BEFORE THE U.S. COPYRIGHT OFFICE
LIRARY OF CONGRESS
WASHINGTON, D.C.

Notice of Inquiry:	)	**Docket No. 2014-03**
Music Licensing Study	)	

COMMENTS SUBMITTED BY INTERESTED PARTIES ADVANCING COPYRIGHT (IPAC) – John C. Barker (Authorized Representative)

On March 17, 2014, the United States Copyright Office (the "Office") issued a notice of inquiry in the Federal Register requesting comments related to the Office's study evaluating the effectiveness of the existing methods of licensing musical works and sound recordings. Specifically, the Office set forth twenty four (24) questions in the notice of inquiry.

IPAC is a group of individuals and entities with a shared interest in the rights granted by the U.S. Copyright Act, 17 U.S.C. 101, *et seq.*, to creators of original works of authorship. IPAC would prefer to eliminate the existing statutory methods of licensing musical works and replace them with methods that reflect a fair and balanced licensing process based on willing buyer/willing seller negotiations and support the Copyright Act's grant of exclusive rights for copyright owners to control the use and distribution of their works. We believe this method of licensing will result in rates and license terms that benefit both copyright owners and entities that use copyrighted works, whether by reproducing, distributing, or performing copyrighted works.

Those questions to which IPAC is providing comments are identified and separately addressed below.

I. Musical Works

1. Please assess the current need for and effectiveness of the Section 115 statutory license for the reproduction and distribution of musical works.

There is no longer a need for the Section 115 statutory license for the reproduction and distribution of musical works. The statutory license has, at best, very limited effectiveness.

A. Historical Reasoning for the Section 115 Statutory License No Longer Applies.

The Section 115 statutory license was created in 1909 when technology was limited and there existed a relatively small number of popular musical works. Under these circumstances, the statutory license was intended to prevent a single entity from monopolizing the piano-roll market by buying the exclusive rights of certain songs. These limitations and concerns, however, no longer exist.

Technology has advanced dramatically in the last 105 years and there are millions of popular musical works available to a multitude of distributors. Owners of musical works are now reluctant to grant exclusive licenses because doing so negatively impacts the amount of revenue a musical composition can generate from those distributors. This effectively eliminates the concern that a monopoly on recorded music might arise without a compulsory license. Today, free market negotiations between music distributors and the owners of musical works would result in the parties setting licensing rates at mutually agreeable amounts—similar to the manner in which music distributors currently negotiate with the owners of sound recordings. Even if certain copyright owners are unable to agree with distributors on licensing rates and refuse to license their works as a result, there will still remain more than enough content to satisfy the distributors' customers. Despite these fundamental changes, however, owners of musical works

have remained subject to the 105-year-old Section 115 statutory license, which today has limited effectiveness and should be eliminated.

B. The Section 115 Statutory License is Problematic for Owners and is Often Used Improperly.

Currently, Section 115 is most often used by digital music services to obtain blanket-type licenses for the use of musical works on their services, as well as by "license agents" on behalf of non-commercial users. Not only are these Section 115 licenses problematic for the owners of musical works, but in many instances these licenses would be invalid under the provisions of the Copyright Office regulations governing the process for securing a compulsory license under Section 115.

For example, a digital music service commonly sends a copyright owner what is identified as a "Notice of Intent to Obtain a Compulsory License for Making and Distributing of Phonorecords." The Notice generally includes many musical works. The regulations that cover the process of obtaining a compulsory license under Section 115 provide that, in the case of a musical work with multiple owners, the user may submit the Notice to only one of the owners in order to comply with Section 115. This provision creates an additional administrative burden on the copyright owners, who must carefully review all income received pursuant to a compulsory license to try to determine whether the digital music service is paying only that owner's share of the royalties or whether the digital music service is paying to one owner the royalties due for all other co-owners of that musical work. If the digital music service pays all royalties for the use of a musical work to only one co-owner, then that co-owner is obligated to pay the other co-owners of the musical work their respective share of the monies received. This practice effectively shifts to the copyright owner the accounting and payment obligations of the user. This example also puts co-owners of the musical work who have not received the Notice at a disadvantage—these

co-owners will likely be unaware that their musical works are being used, be unaware that royalties are due, and be in a difficult position in terms of that co-owner's rights to audit the digital music service.

