, television, and advertisements.¹⁷ Performers have received their income from record companies based on a percentage of the sales income after the company has recouped its investment in the artist.¹⁸ Performers also receive income

outside the United States and/or at a price that does not fall within [Company's] top-line price category applicable to such method of exploitation, the otherwise applicable other provisions of this Article 7

7.02(b) With respect to audio-only compact discs and Electronic Transmissions of Masters hereunder, the royalty rate (which will be deemed to be the Basic Rate with respect to such configuration or method of exploitation) is one hundred percent (100%) of the otherwise applicable royalty rate in the applicable country for the configuration and price category concerned. . . .

7.03(b) With respect to Ancillary Exploitation or any exploitation of Website Material, ECD Material exploited separate and apart from a Record, or Mobile Material for which [Company] receives a royalty or other payment which is directly attributable to such Ancillary Exploitation or exploitation of Website Material, ECD Material, or Mobile Material, your royalty will be an amount equal to a percentage of [Company's] Net Receipts from such royalty or other payment where such percentage equals the applicable Basic Rate set forth in paragraph 7.01(c) above if the Ancillary Exploitation or exploitation of such Website Material, ECD Material, or Mobile Material is made outside of the United States.

13. Bruno, *Strength in Numbers*, *supra* note 11, at 7. See Contract, on file with author, *supra* note 12:

7.03(c) With respect to any use of a Master by [Company] or license of a Master hereunder by [Company] of which [Company] receives a royalty or other payment which is directly attributable to such use or license and where a royalty or other payment for such use or license is not otherwise specifically provided for elsewhere in this Article 7, your royalty will be the sum equal to fifty percent (50%) of [Company's] Net Receipts from such royalty or other payment.

14. See *Hearing Before the S. Comm. on the Judiciary*, 107th Cong. (Apr. 3, 2001) (statement of Don Henley on behalf of the Recording Artists Coalition) ("A new artist agreement is one-sided in favor of the labels. . . . [A] typical artist could sell a half million records and not see one dollar in royalties.").

15. See *Music Licensing Reform: Hearing Before the Subcomm. on Intellectual Props. of the S. Comm. on the Judiciary*, 109th Cong. (July 12, 2005) (statement of Rick Carnes, President of the Songwriters' Guild of America) [hereinafter Carnes Statement] ("Stephen Foster, America's first professional songwriter, died in poverty with 38 cents in his pocket at the age of 37.").

16. 17 U.S.C. § 101 (1976) ("Phonorecords' are material objects in which sounds, other than those accompanying a motion picture or other audiovisual, are fixed by any method now known or later developed, and from which the sounds can be perceived, reproduced, or otherwise communicated, either directly or with the aid of a machine or device. The term 'phonorecords' includes the material object in which the sounds are first fixed.").

17. These are traditional forms of third-party licenses. See Contract cl. 7.03(c), *supra* note 12 (covering all uses not specifically mentioned). Also, regarding sales, consider the following provision from the contract for a major record label, on file with author:

7.01(a) Subject to the other provisions of this Article 7, on USNRC Net Sales of Albums:
(1) On Masters made during the initial Contract Period, first Option Period and second Option Period: X% ('the Basic Rate').

14.21 "'Master,' 'Master Recording' or 'Recording'—any recording of sound, whether or not coupled with a visual image, by any method and on any substance or material, whether now or hereafter known, that is or is intended to be embodied on a Record."

Id.

18. See *id.* § 8.01. "[Company] will compute your royalties as of each June 30 and December 31 for the prior six (6) months, in respect of each six (6) month period in which there are sales or returns

from touring¹⁹ and merchandising.²⁰ Prior to 1995, neither record companies nor performers collected performance royalties.²¹ Performance royalties have traditionally been paid only to music publishing companies and songwriters after those royalties were collected by the performance rights societies.²²

With the current technology and digital marketing available, artists are trying to reform the record industry in attempts to get greater royalty rates.²³ Several artists have produced albums without the help of a major record label.²⁴ While the artists attempt to release directly to the consumer, the top two retailers, Wal-Mart and iTunes, put pressure on the bottom line of record labels trying to keep their margins up.²⁵ Additionally, artists face pressure from their record labels because “hits” are the catalysts that drive sales.²⁶

of Records or other exploitations of Masters on which royalties are payable to you.” *Id.*

19. *See id.* § 9A.01. “[Company] is hereby entitled to a royalty equal to [X] percent (X%) (“Tour Participation Percentage”) of the Net Revenues earned in connection with Concert Dates throughout the United States and, subject to the terms and conditions of this article 9A, during the term hereof.” *Id.*

20. *See id.* § 9A.03(a).

“Tour Merchandise Rights” shall mean the right to sell to the public on the site of Artist’s Concert Dates all types of products and merchandise (including, without limitation, T-shirts, sweatshirts, hats, buttons, bumper stickers, key chains, posters, books, and the like and any other agreed products) embodying an element of the professional name of Artist, other names referring to Artist, photographs, likenesses of and/or biographical material concerning Artist, and/or any words, symbols or other identification of Artist of every kind, as well as copyrights, trademarks, trade names, service marks, artwork, logos, designs, and similar properties of or relating to Artist as a collective or the professional recording career of Artist, including any material prepared by [Company] in connection with the sale of recordings hereunder containing Artist’s performance.

21. *See* Digital Performance Right in Sound Recordings Act of 1995, Pub. L. No. 104-39, § 3(g), 109 Stat. 336, 342.

22. “Performance rights societies” include The American Society of Composers, Authors, and Producers (ASCAP), Broadcast Music, Inc. (BMI), and Society of European Stage Authors & Composers (SESAC). *See* discussion of performance rights societies *infra* Section III.

23. Evan Serpick, *NIN, Eagles, Pumpkins: Who Needs Labels?*, ROLLING STONE, Apr. 17, 2008, at 11; *cf. Allman v. Sony BMG Music Entm’t*, No. 06 CV 3252(GBD), 2008 WL 2477465, at *1 (S.D.N.Y. June 18, 2008) (dismissing a class action claim by recording artists seeking fifty percent of the royalties collected from music downloads and ringtones via digital transmissions).

24. Serpick, *supra* note 23, at 11 (“In the past year, artists including Radiohead, Madonna, Nine Inch Nails, the Eagles and the Black Crowes have all released—or announced plans to release—music without a major label.”).

25. *See* Wilcox Testimony, *supra* note 4 (“Apple’s iTunes Music Store is by far the most popular online site for downloading songs legally. It accounts for more than 80% of online permanent download sales . . . , and like Wal-Mart, Apple exerts considerable downward price pressure. Because of Apple’s dominant position in this market segment, three years after the launch of iTunes we are still hard pressed to raise wholesale prices for even a limited number of online downloads. Moreover, to compete with Apple, other competitors in the music download market have set their retail prices below Apple’s 99 cent price. For example, Wal-Mart sells downloads for 88 cents on its website.”); Steve Knopper, *Wal-Mart Demands CD-Price Cut*, ROLLING STONE, Apr. 3, 2008, at 16 (“Wal-Mart, the nation’s largest music retailer, has threatened to stop selling CDs entirely if the major record labels don’t drastically slash prices . . .”).

26. *See* Rich Cohen, *The Last Record Man*, ROLLING STONE, Feb. 21, 2008, at 61 (describing the feud between performer Kelly Clarkson and producer Clive Davis over the record, *My December*. Clive told Clarkson, “[H]e did not like it. Because he did not hear any hits.” The article goes on to state, “The album . . . lacked a radio-friendly single. Clarkson canceled her tour because of poor ticket sales [and] fired her manager . . .” Clive responded, “The record had no hits—that’s what mattered.”).

All of the players in the music business believe that the revenue distribution models need to change but, to date, have been reluctant to agree on how to implement that change.²⁷ In an effort to reform the music business and to continue its profitability, record companies, music publishing companies, performing rights societies, artists, and songwriters have lobbied Congress to implement meaningful change. There have been three recent bills submitted to the House and Senate. The first bill, Section 115 Reform Act of 2006, sought to require listeners of digital music to acquire a new license for each incidental copy, or copies, of the media made by the act of downloading the music.²⁸ Congress did not enact the bill. It died in the House.²⁹ In the 110th Congress, meeting in 2007, the legislature introduced the Performance Rights Act, which sought to create a public performance right in sound recordings.³⁰ The Act intends to provide parity between the owners of the copyrights in the musical works and the owners of the copyrights in the sound recordings by creating sound recording performance rights under 17 U.S.C. § 114.³¹ A similar bill, introduced the same day, is currently in the Senate.³² Neither bill has been scheduled for debate.³³

This article will discuss some of the major changes proposed to 17 U.S.C. §§ 114 and 115. Part II presents a brief history of compulsory licenses as background for the current state of the law and the perceived need for change. Part III provides a summary of Marybeth Peters' proposals. Part IV discusses the current status of § 114 and the pending legislation to expand the scope of performance royalties for sound recordings. Part V contains the author's proposals to modify Sections 107, 114, and 115.

II. A BRIEF HISTORY OF COMPULSORY LICENSES

This section will provide a brief overview of the development of the compulsory license provisions now included in the Copyright Act.³⁴ In

27. See Wilcox Testimony, *supra* note 4, at 23 ("These problems go as far back as 1999-2000, when publishers refused to issue licenses for downloads and subscription services until industry agreements were negotiated between [the Recording Industry Association of America, Inc.] and [the National Music Publishers' Association].").

28. H.R. 5553, 109th Cong. (2006).

29. GovTrack.us, *H.R. 5553 [109th]: Section 115 Reform Act of 2006*, <http://www.govtrack.us/congress/bill.xpd?bill=h109-5553> (last visited Oct. 4, 2008).

30. H.R. 4789, 110th Cong. (2007).

31. *Id.*

32. Performance Rights Act, S. 2500, 110th Cong. (2007).

33. See GovTrack.us, *S. 2500: Performance Rights Act*, <http://www.govtrack.us/congress/bill.xpd?bill=s110-2500> (last visited Oct. 4, 2008); GovTrack.us, *H.R. 4789: Performance Rights Act*, <http://www.govtrack.us/congress/bill.xpd?bill=h110-4789> (last visited Oct. 4, 2008).

34. See *Music Licensing Reform: Hearing Before the Subcomm. on Courts, the Internet, and Intellectual Prop. of the H. Comm. on the Judiciary*, 109th Cong. (June 21, 2005) (statement of Marybeth Peters, Register of Copyrights), available at: <http://www.copyright.gov/docs/regstat062105.html> [hereinafter Peters' June 21 Statement]; see also Lydia Pallas Loren, *Untangling the Web of Music Copyrights*, 53 CASE W. RES. L. REV. 673, 679-98 (2003) (providing a history of the musical

doing so, it discusses how case law first acknowledged the need for such provisions, and how those needs were addressed, in part, by the 1909 and 1976 Copyright Acts. The section concludes with a call for change in the current law.

A. White-Smith Music Publishing Co. v. Apollo Co.

When Justices Day and Holmes wrote separately in *White-Smith Music Publishing Co. v. Apollo Co.*,³⁵ they recognized the need for Congress to modify the Copyright Act of 1891 to keep up with technology.³⁶ The Justices held that courts would not recognize as infringement the manufacture and sale of perforated rolls used in connection with mechanical player pianos to reproduce sounds of copyrighted musical compositions.³⁷ In *White-Smith*, the perforated rolls were a relatively new technology, and the copyright infringement suit pitted technological innovators against composers and music publishers who were attempting to protect their intellectual property and enforce their rights.³⁸ The Court looked to the legislative history to determine the intended definition of “copy” and stated, for the purposes of the Act, that the perforated rolls were not copies.³⁹ Because the Copyright Act was intended to protect physical copies that could be read by individuals, and the per-

work copyright from 1831 through 2003).

35. 209 U.S. 1 (1908).

36. *Id.* at 9 (construing Rev. St. U.S. § 4952 (U.S. Comp. Stat. Supp. 1907 p. 1021)). Justice William Day wrote the majority opinion. *Id.* at 8. In his concurring opinion, Justice Oliver Holmes stated:

A musical composition is a rational collocation of sounds apart from concepts, reduced to a tangible expression from which the collocation can be reproduced either with or without continuous human intervention. On principle anything that mechanically reproduces that collocation of sounds ought to be held a copy, or if the statute is too narrow ought to be made so by a further act, except so far as some extraneous consideration of policy may oppose.

Id. at 19-20.

37. *Id.* at 18.

38. *Id.* at 9. The Court stated:

The manufacture of such instruments [musical instruments adapted to play perforated rolls] and the use of such musical rolls has developed rapidly in recent years in this country and abroad. The record discloses that in the year 1902 from seventy to seventy-five thousand of such instruments were in use in the United States, and that from one million to one million and a half of such perforated musical rolls, to be more fully described hereafter, were made in this country in that year.

It is evident that the question involved in the use of such rolls is one of very considerable importance, involving large property interests, and closely touching the rights of composers and music publishers.

Id.

39. *Id.* at 16-17. The Court stated:

A musical composition is an intellectual creation which first exists in the mind of the composer; he may play it for the first time upon an instrument. It is not susceptible of being copied until it has been put in a form which others can see and read. The statute has not provided for the protection of the intellectual conception apart from the thing produced, however meritorious such conception may be, but has provided for the making and filing of a tangible thing, against the publication and duplication of which it is the purpose of the statute to protect the composer.

Id. at 17.

forated rolls could only be read by a few, highly-trained technicians, the rolls were unprotected.⁴⁰ The majority opinion closed by stating, “But such considerations properly address themselves to the legislative and not the judicial branch of the government. As the act of Congress now stands we believe it does not include these records as copies or publications of the copyrighted music involved in these cases.”⁴¹

B. The 1909 Copyright Act

In the 1909 Copyright Act,⁴² Congress responded to the challenge raised in *White-Smith* by including a statutory definition of a “compulsory license.”⁴³ In section 1(e), Congress granted copyright owners protection for mechanical reproductions (or phonorecords) by providing that anyone could make or distribute a phonorecord based on the copyright owner’s musical work by paying a statutory fee.⁴⁴ This section established the first official compulsory license.⁴⁵ Under the plain language of the statute, no one could utilize the compulsory license until the copyright owner authorized the first phonorecord.⁴⁶ The clear statutory language stated that any secondary user wishing to record a musical work by using a compulsory license must send a “notice to use” to the copyright holder and the United States Copyright Office.⁴⁷ The copyright language was interpreted to require the original copyright holder to use the work in a mechanical reproduction and then file notice with the Copyright Office, which served as notice to potential users that the work was available for a compulsory license.⁴⁸ This simultaneously pre-

40. *Id.* at 17-18. “These musical tones are not a copy which appeals to the eye.” *Id.* at 17.

41. *Id.* at 18.

42. 17 U.S.C. §§ 1-216 (1909).

43. *See, e.g., id.* § 4.

44. *Id.* § 1(e) (“[A]s a condition of extending the copyrighted control to such mechanical reproductions, that whenever the owner of a musical copyright has used or permitted or knowingly acquiesced in the use of the copyrighted work upon the parts of instruments serving to reproduce mechanically the musical work, any other person may make similar use of the copyrighted work upon the payment to the copyright proprietor of a royalty of 2 cents on each such part manufactured, to be paid by the manufacturer thereof . . .”).

45. *See id.*; *see also* 17 U.S.C. § 115(a)(2) (2006). This section provides:

A compulsory license includes the privilege of making a musical arrangement of the work to the extent necessary to conform it to the style or manner of interpretation of the performance involved, but the arrangement shall not change the basic melody or fundamental character of the work, and shall not be subject to protection as a derivative work under this title, except with the express consent of the copyright owner.

46. 17 U.S.C. § 1(e) (1909).

47. *Id.* at § 101(e). This section provided:

Whenever any person, in the absence of a license agreement, intends to use a copyrighted musical composition upon the parts of instruments serving to reproduce mechanically the musical work, relying upon the compulsory license provision of this title, he shall serve notice of such intention, by registered mail, upon the copyright proprietor at his last address disclosed by the records of the copyright office, sending to the copyright office a duplicate of such notice.

Id.

48. *See* H.R. REP. NO. 94-1476, at 108 (1976) (“The [1909] law, though not altogether clear, apparently bases compulsory licensing on the making or licensing of the first recording [by the copy-

served copyright owners' rights under the law and served as notice to those wishing to reproduce it.⁴⁹

C. The 1976 Copyright Act

Prior to enacting the Copyright Act of 1976,⁵⁰ the House and Senate convened to discuss advancements in technology and necessary changes to copyright and compulsory license law.⁵¹ Specifically, they stated “‘that a compulsory licensing system is still warranted as a condition for the rights of reproducing and distributing phonorecords of copyrighted music,’ but ‘that the present system is unfair and unnecessarily burdensome of copyright owners, and that the present statutory rate is too low.’”⁵² Congress set forth numerous new conditions to reduce the burden of securing a compulsory license, including: (1) “a compulsory license would be available to anyone as soon as ‘phonorecords . . . have been distributed to the public in the United States under the authority of the copyright owner’”;⁵³ (2) a compulsory license may only be obtained when the “‘primary purpose . . . is to distribute them to the public for private use’”;⁵⁴ (3) the licensee cannot duplicate the sound recording without the authorization of the copyright owner;⁵⁵ (4) a musical work can be rearranged “‘to the extent necessary to conform it to the style or manner of interpretation of the performance involved,’ so long as it does not ‘change the basic melody or fundamental character of the work’”;⁵⁶ (5) a licensee must “‘serve a ‘[N]otice of [I]ntention to obtain a compulsory license’” on the copyright owner “‘before or within [thirty] days after making [the] phonorecords,’” and, if the Copyright Office does not have the owner’s address, the notice must be served to

right holder], even if no authorized records are distributed to the public.”); *see also Music Licensing Reform: Hearing Before the Subcomm. on Intellectual Prop. of the S. Comm. on the Judiciary*, 109th Cong. (July 12, 2005) (statement of Marybeth Peters, Register of Copyrights) [hereinafter Peters’ July 12 Statement] (“[N]o one could take advantage of the compulsory license until the copyright owner had authorized the first mechanical reproduction of the work.”).

49. *See* H.R. REP. NO. 94-1476, at 108 (1976).

50. 17 U.S.C. §§ 101-810 (1976).

51. H.R. REP. NO. 94-1476, at 47 (1976). The report stated:

Since [1909] significant changes in technology have affected the operation of the copyright law. Motion pictures and sound recordings had just made their appearance in 1909, and radio and television were still in the early stages of their development. During the past half century a wide range of new technologies for capturing and communicating printed matter, visual images, and recorded sounds have come into use, and the increasing use of information storage and retrieval devices, communications satellites, and laser technology promises even greater changes in the near future. The technical advances have generated new industries and new methods for the reproduction and dissemination of copyrighted works, and the business relations between authors and users have evolved new patterns.