Section 115 also states that the owner of a musical composition must be identified in the registration or other public records of the Copyright Office in order to be eligible to receive royalties for these licenses. However, the owner is not entitled to retroactive royalties earned prior to the date such registration occurs. While the intent of motivating owners of musical compositions to register their works seems reasonable, the negative impact of the lack of such registration is far-reaching and not consistent with other types of copyrights or uses.

Furthermore, the law is very clear with regard to the conditions necessary to obtain a compulsory license, including sending a proper notice of intent prior to the distribution of the work. Failure to send proper notice in a timely manner "forecloses the possibility of a compulsory license" and should be considered an act of infringement if no negotiated license exists. Timely accounting on a monthly basis, and annual audited statements are also required. Many services and users fail to comply with these requirements.

In short, many compulsory licenses being used in today's market are not correct and valid. It is improbable that the current system will ever produce satisfactory results. We believe such a process should be replaced.

C. The Section 115 Statutory License Treats Musical Works Differently Than Other Copyrighted Works.

The Section 115 statutory license also treats the bundle of rights in musical works differently than the rights in any other works protected by copyright. Section 115 strips away the very thing copyright protection was intended to provide: the copyright owner's exclusive right to control the use and exploitation of the work. The fact that no other creative works are subject to

a compulsory license for the reproduction and distribution of the works begs the question: "Why should musical works be subject to a compulsory license?" This different treatment for musical works cannot be justified. The discrepancy creates an imbalance between copyright owners of musical works and the owners of sound recording copyrights, which embody those musical works. Although these copyrighted works are generally used in tandem, owners of sound recordings in all but one category (Section 114) can negotiate freely with the various music services distributing those recordings, while owners of the underlying musical compositions are subject to pre-determined rates that are not based on free-market negotiations.

For example, sound recording owners and iTunes recently increased the rate of most songs available on the service from $.99 to $1.29. Despite the increased retail price, owners of musical works saw their rates remain at the almost ten-year-old rate of $.091. Negotiating this rate is not an option. Instead, all other parties engaged in the transaction participate in increased profits, and the owners of the sound recordings receive significantly higher fees than the owners of the underlying musical works. There is no valid justification for treating copyright owners differently based on the type of protected work they own. Section 115 prevents copyright owners of musical works from participating in revenue growth resulting from popularity of the records featuring their musical works while owners of the sound recording component are free to raise prices based on demand for or popularity of the recorded performances.

D. Widespread Recognition that the Section 115 Statutory License Should be Repealed or Revised.

Section 115 has, for several decades, been the subject of a great deal of scrutiny. In fact, two Registers of Copyright, Abraham Kaminstein in 1961[1] and Marybeth Peters in 2004[2] have expressed their belief that the compulsory license should be repealed. The writing has been on the wall for far too long. The time has come to take the steps necessary to repeal Section 115, which has become primarily a method for securing blanket type licenses, and replacing it with a free-market system that will allow for licenses of musical works to be granted to those industries that require them and the overall licensing of musical works based on willing buyer/willing seller negotiations. Therefore, IPAC supports the repeal of Section 115.

Owners of musical works are sympathetic to those entities that need an efficient process by which to obtain licenses for musical works. In that regard, IPAC supports the creation of one or more licensing agencies to negotiate fair market license rates and grant licenses on behalf of the copyright owners of the musical works on a blanket license or individual song basis. This aligns with a comment made by the current Register of Copyrights, Maria Pallante, who stated in her 2013 lecture, "The Next Great Copyright Act", that "In 2006, Congress considered legislation, the Section 115 Reform Act (or "SIRA"), that would have changed the section 115 licensing structure to a blanket style system for digital uses, but it was not enacted. It may be time for Congress to take another look. "IPAC envisions such entities operating in such a way that allows the individual copyright owners to maintain some level of control over the use of their works by way of an opt-in/opt-out process whereby individual copyright owners can choose whether to allow their works to be licensed for specific uses on a case-by-case basis. Licensing musical works in this manner will allow the users of musical works to efficiently obtain the