Id.

52. *Id.* at 107.

53. *Id.* at 108 (citing Copyright Act of 1976, S. 22, 94th Cong. § 115(a)(1), codified at 17 U.S.C. § 115(a)(1) (2006)).

54. *Id.*

55. *Id.* at 108-09.

56. *Id.* at 109.

the Copyright Office;⁵⁷ (6) the copyright owner is entitled to receive copyright royalties on the phonorecords “made” and “distributed” after the copyright owner is identified in the registration of the Copyright Office;⁵⁸ and (7) a compulsory license may be terminated for failure to pay monthly royalties if a user fails to make payment within thirty days of a receipt of a written notice on a defaulting licensee.⁵⁹

While this language in the Copyright Act of 1976 sufficed prior to digital technology, the emergence of digital transmissions created a need for the Digital Performance Right in Sound Recordings Act of 1995.⁶⁰ The intention of the 1995 Act was to extend the scope of compulsory licenses to cover the distribution of a phonorecord in a digital format.⁶¹ The 1995 Act added a “digital phonorecord delivery” definition to 17 U.S.C. § 115:

A “digital phonorecord delivery” is each individual delivery of a phonorecord by digital transmission of a sound recording which results in a specifically identifiable reproduction by or for any transmission recipient of a phonorecord of that sound recording . . . or any nondramatic musical work embodied therein. A digital phonorecord delivery does not result from a real-time, non-interactive subscription transmission of a sound recording where no reproduction of the sound recording or the musical work embodied therein is made from the inception of the transmission through to its receipt by the transmission recipient in order to make the sound recording audible.⁶²

The definition acknowledges both rights of public performance and reproduction or transmission.⁶³ In order to transmit a sound recording⁶⁴

57. *Id.*

58. *Id.* at 110. The report noted:

The term “made” is intended to be broader than “manufactured,” and to include within its scope every possible manufacturing or other process capable of reproducing a sound recording in phonorecords. The use of the phrase “made and distributed” establishes the basis upon which the royalty rate for compulsory licensing under section 115 is to be calculated

Id.

59. *Id.* at 111.

60. Pub. L. No. 104-39, 109 Stat. 336 (1995) (codified in scattered sections of 17 U.S.C.); S. REP. NO. 104-128, at 14 (1996). The report stated:

[I]n the absence of appropriate copyright protection in the digital environment, the creation of new sound recordings and musical works could be discouraged, ultimately denying the public some of the potential benefits of the new digital transmission technologies. The Committee believes that current copyright law is inadequate to address all of the issues raised by these new technologies dealing with the digital transmission of sound recordings and musical works and, thus, to protect the livelihoods of the recording artists, songwriters, record companies, music publishers and others who depend upon revenues derived from traditional record sales.

In particular, the Committee believes that recording artists and record companies cannot be effectively protected unless copyright law recognizes at least a limited performance right in sound recordings.

S. REP. NO. 104-128, at 14 (1996).

61. *Hearing Before the Subcomm. on Courts, the Internet, & Intellectual Prop. of the H. Comm. on the Judiciary*, 108th Cong. (Mar. 11, 2004) (statement of Marybeth Peters, Register of Copyrights) [hereinafter Peters’ March 11 Statement], available at <http://judiciary.house.gov/legacy/peters031104.pdf>.

62. 17 U.S.C. § 115(d) (2006).

63. Peters’ March 11 Statement, *supra* note 61. In her testimony, she stated:

digitally, the broadcaster must obtain a mechanical license from the copyright owner of the musical work and pay the performance royalty created by 17 U.S.C. § 114. Many music industry professionals suggest that change is necessary to avoid the perceived double dipping.⁶⁵ Marybeth Peters,⁶⁶ United States Register of Copyrights, has testified before Congress numerous times concerning possible reforms for compulsory licenses and performing rights royalties.⁶⁷

D. Why There Must Be Change

Since the mid-1990s, digital music services have had the right to use compulsory licenses to acquire the rights to already-recorded phonorecords and deliver these phonorecords to consumers.⁶⁸ A two-track licensing system has developed whereby digital music providers must obtain a license for the public performance rights from a performing rights society and another license for the distribution rights from the copyright owners.⁶⁹ Digital transmissions implicate both performance rights and distribution rights, and “licensees end up paying twice for the right to make a digital transmission of a single work.”⁷⁰ The two-step process creates increased transactional costs.⁷¹ The increased transactional costs mean a decrease in profitability for the record companies.⁷² Additionally, these transactional costs are possibly one reason why the illegal download services, or free services, have been so popular.⁷³

In 2005, the United States Supreme Court, in *MGM v. Grokster*,⁷⁴ held that when one distributes a device that can be used to infringe copyright, it is liable for the resulting acts of infringement by third par-

Congress made changes to Section 115 to meet the challenges of providing music in a digital format when it enacted the Digital Performance Right in Sound Recordings Act of 1995 (“DPRA”), . . . which also granted copyright owners of sound recordings an exclusive right to perform their works publicly by means of a digital audio transmission, . . . subject to certain limitations. . . . The amendments to Section 115 clarified the reproduction and distribution rights of music copyright owners and producers and distributors of sound recordings, especially with respect to what the amended Section 115 termed “digital phonorecord deliveries.” Specifically, Congress wanted to reaffirm the mechanical rights of songwriters and music publishers in the new world of digital technology.

Id.

64. 17 U.S.C. § 101 (1976) (providing, “‘Sound recordings’ are works that result from the fixation of a series of musical, spoken, or other sounds, but not including the sounds accompanying a motion picture or other audiovisual work, regardless of the nature of the material objects, such as disks, tapes, or other phonorecords, in which they are embodied.”).

65. Peters’ July 12 Statement, *supra* note 48.

66. See *supra* note 1 and accompanying text.

67. See, e.g., Peters’ July 12 Statement, *supra* note 48; see also 17 U.S.C. §§ 114-115 (2006).

68. 17 U.S.C. § 115 (2006) (amended in 1995); see generally Peters’ July 12 Statement, *supra* note 48.

69. Peters’ July 12 Statement, *supra* note 48.

70. *Id.*

71. *Id.*

72. See *id.*

73. *Id.* Examples of “free services” include Napster, KaZaa, Grokster, and StreamCast.

74. 545 U.S. 913 (2005).

ties.⁷⁵ Grokster and its co-defendant StreamCast “distribute[d] free software products that allow[ed] computer users to share [copyrighted material] through peer-to-peer networks.”⁷⁶ During discovery, MGM found that billions of files were shared across peer-to-peer networks each month.⁷⁷ After *A&M Records, Inc. v. Napster, Inc.*,⁷⁸ Grokster and StreamCast promoted and marketed themselves as Napster alternatives.⁷⁹ In *Grokster*, neither defendant received any revenue from its users; however, they generated income by selling advertising space and streaming it to their users.⁸⁰ Additionally, both companies were aware of the infringement, “voiced the objective that recipients use the software to download copyrighted works, and took active steps to encourage infringement.”⁸¹

Looking at the number of illegal downloads and their frequency, the Court found the argument for indirect liability persuasive.⁸² The Court stated, “When a widely shared service or product is used to commit infringement, it may be impossible to enforce rights in the protected work effectively against all direct infringers, the only practical alternative being to go against the distributor of the copying device for secondary liability on a theory of contributory or vicarious infringement.”⁸³ The Court defined “contributory liability” as “intentionally inducing or encouraging direct infringement,” and defined “vicarious liability” as “profiting from direct infringement while declining to exercise a right to stop or limit it.”⁸⁴ Advertising an infringing use for a product, or instructing on how to engage in an infringing use with a product, are evidence of active steps taken to encourage direct infringement.⁸⁵ The advertising and instruction by Grokster and StreamCast showed an

75. *Id.* at 919.

76. *Id.* A peer-to-peer network communicates directly with other computers, which eliminates the need for a central computer server. *Id.* at 920. Additionally, the high-bandwidth communications capacity for a server can be dispensed with, making costly server storage unnecessary. *Id.*

77. *Id.* at 923.

78. 239 F.3d 1004 (9th Cir. 2001). Napster was found liable for copyright infringement after the court established that its Internet service facilitated the transmission and retention of digital audio files by its users. Specifically, Napster interfered with the copyright holders’ exclusive rights of reproduction per 17 U.S.C. § 106(1), and distribution per 17 U.S.C. § 106(3). *Id.* at 1014.

79. *Grokster*, 545 U.S. at 913. Additionally, StreamCast gave away a software program known as OpenNap, designed to be comparable to Napster software. *Id.* at 924. “Evidence indicates that it was always StreamCast’s intent to use its OpenNap network to be able to capture email addresses of its initial target market so that it could promote its StreamCast Morpheus interface to them.” *Id.* (internal quotations omitted).

80. *Id.* at 926.

81. *Id.* at 913.

82. *Id.* at 927. The Court overturned *Grokster* on the basis that the lower court misread *Sony Corp. of America v. Universal City Studios, Inc.*, 464 U.S. 417 (1984), which held that distribution of a commercial product capable of substantial noninfringing uses did not give rise to contributory liability for infringement unless the distributor had *actual knowledge* of specific instances of infringement and failed to act on that knowledge. *Grokster*, 545 U.S. at 927.

83. *Grokster*, 545 U.S. at 929-30.

84. *Id.* at 930.

85. *Id.* at 936.

affirmative intent that the product be used to infringe, and thus overcame the law's reluctance to find liability when a defendant sells a product suitable for a lawful use.⁸⁶

On September 28, 2005, three months after *Grokster* was decided, Marybeth Peters delivered a statement to the Senate Committee on the Judiciary at its hearing on "Protecting Copyright and Innovation in a Post-Grokster World."⁸⁷ Peters described the *Grokster* decision as "hav[ing] encouraged productive negotiations and agreements within the music industry, ultimately benefiting the music consumer by making it easier to legitimately obtain music online."⁸⁸ The essential problem is that requiring two licenses from different rights-holders for a single transmission of a single work is inefficient; Peters advocates for Congress to change this law to create an efficient and effective system of licensing.⁸⁹

III. MARYBETH PETERS' PROPOSALS

In her initial 2004 testimony before a congressional subcommittee, Peters outlined several options to reconcile the compulsory license provisions with emerging and existing digital technology.⁹⁰ First, Peters suggested eliminating the compulsory license.⁹¹ Peters stated that all other countries that had a similar compulsory license—except the United States and Australia—have eliminated the license from their copyright laws.⁹² She justified this by stating, "A compulsory license limits an author's bargaining power. It deprives the author of determining with whom and on what terms he wishes to do business."⁹³ In its place, Peters suggested a collective administration, modeled after the American Society of Composers, Authors, and Producers (ASCAP),⁹⁴ Broadcast Music, Inc (BMI),⁹⁵ and the Society of European Stage Authors & Composers (SESAC),⁹⁶ which would become Music Rights

86. *Id.* at 939-40.

87. *Protecting Copyright and Innovation in a Post-Grokster World: Hearing Before the S. Comm. on the Judiciary*, 109th Cong. (Sept. 28, 2005) (statement of Marybeth Peters, Register of Copyrights), available at <http://www.copyright.gov/docs/regstat092805.html>.

88. *Id.*

89. *See id.*

90. Peters' March 11 Statement, *supra* note 61.

91. *Id.*

92. *Id.*

93. *Id.*

94. ASCAP was established in 1914 to collect performance royalties. ASCAP, *About ASCAP*, <http://www.ascap.com/about/> (last visited Sept. 26, 2008). ASCAP has a membership association of more than 330,000 composers, songwriters, lyricists, and music publishers throughout the United States. *Id.*

95. BMI was established in 1939 to collect performance royalties. BMI, *BMI 101*, <http://www.bmi.com/about/?link=navbar> (last visited Sept. 26, 2008). BMI is a performing rights organization, which collects license fees on behalf of its songwriters, composers, and music publishers and distributes them as royalties to those members whose works have been performed. *Id.*

96. SESAC was established in 1930. SESAC, *What is SESAC?*, <http://www.sesac.com/writerpublisher/whatissesac.aspx> (last visited Sept. 26, 2008). "SESAC, Inc. is a performing rights

Organizations (MRO), and which would license all rights related to making musical works available to the public.⁹⁷ “As a matter of principle, [she] believe[s] that the Section 115 license should be repealed and that licensing of rights should be left to the marketplace, most likely by means of collective administration.”⁹⁸

Establishing an MRO capable of licensing all rights related to making musical works available to the public is a good idea, and a detailed discussion follows.⁹⁹ Even though record companies rarely use compulsory licenses to obtain mechanical licenses from music publishing companies,¹⁰⁰ eliminating the compulsory license provision and leaving the rate setting to the marketplace is a bad idea because it would provide yet another method for record companies to extract money from their recording artists.¹⁰¹ Most record contracts include a controlled compensation clause that limits the amount paid to the artist for songs included on the album.¹⁰² Record companies cap the amount of money available to pay mechanical royalties on a recording artist’s behalf, while in a separate section of the contract, the company requires a minimum number of songs¹⁰³ and a minimum number of minutes to satisfy those re-

organization with headquarters in Nashville and offices in New York, Los Angeles, Atlanta, [Miami] and London.” *Id.*

97. Peters’ Mar. 11 Statement, *supra* note 61.

98. *Id.*

99. *See infra* Section V.E.

100. *See Wilcox Testimony, supra* note 4 (“However, the compulsory license is so burdensome to rely on that it was not a practical option for us.”); *see also Written Direct Statement of the Recording Indus. Assoc. of America, Inc., In re Mech. & Digital Phonorecord Delivery Rate Adjustment Proceedings*, No. 2006-3 CRB DPRA, at vol. 1, tab A, p. 9 (filed Apr. 10, 2007) (Introductory Memorandum), available at <http://www.loc.gov/crb/proceedings/2006-3/riaa-written.pdf> (describing “the practical difficulties of the mechanical licensing system, in which the compulsory process is so burdensome that it is almost never used”).

101. *See generally* Croce v. Kurnit, 565 F. Supp. 884, 893 (S.D.N.Y. 1982). The court stated: As the facts stated above indicate, the contracts were hard bargains, signed by an artist without bargaining power, and favored the publishers, but as a matter of fact did not contain terms which shock the conscience or differed so grossly from industry norms as to be unconscionable by their terms. The contracts were free from fraud and although complex in nature, the provisions were not formulated so as to obfuscate or confuse the terms. Although Jim Croce might have thought that he retained the right to choose whether to exercise renewal options, this misconception does not establish that the contracts were unfair.

Id.

102. *See, e.g.*, Recording Contract Executed (Aug. 15, 2007) (on file with author). The contract reads, in part:

11.01.(a)(2) For that License, [Company] will pay you or your designee Mechanical Royalties, on the basis of Net Sales, at the following rate (the ‘Controlled Rate’): (A) On Records distributed in the United States: (i) If the copyright law of the United States provides for a minimum compulsory rate: The rate equal to seventy-five percent (75%) of the minimum compulsory license rate applicable to the use of musical compositions on audio Records under the United States copyright law (hereinafter referred to as the ‘U.S. Minimum Statutory Rate’) at the time of the commencement of the recording of the Master concerned but in no event later than the last date for timely delivery of such Master (the applicable date is hereinafter referred to as the ‘Copyright Fixing Date’). (The U.S. Minimum Statutory Rate is \$.091 per Composition as of January 1, 2006).

Id.

103. “‘Album’ or ‘LP’—a sufficient number of Masters that qualify as Sides hereunder embodying Artist’s performances to comprise one (1) or more Compact Discs, or the equivalent, of not less than forty-five (45) minutes of playing time and containing at least eleven (11) different composi-

ording requirements.¹⁰⁴ If the bargaining power of the parties was not so unbalanced in favor of the record company, the free market system might work. But the transactional costs required to negotiate a separate mechanical royalty rate for every song included on any album would likely exceed any savings for the company and unduly burden copyright owners.¹⁰⁵ Arguing that music-publishing companies have equal bargaining power with the record companies ignores market realities and ultimately punishes the recording artist who has a cap on the amount the company will pay on the artist's behalf.¹⁰⁶

Peters' second proposal is to change the language of § 115 to state that "all reproductions of a musical work made in the course of a digital phonorecord delivery are within the scope of the [§] 115 compulsory license."¹⁰⁷ By doing this, the language would "provide expressly that all reproductions that are incidental to the making of a digital phonorecord delivery . . . are included within the scope" of § 115.¹⁰⁸ Some of these ideas will be incorporated in this author's proposal below.¹⁰⁹

Peters' third suggestion is to amend the law "to provide that reproductions of musical works made in the course of a licensed public performance are either exempt from liability or subject to a statutory license."¹¹⁰ Under the current statutes, "[w]hen a webcaster transmits a public performance of a sound recording of a musical composition, the webcaster must obtain a license from the copyright owner for the public

tions." *Id.*

104. *Id.* Record companies design these clauses to prevent an artist from using one song to satisfy the album delivery requirement. *Cf.* Robert Christgau & David Fricke, *The 40 Essential Albums of 1967*, ROLLING STONE, July 12-26, 2007, at 133 (discussing Arlo Guthrie's "Alice's Restaurant," an eighteen-minute song; Guthrie re-recorded the song and added four minutes for a CD release).

105. No one knows which song or songs on an album are ultimately going to drive album sales or airplay before the record companies release the album. Assigning different mechanical rate values to each song would make record company accounting more complicated and more obfuscated than it already is. *See generally* DON PASSMAN, ALL YOU NEED TO KNOW ABOUT THE MUSIC BUSINESS (6th ed. 2006).

106. If the Controlled Compensation Clause is based on a rate lower than the statutory rate through negotiations and the delivery requirement exceeds the cap in the Controlled Composition Clause, the artist will have to pay the difference. *See* Todd Brabec & Jeff Brabec, *Controlled Composition Clauses*, <http://www.ascap.com/musicbiz/money-clauses.html> (last visited Sept. 26, 2008). The website states:

[W]hen a writer/artist has recorded a substantial number of songs by other writers, he/she has been put in a position of receiving no royalties for his/her own songs, since the aggregate album-royalty maximum has been paid out to outside songwriters and publishers. . . . But it can get even worse. There have actually been instances in which the writer/artist's mechanical royalties have been in the minus column for every album sold because of the operation of these controlled composition clauses. Additionally, the era of multiple remixes has given rise to a clause which provides that the writer/artist will only receive a mechanical royalty for one use of his/her song regardless of the number of versions contained on the single or album.

Id.

107. Peters' Mar. 11 Statement, *supra* note 61.

108. *Id.* By including this, an individual could be charged several times for copies incidental to the download, that the user or server could not access individually. *Id.*; *see* 17 U.S.C. § 115 (2006).

109. *See* discussion *infra* Section V.