[1] See, Register of Copyrights, Copyright Law Revision-Report of the Register Of Copyrights on the General Revisions of U.S. Copyright Law, 87th Cong., 1st Sess. (H. Comm. on the Judiciary Print July 7, 1961)

[2] Marybeth Peters in her Statement before the Subcommittee on Courts, The Internet and Intellectual Property of the House Committee on the Judiciary on March 11, 2004, said "As a matter of principle, I believe that the Section 115 license should be repealed and that licensing of rights should be left to the marketplace…"

licenses they need, while also preserving the copyright owners' rights to control the use and exploitation of their works.

In closing, we conclude that the compulsory licenses defined in Section 115 and practiced in today's market have two primary functions: a process for licensing and a rate cap of those licenses. An updated solution can and should be created for the process, and the rate cap should be replaced with a rate-setting process which best replicates a willing buyer/willing seller situation.

2. Please assess the effectiveness of the royalty ratesetting process and standards under Section 115.

The royalty ratesetting process has essentially become a negotiation between the Harry Fox Agency and National Music Publishers' Association on one hand and the Record Industry Association of America and other groups representing distributors of sound recordings. These negotiations, because they are subject to the standards under Section 115, do not truly represent willing buyer/willing seller negotiations. While this process does result in rates being set, because the rates do not truly represent fair market rates, the result is unfairly low rates for creators and owners of musical works. The absence of a willing buyer/willing seller standard unnecessarily imposes governmental interference with the free market. Furthermore, the inability of the Copyright Royalty Board to consider Section 106(6) rates has indisputably led to an inequitable hodgepodge of royalty rates with no logical justification.

3. Would the music marketplace benefit if the Section 115 license were updated to permit licensing of musical works on a blanket basis by one or more collective licensing entities, rather than on a song-by-song basis? If so, what would be the key elements of any such system?

As stated earlier, IPAC supports the repeal of Section 115. That said, the music marketplace would benefit from a collective licensing entity or entities. The key elements of

such a system would be that the rates are set based on willing buyer/willing seller negotiations and that the individual copyright owners are allowed to maintain some level of control over the use of their works by way of an opt-in/opt-out process whereby individual copyright owners can choose whether to allow their works to be licensed for specific uses on a case-by-case basis, thus providing a licensing process equivalent to that of the sound recording.

4. For uses under the Section 115 statutory license that also require a public performance license, could the licensing process be facilitated by enabling the licensing of performance rights along with reproduction and distribution rights in a unified manner? How might such a unified process be effectuated?

A unified licensing scheme for uses that require both public performance and mechanical licenses could benefit both licensees and copyright owners. Licensees would benefit from a streamlined licensing process, while copyright owners would benefit from consolidated collection and transparency. However, such a unified process would be best effectuated by free market negotiation between interested parties rather than governmental mandate.

5. Please assess the effectiveness of the current process for licensing the public performances of musical works.

Some of the processes for licensing the public performance of musical works are outdated. There are certain uses that the system handles better than others (e.g., performances in nightclubs, hotels, etc. where tracking of all songs performed is not yet feasible), but clearly, the digital use is not one of those. The consent decrees of the PROs dramatically impact the process and do not promote partnerships that benefit the consumer.

New digital companies are creating and building businesses on the backs of musical works while the law effectively allows them to refuse to pay until a rate can be determined, which may take years and several million dollars. If a goal of the rate setting were to find a fair market rate, it would be easier to swallow, but the rate court does not try to create fair market

rates. Rate court has become a place music users can go to get around paying a fair market rate, rather than the place that would seek a fair market rate.

6. Please assess the effectiveness of the royalty ratesetting process and standards applicable under the consent decrees governing ASCAP and BMI, as well as the impact, if any, of 17 U.S.C. 114(i), which provides that ''[l]icense fees payable for the public performance of sound recordings under Section 106(6) shall not be taken into account in any administrative, judicial, or other governmental proceeding to set or adjust the royalties payable to copyright owners of musical works for the public performance of their works.''