110. Peters' Mar. 11 Statement, *supra* note 61.

performance”¹¹¹ Many of these public performance rights are controlled by the public performance organizations ASCAP, BMI, or SESAC.¹¹² While these organizations control the public performance rights, music publishers control reproduction rights associated with the transmission of the performance.¹¹³ Webcasters currently must get licenses for both the public performance of the work and the right to reproduce the work for transmission on the website.¹¹⁴ Peters suggests that this situation is parallel to when broadcasters use ephemeral recordings¹¹⁵ of their transmission programs.¹¹⁶ Under 17 U.S.C. § 112(a), broadcasters currently receive an exemption for these recordings.¹¹⁷ Peters suggests it is inconsistent to allow broadcasters an exemption but not allow webcasters an exemption for these similar recordings.¹¹⁸ As a result, she states the licensed public performance should either be “exempt from liability or subject to a statutory license.”¹¹⁹ Similarly, this author proposes that the public performance be subject to a statutory license administered and collected by the MROs.¹²⁰ This suggestion has not been accepted by the Copyright Royalty Judges who are responsible

111. *Id.*; see 17 U.S.C. §§ 114-115.

112. See Peters’ Mar. 11 Statement, *supra* note 61.

113. *Id.*

114. See *id.*

115. An “ephemeral recording” is not specifically defined in the Copyright Act, however, Congress defined it in the legislative history as: “copies or phonorecords of a work made for purposes of later transmission by a broadcasting organization legally entitled to transmit the work.” H.R. REP. NO. 94-1476, 94th Cong., at 101 (1976). The House Report also stated:

[T]he organization must have the right to make the transmission “under a license or transfer of the copyright or make the limitations on exclusive rights in sound recordings specified by § 114(a).” Thus, except in the case of copyrighted sound recordings (which have no exclusive performing rights under the bill), the organization must be a transferee or licensee (including compulsory licensee) of performing rights in the work in order to make an ephemeral recording of it.

Id. at 102.

116. Peters’ Mar. 11 Statement, *supra* note 61.

117. Section 112 states:

(a)(1) Notwithstanding the provisions of section 106, and except in the case of a motion picture or other audiovisual work, it is not an infringement of copyright for a transmitting organization entitled to transmit to the public a performance or display of a work, under a license, including a statutory license under section 114(f), or transfer of the copyright or under the limitations on exclusive rights in sound recordings specified by section 114(a), or for a transmitting organization that is a broadcast radio or television station licensed as such by the Federal Communications Commission and that makes a broadcast transmission of a performance of a sound recording in a digital format on a nonsubscription basis, to make no more than one copy or phonorecord of a particular transmission program embodying the performance or display, if—

(A) the copy or phonorecord is retained and used solely by the transmitting organization that made it, and no further copies or phonorecords are reproduced from it; and

(B) the copy or phonorecord is used solely for the transmitting organization’s own transmissions within its local service area, or for purposes of archival preservation or security; and

(C) unless preserved exclusively for archival purposes, the copy or phonorecord is destroyed within six months from the date the transmission program was first transmitted to the public.

17 U.S.C. § 112 (2006).

118. Peters’ Mar. 11 Statement, *supra* note 61.

119. *Id.*

120. See *id.*

for setting rates.¹²¹ Effective May 1, 2007, the Copyright Royalty Board set the commercial webcaster rates for performances between 2006 and 2010.¹²² The Board also set a reduced rate for “small” and “noncommercial” webcasters.¹²³

Peters’ final suggestion is to expand the § 115 digital phonorecord delivery license “to include both reproductions and performances of nondramatic musical works in the course of either digital phonorecord deliveries or transmissions of performances.”¹²⁴ This arises from the distinction between reproduction rights and performance rights, and from the fact that online music services are asked to pay separately for each of these rights.¹²⁵ She suggests placing both uses under a single license requiring a single payment.¹²⁶ This author agrees with this proposal and has incorporated it into the suggestions discussed below.¹²⁷ Before Peters concluded her testimony, she listed some suggestions submitted by interested parties.¹²⁸ Some of those suggestions are also included below.¹²⁹

IV. PERFORMANCE RIGHTS UNDER § 114

Sound recordings did not receive protection until the Sound Re-

121. See 17 U.S.C. § 801 (2006) (defining the role of the Copyright Royalty Tribunal and the role of the Copyright Royalty Judge); 17 U.S.C. § 101 (defining a Copyright Royalty Judge as a judge “appointed under section 802 of this title, and includes any individual serving as an interim Copyright Royalty Judge under such section”).

122. 37 C.F.R. § 380.3(a)(1) (2007) (“*Commercial Webcasters*: . . . For all digital audio transmissions, including simultaneous digital audio retransmissions of over-the-air AM or FM radio broadcasts, a Commercial Webcaster will pay a performance royalty of: \$.0008 per performance for 2006, \$.0011 per performance for 2007, \$.0014 per performance for 2008, \$.0018 per performance for 2009, and \$.0019 per performance for 2010.”).

123. 37 C.F.R. § 380.3(a)(2) (“*Noncommercial Webcasters*: (i) For all digital audio transmissions totaling not more than 159,140 Aggregate Tuning Hours (ATH) in a month, including simultaneous digital audio retransmissions of over-the-air AM or FM radio broadcasts, a Noncommercial Webcaster will pay an annual per channel or per station performance royalty of \$500 in 2006, 2007, 2008, 2009 and 2010.”); see ROBIN JEWELER, CONGRESSIONAL RESEARCH SERVICE REPORT FOR CONGRESS, STATUTORY ROYALTY RATES FOR “SMALL” WEBCASTERS: DECISIONS OF THE COPYRIGHT ROYALTY BOARD, 110th Cong. (Mar. 23, 2007), available at <http://lieberman.senate.gov/documents/crs/Webcasters.pdf>.

124. Peters’ June 21 Statement, *supra* note 34.

125. *Id.*

126. See *id.* (stating that “it seems inefficient to require a licensee to seek out two separate licenses from two separate sources” with regard to one transmission of a work).

127. See discussion *infra* Section V.

128. Peters’ June 21 Statement, *supra* note 34. These included: adoption of a model similar to a § 114 webcasting license; “[e]stablishment of a collective to receive and disburse royalties under the [§] 115 license”; establishment of a single entity which receives notices to use and royalties; creation of an electronic database of all musical works registered with the copyright office; shifting the burden of obtaining the rights to the sound recording copyright owner; “[c]reation of a safe harbor for those who fail to exercise properly the license during a period of uncertainty arising from the administration of the license for the making of [digital phonorecord deliveries]”; “[e]xtension of the period for effectuating service on the copyright owner or its agent” beyond 30 days; payment of royalties on a quarterly rather than a monthly basis; and “[p]rovision for an offset of the costs associated with filing Notices with the [United States Copyright] Office in those cases where the copyright owner wrongfully refuses service.”

129. See discussion *infra* Section V.

ording Act of 1971, when “Congress enacted a law . . . that granted exclusive rights of reproduction and distribution to copyright owners of sound recordings.”¹³⁰ In 1972, this provision was challenged in a lawsuit to enjoin the Attorney General and the Librarian of Congress from implementing and enforcing the 1971 Act.¹³¹ The court found that a limited copyright in sound recordings was justified because it was designed to protect against piracy.¹³²

The question of limited performance rights in sound recordings was not conclusively decided until the Digital Performance Right in Sound Recordings Act of 1995 (DPRA).¹³³ Prior to this legislation, there was significant debate over limited performance rights.¹³⁴ The purpose of the DPRA was to “ensure that performing artists, record companies and others whose livelihood depends upon effective copyright protection for sound recordings, will be protected as new technologies affect the ways in which their creative works are used.”¹³⁵ The DPRA was designed to do this by granting a “limited right to copyright owners of sound recordings which are publicly performed by means of a digital transmission.”¹³⁶ The royalty “create[ed] a carefully crafted and narrow performance right, applicable only to certain digital transmissions of sound

130. *Hearing Before the Subcomm. on Courts, the Internet, and Intellectual Prop. of the H. Comm. on the Judiciary*, 108th Cong. (2004) (statement of David O. Carson, general counsel, United States Copyright Office) [hereinafter Carson Statement]; Sound Recording Act of 1971, Pub. L. No. 92-140, 85 Stat. 391 (1971) (codified as amended in scattered sections of 17 U.S.C.) (“To amend title 17 of the United States Code to provide for the creation of a limited copyright in sound recordings for the purpose of protecting against unauthorized duplication and piracy of sound recording, and for other purposes.”).

131. *Shaab v. Kleindienst*, 345 F. Supp. 589, 590 (D.D.C. 1972).

132. *Id.*; see also *Goldstein v. California*, 412 U.S. 546, 559 (1973) (“At any time Congress determines that a particular category of ‘writing’ is worthy of national protection and the incidental expenses of federal administration, federal copyright protection may be authorized.”).

133. See Pub. L. No. 104-39, 109 Stat. 336 (1995) (codified in scattered sections of 17 U.S.C.).

134. The committee report reveals this debate, stating:

The Committee considered at length the arguments in favor of establishing a limited performance right, in the form of a compulsory license, for copyrighted sound recordings, but concluded that the problem requires further study. It therefore added a new subsection (d) to the bill requiring the Register of Copyrights to submit to Congress, on January 3, 1978, “a report setting forth recommendations as to whether this section should be amended to provide for performers and copyright owners . . . any performance rights” in copyrighted sound recordings. Under the new subsection, the report “should describe the status of such rights in foreign countries, the views of major interested parties, and specific legislative or other recommendations if any.”

H.R. REP. NO. 94-1476, 106 (1976) (citing Copyright Act of 1976, S. 22, 94th Cong. § 114(d), codified at 17 U.S.C. § 114(d) (1976)) (omissions in original). Additionally:

Such rights are entirely consonant with the basic principles of copyright law generally, and with those of the 1976 Copyright Act specifically. Recognition of these rights would eliminate a major gap in this recently enacted general revision legislation by bringing sound recordings into parity with other categories of copyrightable subject matter. A performance right would not only have a salutary effect on the symmetry of law, but also would assure performing artists of at least some share of the return realized from the commercial exploitation of their recorded performances.

SUBCOMM. ON COURTS, CIVIL LIBERTIES, AND THE ADMIN. OF JUSTICE, PERFORMANCE RIGHTS IN SOUND RECORDINGS, H.R. DOC. NO. 15, at 177 (1978); see also Carson Statement, *supra* note 130; H.R. REP. NO. 104-274 (1995).

135. H.R. REP. NO. 104-274, at 10.

136. *Id.*

recordings.”¹³⁷ Congress codified this right in 17 U.S.C. § 114(d)(2).¹³⁸ The digital performance right was restricted to interactive services and subscription services, and created exemptions for over-the-air broadcasts.¹³⁹ In 1998, Congress revisited digital performance rights in the Digital Millennium Copyright Act (DMCA).¹⁴⁰

Congress designed the DMCA to protect the growth of the Internet and avoid bankruptcy of record companies by expanding § 114 license requirements.¹⁴¹ These expanded sections specifically required that: (1) the transmitting entity could not “induce” publication, or facilitate publication, by either announcing or publishing a play-list or song-list in advance;¹⁴² (2) the transmitting entity must cooperate with copyright owners to prevent a “transmission recipient” or “other transmitting entities” from automatically scanning for a particular sound recording or artist;¹⁴³ and (3) the transmitting entity cannot “interfere with the transmission of technical measures that ‘are widely used’ by sound recording copyright owners to identify or protect copyrighted works”¹⁴⁴ The Performance Rights Act, introduced in both the House and Senate, is currently in committee.¹⁴⁵ These bills would provide a performance royalty for all performances of sound recordings.¹⁴⁶

137. *Id.* at 12.

138. Copyright Act of 1976, Pub. L. No. 94-553, § 114, 90 Stat. 2541, 2560-61 (codified at 17 U.S.C. § 114(d)(2)). This states:

STATUTORY LICENSING OF CERTAIN TRANSMISSIONS—The performance of a sound recording publicly by means of a subscription digital audio transmission not exempt under paragraph (1), an eligible nonsubscription transmission, or a transmission not exempt under paragraph (1) that is made by a preexisting satellite digital audio radio service shall be subject to statutory licensing, in accordance with subsection (f) if—(A)(i) the transmission is not part of an interactive service.

17 U.S.C. § 114(d)(2).

139. *Id.*

140. Pub. L. No. 105-304, 112 Stat. 2860 (1998) (codified as amended in scattered sections of 17 U.S.C.).

141. See H.R. REP. NO. 105-796, at 80 (1998) (Conf. Rep.). The report stated:

The amendments to sections 112 and 114 of the Copyright Act that are contained in this section of the bill are intended to achieve two purposes: first, to further a stated objective of Congress when it passed the Digital Performance Right in Sound Recordings Act of 1995 (“DPRA”) to ensure that recording artists and record companies will be protected as new technologies affect the ways in which their creative works are used; and second, to create fair and efficient licensing mechanisms that address the complex issues facing copyright owners and copyright users as a result of the rapid growth of digital audio services.

Id.

142. 17 U.S.C. § 114(d)(2)(C)(ii) (2006). Congress designed this section to ensure that individuals would not know in advance what time a particular song would be played. See *id.* This prevented them from setting a timed device to record the song automatically when it was transmitted. See *id.*

143. *Id.* § 114(d)(2)(v). Congress designed this section to prevent an individual, company, or other entity from scanning a transmission to automatically record a song/artist when played. See *id.*

144. *Id.* § 114(d)(2)(viii) (internal quotations added). The objective of this change was to allow for copyright owners to use technology to indicate when and how often their songs were being played to ensure royalty payments. See *id.*

145. H.R. 4789, 110th Cong. (2007); S. 2500, 110th Cong. (2007); see GovTrack.us, *Performance Rights Act*, <http://www.govtrack.us/congress/bill?bill=h110-4789> (last visited Sept. 28, 2008); GovTrack.us, *Performance Rights Act*, <http://www.govtrack.us/congress/bill?bill=s110-2500> (last visited Sept. 28, 2008).

146. H.R. 4789, 110th Cong. (2007); S. 2500, 110th Cong. (2007).

V. A BETTER SOLUTION TO THE PROBLEM

The following recommendations include many of Peters' suggestions to construct a scheme that should provide market certainty for the companies while also providing market certainty and income for artists and copyright holders.¹⁴⁷ The Copyright Royalty Judges¹⁴⁸ need to ad-

147. See Peters' June 21 Statement, *supra* note 34, at App. A. Peters submitted the following bill to Congress:

This Act may be cited as the '[Twenty-First] Century Music Licensing Reform Act'.

SEC. 2. DEFINITIONS REVISED.

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

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

(ii) adding the following definition:

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

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

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

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

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

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

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

Section 115 of title 17, United States Code, is amended to read as follows: 'Sec. 115. Scope of exclusive rights in nondramatic musical works: Licensing of reproduction, distribution and public performance rights 'In the case of nondramatic musical works, the exclusive rights provided by clauses (1), (3) and (4) of section 106, to make phonorecords of such works, to distribute phonorecords of such works and to perform such works publicly, are subject to the conditions specified by this section.

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

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

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

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

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

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

just the statutory mechanical rate and set the statutory performance royalty on a biannual basis.¹⁴⁹ Congress should pass legislation to codify the performance royalty¹⁵⁰ and to add a compulsory sample royalty rate.¹⁵¹ In addition, Congress should modify the current fair use clause¹⁵² to exclude music and adopt a fair use provision specifically for music.¹⁵³

A. Retain the Statutory Rate

The statutory mechanical compulsory license rate has become the de facto maximum rate that a music publisher or a copyright owner can charge for a mechanical license.¹⁵⁴ Congress should legislate a change, establishing the rate as a minimum. This would benefit owners. The Copyright Royalty Board released the mechanical royalty rates applicable from January 1, 2006 through December 31, 2010, on October 2, 2008.¹⁵⁵ Closing arguments for the Mechanical and Digital Phonorecord Delivery Rate Adjustment Proceedings took place on July 24, 2008.¹⁵⁶

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

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

148. 17 U.S.C. § 101 (“A ‘Copyright Royalty Judge’ is a Copyright Royalty Judge appointed under § 802 of this title, and includes any individual serving as an interim Copyright Royalty Judge under such section.”); 17 U.S.C. § 801(b)(1) (“[T]he functions of the Copyright Royalty Judges shall be as follows: (1) To make determinations and adjustments of reasonable terms and rates as provided in sections.”).

149. See discussion *infra* Section V.A.

150. See discussion *infra* Section V.B.

151. See discussion *infra* Section V.C.

152. 17 U.S.C. § 107 (2006). This clause states:

Notwithstanding the provisions of sections 106 and 106A, the fair use of a copyrighted work, including such use by reproduction in copies or phonorecords or by any other means specified by that section, for purposes such as criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research, is not an infringement of copyright. In determining whether the use made of a work in any particular case is a fair use the factors to be considered shall include—

- (1) the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes;
- (2) the nature of the copyrighted work;
- (3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and
- (4) the effect of the use upon the potential market for or value of the copyrighted work.

Id.

153. See discussion *infra* Section V.D.

154. The current rate is 9.1 cents (\$0.091), set by the Copyright Royalty Judges. See U.S. Copyright Office, *Mechanical License Royalty Rates*, <http://www.copyright.gov/carp/m200a.html> (last visited Sept. 28, 2008) (containing a list of current and previous rates set by the Copyright Royalty Judges).

155. *In the Matter of Digital Performance Right in Sound Recording and Ephemeral Recordings*, No. 2005-1 CRB DTRA (Mar. 2, 2007), available at <http://www.loc.gov/crb/proceedings/2005-1/rates-terms2005-1.pdf>; 17 U.S.C. § 804(b)(3)(A); see Ed Christman, *Consensus Rules*, BILLBOARD, Oct. 11, 2008, at 10.

156. Copyright Royalty Board: *Docket 2006-3*, <http://www.loc.gov/crb/proceedings/2006->

The Recording Industry Association of America (RIAA), supported by its economic expert, Professor David J. Teece,¹⁵⁷ proposed that the mechanical rate be changed from a penny rate to a percentage of wholesale revenue.¹⁵⁸ The rate he proposed was significantly below the current statutory mechanical rate.¹⁵⁹ His proposal was designed to allow record companies to be more flexible with consumer pricing by allowing the record companies to reduce the amount of mechanical royalties paid to songwriters.¹⁶⁰ If his proposed 7.8% rate had been accepted, copyright owners and songwriters would have suffered significant losses in income over the next few years.¹⁶¹

For Teece's proposal to benefit both record companies and copyright owners, the percentage needed to be higher so that songwriters did not suffer an immediate loss of income per song. In addition to the new rates, there must be a maximum number of songs permitted on each album, and there cannot be a reduction in the percentage through a controlled composition clause.

Making the rate non-negotiable and not subject to reduction through a controlled compositions clause or a cap on the amount of royalties payable for mechanical licenses would benefit the songwriters whose income is earned a few pennies at a time.¹⁶² Controlled compensation clauses, included in almost every recording contract, limit artists.¹⁶³ The new rate for physical products and permanent downloads is

3/index.html (last visited Sept. 28, 2008).

157. Professor David J. Teece received his Ph.D. in Economics from the University of Pennsylvania, and is "currently the Mitsubishi Bank Professor in the Haas School of Business and Director of the Institute of Management, Innovation and Organization at the University of California at Berkeley, and Director and Chairman of LECG, LLC (an international consulting firm)" and has published "over 200 scholarly books and articles in the fields of industrial organization, technology management, the valuation and management of intellectual property, and public policy." *Testimony of Professor David J. Teece, In re Mech. & Digital Phonorecord Delivery Rate Adjustment Proceedings*, No. 2006-3 CRB DPRA, at 1 (Nov. 30, 2006), available at <http://www.loc.gov/crb/proceedings/2006-3/riaa-teece-amended.pdf> [hereinafter Teece Statement].

158. *Id.* at 69.

159. *See id.* Teece's proposed rate of 7.8% or less of the wholesale unit price will yield a much lower return for a songwriter or copyright owner. Assuming the wholesale price is \$7.00 per unit, 7.8% of the price equals \$0.546. If the total royalty available is divided by 11 songs, as indicated in the controlled composition clause, the amount payable per song is \$0.0496 presuming no further discounts are extracted by the record company. This is significantly less than the current \$0.091 per song, and less than the \$0.068 (75%) rate.

160. *See id.*

161. *See id.*

162. *See* Carnes Statement, *supra* note 15. This testimony stated:

[T]he U.S. statutory mechanical royalty rate was not raised from the 2 cent level for 69 years from 1909 to 1978. And for the last 27 years, modest increases to 8.5 cents have not addressed that longstanding, bedrock inequity. The reason I am making less than \$16,000.00 on a million sales is that I am getting 1936 wages in 2005! . . . More and more songwriters simply can no longer afford to continue to expend the time and energy required to practice their craft, while attempting to support their families.

163. *Id.* This testimony stated:

[A] songwriter is to receive 8.5 cents per song on any CD ('phonorecord') manufactured and distributed, or legally downloaded, in the United States. So, if one of my songs appears on a million selling album, I am theoretically due \$85,000 by statute. However, I split that money half and half with my music publisher by contract. That leaves me \$42,500. Then I

the same as the old rate of nine point one cents (\$0.091) per song.¹⁶⁴ The judges set the rate for mastertone ringtones at twenty-four cents (\$0.24) per mastertone, which was substantially higher than the fifteen cents (\$0.15) proposed by the National Music Publishers Association.¹⁶⁵ The Copyright Royalty Judges should continue to preserve the penny rate and adjust it regularly to compensate for inflation and market trends.¹⁶⁶

B. Create a Non-assignable Performance Right for Performers

As discussed above, § 114 was amended to create a limited performance right.¹⁶⁷ Congress is currently considering amending § 114 to include a full performance royalty to benefit both the record companies and the performers.¹⁶⁸ The proposed legislation should also make the performer's performance royalty unassignable so that the record companies do not take the income from the performer in order to recoup recording costs.¹⁶⁹ For years artists have tried to change the way recording contracts are structured without success.¹⁷⁰ The most commercially successful artists have been unable to change the accounting prac-

must spilt [sic] that in half again with the recording artists who co-wrote the song with me, leaving me with \$21,250. Practically every artist now co-writes every song on his or her album with the primary songwriter, because the record labels have included a controlled composition clause in every new artist's contract that makes it financially ruinous for the artist to record more than one or two tracks that he or she did not co-write. The reason the record companies do this is so they can pay the artist, and his or her co-writer, 75% of the statutory mechanical royalty rate. Because of the controlled composition clause, and with transaction costs deducted, my royalty income is reduced by thousands more dollars. Thus, after all is said and done, I end up making less than \$16,000 for having a song on a million selling CD.

Id.

164. *In the Matter of Digital Performance*, *supra* note 155; 17 U.S.C. § 804(b)(3)(A); see Christman, *supra* note 155, at 10.

165. *In the Matter of Digital Performance*, *supra* note 155; 17 U.S.C. § 804(b)(3)(A); see Christman, *supra* note 155, at 10.

166. Two cents (\$0.02) in 1909 equals forty-six cents (\$0.46) in 2007. S. Morgan Friedman, *The Inflation Calculator*, <http://www.westegg.com/inflation/infl> (last visited Sept. 28, 2008). The current 9.1 cent (\$0.091) rate has not kept up with inflation. *See id.*

167. *See* discussion *supra* Section IV.

168. H.R. 4789, 110th Cong. (2007); S. 2500, 110th Cong. (2007); *see* GovTrack.us, *Performance Rights Act*, <http://www.govtrack.us/congress/bill.xpd?bill=h110-4789> (last visited Sept. 28, 2008); GovTrack.us, *Performance Rights Act*, <http://www.govtrack.us/congress/bill.xpd?bill=s110-2500> (last visited Sept. 28, 2008).

169. *See* Chuck Philips, *Recording Stars Challenge Music Labels' Business Practices*, L.A. TIMES, Mar. 29, 2001, at A-1, available at <http://articles.latimes.com/2001/mar/29/news/mn-44202> ("Singer-songwriter Don Henley, co-founder of the Recording Artists Coalition, which represents dozens of stars, including Eric Clapton, Joni Mitchell, Q-Tip, and Peggy Lee, said: 'Record companies have been screwing artists for ages.'").

170. *See id.* ("[Courtney] Love compares the plight of recording artists to that of movie stars before the founding of the Screen Actors Guild and baseball players before they launched their union. Without collective bargaining clout, Love said, artists will never obtain health benefits or pension plans to be able to stand up in any way to the Big Five music conglomerates which she said work together as an unlawful trust restraining trade and competition."). *See generally* Fred Goodman, *Courtney Love vs. The Music Biz*, ROLLING STONE, June 7, 2001, at 25 (discussing the general displeasure among artists with recording contracts and the way music is distributed).

tices of the major labels.¹⁷¹ Because of the imbalance in bargaining power between record companies and artists, if the performance royalty is not unassignable, the record companies will demand that artists assign the royalty to the company to help recoup the cost of the album.¹⁷²

While it is beyond the scope of this article to analyze fully the proposed performance royalty fully, Congress should implement a non-assignable performance royalty, collected by the new MROs on behalf of the record companies and performing artists. The royalty should be set by the Copyright Royalty Judges and should be in addition to the statutory mechanical rate and the rates currently charged by the societies on behalf of the copyright owners for performance of the musical works.¹⁷³ The additional rate should not diminish the income already received by the songwriters and copyright owners.

*C. Create a Statutory Rate for Samples*¹⁷⁴

Congress should create a standard statutory rate for samples to provide market certainty for sample use.¹⁷⁵ In order to obtain clearance for the use of a sample,¹⁷⁶ the user/adaptor must obtain a master use license for use of the sound recording and a mechanical license for use of

171. See Philips, *supra* note 169, at A-1 (“Not only do they cheat you on the way in,” [Merle] Haggard said, “they rob you on the way out.”); see also Corey Moss, *Montell Jordan, Others Accuse Labels of Accounting Fraud*, July 24, 2002, http://www.mtv.com/news/articles/1456242/20020724/jordan_montell.jhtml.

172. See generally *Stewart v. Abend*, 495 U.S. 207 (1990) (discussing the assignment of the renewal term under the 1909 Copyright Act, 17 U.S.C. § 24).

173. H.R. 4789, 110th Cong. (2007); S. 2500, 110th Cong. (2007); see GovTrack.us, *Performance Rights Act*, <http://www.govtrack.us/congress/bill.xpd?bill=h110-4789> (last visited Sept. 28, 2008); GovTrack.us, *Performance Rights Act*, <http://www.govtrack.us/congress/bill.xpd?bill=s110-2500> (last visited Sept. 28, 2008). Section 5(b) of both bills states: “Public Performance Rights and Royalties.— Nothing in this Act shall adversely affect in any respect the public performance rights of or royalties payable to songwriters or copyright owners of musical works.”

174. *Brown v. Columbia Recording Corp.*, No. 03 Civ. 6570, 2006 WL 3616966, *2 (S.D.N.Y. Dec. 12, 2006). The court in *Brown* stated:

Digital sampling is a technique whereby a portion of an already existing sound recording is incorporated into a new work. More specifically, digital sampling has been described as: [T]he conversion of analog sound waves into a digital code. The digital code that describes the sampled music . . . can then be reused, manipulated or combined with other digitalized or recorded sounds using a machine with digital data processing capabilities, such as a . . . computerized synthesizer.

Id. (alterations in original omitted).

175. Examples of sampling use include: Puff Daddy’s “Mo Money, Mo Problems,” originally Diana Ross’ “I’m Coming Out”; Puff Daddy and Faith Evans’ “I’ll Be Missing You,” originally Sting’s “I’ll Be Watching You”; MC Hammer’s “You Can’t Touch This,” originally Rick James’ “Superfreak”; and Vanilla Ice’s “Ice, Ice, Baby,” originally David Bowie’s “Under Pressure.” Khalilah L. Liprot, *A Musical Interlude: Sampling Goods vs. Stealing Goods*, MEDILL NEWS SERVICE, July 15, 2004, available at <http://74.125.45.104/search?q=cache:LGMVJ58EYHsJ:docket.medill.northwestern.edu/archives/000932.php+A+Musical+Interviewed:+Sampling+Goods+vs+Stealing+Goods&hl=en&ct=clnk&cd=1&gl=us>.

Vanilla Ice never credited the song to Bowie, or received a license for its use. *Id.* It is rumored that Vanilla Ice and Bowie settled the dispute out of court. *Id.*

176. *Bridgeport Music, Inc. v. Dimension Films*, 410 F.3d 792, 801 (6th Cir. 2005) (“[S]ampling is never accidental When you sample a sound recording you know you are taking another’s work product.”).

the musical composition.¹⁷⁷ A rate set at fifty percent of a compulsory mechanical rate¹⁷⁸ and a rate set at fifty percent of a compulsory public performance rate¹⁷⁹ will make sample usage efficient. In addition to the fixed rate, the original author should be listed as co-author of the new record entitled to royalties.¹⁸⁰ Songwriters, producers, music publishing companies, record companies, and the performing rights societies will all benefit from market certainty for credit and the payment of royalties. Parodies would be included and qualify for the sample rate.¹⁸¹

For the purposes of this proposed statutory section, a “sample” would be defined as “any use of the music without the lyrics or the lyrics without the music, or any modification or combination of the music and lyrics with additional music and lyrics such that the original musical work consists of fifty percent or less of the content of the new work.”¹⁸² Any usage containing more than fifty percent of the original work would not qualify for this proposed statutory sample rate. Rearrangement of more than fifty percent of the original work is either a cover of the original work, requiring a compulsory license, or a derivative work for the original work, requiring negotiation with the copyright owner.

D. Limit Fair Use for Music

The fair use doctrine¹⁸³ needs a serious overhaul. While a complete overhaul of the fair use doctrine is beyond the scope of this article, Congress should remove musical works and sound recordings from the coverage of 17 U.S.C. § 107¹⁸⁴ and create a new § 107A¹⁸⁵ to cover music. Excepting musical works and sound recordings from the current fair use section should not be difficult. Congress can accomplish this exception by simply adding a sentence to § 107 that reads, “This section shall not apply to musical works and sound recordings.” Adding a new section to clarify the “fair use” of music is necessary to make the royalty scheme work most efficiently and to maximize income for the copyright owners.

Unlike courts’ current interpretations of § 107,¹⁸⁶ the preamble of

177. See *id.* at 796 n.3 (noting separate copyrights for sound recording and underlying compositions); Peters’ June 21 Statement, *supra* note 34 (“[I]n order to use a digital sample without violating the Copyright Act, an artist must obtain two different licenses; one from the owner of the master recording and one from the owner of the copyright to the underlying composition.”).

178. 17 U.S.C. § 115 (2006).

179. 17 U.S.C. § 114 (2006) (as modified by pending legislation).

180. This is the standard practice, the exception being “Ice, Ice Baby” referred to in footnote 175.

181. See discussion *infra* Section V.D.

182. See *Bridgeport Music, Inc.*, 410 F.3d at 802, 804 n.18 (6th Cir. 2005) (“If the sample physically copied any portion of another’s copyrighted sound recording, then infringement should be found.”).

183. 17 U.S.C. § 107 (2006). The full text of § 107 is included in footnote 152.

184. *Id.*

185. Section 107A would parallel 17 U.S.C. § 106A.

186. David Nimmer, *Codifying Copyright Comprehensively*, 51 UCLA L. REV. 1233, 1274 (2004) (“As has often been remarked, it is only after litigating a case all the way to the Supreme Court level

the new section must be followed at all times.¹⁸⁷ If the use does not fit into the specifically enumerated uses set forth in the preamble of § 107A, there can be no fair use and analysis of the fair use factors need not be undertaken. The only uses that should qualify for a “fair use” of music are news reporting, teaching, scholarship, and research.¹⁸⁸ The new § 107A should read as follows:

Notwithstanding the provisions of § 106, the fair use of a musical work or sound recording, for purposes such as news reporting, teaching, scholarship, or research, is not an infringement of copyright. In determining whether the use made of a work in any particular case is a fair use the factors to be considered shall include—

- (1) the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes;
- (2) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and
- (3) the effect of the use upon the potential market for or value of the copyrighted work.

Criticism and comment will only be considered a fair use if they fit into the news reporting exception.¹⁸⁹ Parody is specifically excluded as fair use but may qualify for a compulsory sample license.¹⁹⁰ This new system will bring certainty to the marketplace and avoid unnecessary transaction costs and litigation.¹⁹¹

E. Music Rights Organizations or “One-Stop Shopping”

Congress should adopt Peters’ suggestion that one or more entities should control all of the licenses necessary to record and distribute musical works to facilitate “one-stop shopping” for content users.¹⁹² Con-

that one truly knows whether a previous utilization qualified as ‘fair’ or ‘unfair.’”).

187. Courts have ignored the preamble of § 107 to reach their desired result. *See, e.g.*, *MGM v. Grokster, Ltd.*, 545 U.S. 913 (2005) (Breyer, J., concurring) (praising the *Sony* decision as “clear” and an effective means of protecting new technology); *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569 (1994) (combining discussion of the preamble with the first prong presumably because parody is not specifically mentioned in the preamble); *Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 416 (1984) (ignoring the preamble because timeshifting does not fit into any of the enumerated categories); *Kelly v. Arriba Soft Corp.*, 336 F.3d 811 (9th Cir. 2003) (ignoring the preamble to make internet linking fit as a “fair use”).

188. These uses are included in the preamble of § 107.

189. Music reviews fit into this section.

190. Under the proposed section 107A, a parody would not qualify as a fair use. *See Campbell*, 510 U.S. 569 (1994) (finding 2 Live Crew’s use of Roy Orbison’s “Pretty Woman” was a parody because the use was transformative). Under the new section 107A, 2 Live Crew would have to pay a royalty for use of Orbison’s bass line and lyrics. Any use of the musical work or sound recording of another would require a royalty payment.

191. Telephone Interview with Jay Levy, Weird Al Yankovic’s Manager (July 3, 2003) (cited in SHERRI BURR & WILLIAM HENSLEE, ENTERTAINMENT LAW: CASES AND MATERIALS ON FILM, TELEVISION, AND MUSIC 750 (2004)). Levy stated, “[Weird] Al believes that getting permission to use the songs is the ethical thing to do. It’s not a legal issue to him; it’s the right thing to do. The main reason Al gets permission from the artist is because he wants the artist to be in on the joke.” *Id.*

192. *See Peters’ June 21 Statement, supra* note 34.

gress must also allow the performing rights societies¹⁹³ and the Harry Fox Agency¹⁹⁴ to evolve into the Music Rights Organizations that Peters proposes.¹⁹⁵ As she stated in her proposal, Congress will have to pass specific legislation to exempt the organizations from antitrust liability.¹⁹⁶ While it will cause some short-term market confusion, the surviving MROs will be able to efficiently license the music in their catalogue for any and all uses.

Music publishing companies will remain relevant to songwriters for song placement.¹⁹⁷ Synchronization licenses¹⁹⁸ and grand rights licenses¹⁹⁹ are not subject to § 115.²⁰⁰ Music publishing companies will continue to have a role in developing songwriters and placing their music, a role not currently filled by the performance rights societies and not contemplated by the proposed changes to create MROs.

VI. CONCLUSION

These proposals should satisfy some of the concerns of the record companies and the copyright owners. Although creating a compulsory sample license and modifying the fair use doctrine for music will be controversial in the short term, the long-term effect should be to provide market stability and facilitate the growth of the music business in the future. Modification of the fair use doctrine will require anyone who uses the musical work or sound recording of another to pay for that use. A statutory sample license will take the uncertainty out of the cost for using a sample.

Marybeth Peters is almost right. With a few additional proposals that place the rights of songwriters, performing artists, and copyright owners on par with the record companies, modifying 17 U.S.C. §§ 114 and 115 should benefit all of the players in the music business.

193. ASCAP, BMI, and SESAC are performing rights societies. *See supra* notes 94-96.

194. The National Music Publisher's Association established the Harry Fox Agency (HFA) in 1927 "to act as an information source, clearinghouse, and monitoring service for licensing musical copyrights HFA licenses the largest percentage of the mechanical and digital uses of music in the United States on CDs, digital services, records, tapes and imported phonorecords." Harry Fox Agency, Inc., *About HFA*, <http://www.harryfox.com/public/HFA.jsp> (last visited Sept. 28, 2008).

195. *See* Peters' June 21 Statement, *supra* note 34.

196. *Id.*

197. Film, television, theater, and advertising placement will continue to be the function of music publishing companies.

198. *ABKCO Music, Inc. v. Stellar Records, Inc.*, 96 F.3d 60, 62 n.4 (2d Cir. 1996) ("A synchronization license is required if a copyrighted musical composition is to be used in 'timed-relation' or synchronization with an audiovisual work. Most commonly, synch licenses are necessary when copyrighted music is included in movies and commercials. The 'synch' right is a right exclusively enjoyed by the copyright owner.") (internal citations omitted).

199. *See Robert Stigwood Group, Ltd. v. Sperber*, 457 F.2d 50, 55 n.6 (2d Cir. 1972) (distinguishing between small and grand rights performances (dramatic rights), stating, "A performance of a musical composition is dramatic if it aids in telling a story; otherwise, it is not.")

200. *See* 17 U.S.C. § 115 (2006).