The imposition of the current consent decrees prohibits a basic fundamental fairness with no logical justification. To have the entire music industry bound by the opinion of one federal judge, who does not have a background in the music industry, defies any justification. 17 U.S.C. 114(i) eliminates the possibility for a fair evaluation of what the royalties payable for the public performance of musical works should be and creates an artificial difference in the perceived value of sound recordings and the underlying musical work. Royalty rates should be determined based on a willing buyer/willing seller negotiation. In the event the parties simply cannot reach an agreement, rather than bring the matter before a federal judge, a better solution would be expedited mediation by a mediator with ample experience in the music industry and time limits to finalize the mediation.

7. Are the consent decrees serving their intended purpose? Are the concerns that motivated the entry of these decrees still present given modern market conditions and legal developments? Are there alternatives that might be adopted?

The consent decrees are not serving their intended purpose today. The music marketplace is much different than it was in 1939 and copyright owners should be allowed to control their rights. Collective licensing is necessary for the marketplace, but certain provisions of the consent decrees unfairly disadvantage copyright owners; specifically the rate court and the process for rate settings. If a music user applies for a license, it is immediately granted that

license, but is not required to pay the copyright owners for use of their works until an interim rate has been agreed upon, which can be costly and time consuming. Worse yet, a full rate proceeding can cost tens of millions of dollars and a rate is handed them by a rate court judge whose goal is not to arbitrate to find a fair market rate, but to follow the restrictive guidelines set forth in the consent decrees and declare the rate based on these outdated directives. A speedy mediation process to find and promote a marketplace rate should be the goal. If the consent decrees are not amended to allow copyright owners a way to obtain fair marketplace rates, copyright owners will be forced to withdraw from these organizations and make direct marketplace deals with music users. This would essentially instigate the collapse of the collective licensing system, creating the opposite of what the music licensing environment needs.

II. Sound Recordings

8. Please assess the current need for and effectiveness of the Section 112 and Section 114 statutory licensing process.

9. Please assess the effectiveness of the royalty ratesetting process and standards applicable to the various types of services subject to statutory licensing under Section 114.

10. Do any recent developments suggest that the music marketplace might benefit by extending federal copyright protection to pre-1972 sound recordings? Are there reasons to continue to withhold such protection? Should pre-1972 sound recordings be included within the Section 112 and 114 statutory licenses?

Recent legal actions and the introduction of state bills clearly show the need for clarity in licensing by extending federal protection to pre-1972 sound recordings. The music marketplace would benefit by extending federal copyright protection to pre-1972 sound recordings because uniform copyright protection for sound recordings will eliminate any confusion related to the status of copyright protection for such sound recordings and the burden of having to research the copyright protection for such sound recordings in each state. Pre-1972 sound recordings should

be included within any federal statutory licenses that apply to sound recordings created during and after 1972.

11. Is the distinction between interactive and noninteractive services adequately defined for purposes of eligibility for the Section 114 license?

III. Platform Parity

12. What is the impact of the varying ratesetting standards applicable to the Section 112, 114, and 115 statutory licenses, including across different music delivery platforms? Do these differences make sense?

The varying ratesetting standards seem to be based solely upon historical anomalies, and it is difficult to find any logical justification. The impact of the varying ratesetting standards is that, for certain uses, sound recording copyright owners receive significantly higher royalties for the use of their copyrights than do the copyright owners of the musical works embodied on those recordings. When looking at other licensed uses of recorded musical works, these differences do not make sense. When a recording of a musical work is used in a television program, film or television commercial, the license fee for the sound recording is generally equal to the fee for the musical work. In light of this, it makes no sense for the sound recording to receive a significantly higher fee than the musical work when the recorded musical work is streamed. After all, without the musical work, the sound recording does not exist.

13. How do differences in the applicability of the sound recording public performance right impact music licensing?

IV. Changes in Music Licensing Practices

14. How prevalent is direct licensing by musical work owners in lieu of licensing through a common agent or PRO? How does direct licensing impact the music marketplace, including the major record labels and music publishers, smaller entities, individual creators, and licensees?

Direct licensing is much more efficient when done in a free market, as all parties are aware of the need for licensing on both sides, and come to the table as partners rather than adversaries. The increased emphasis in the publishing community on seeking revenue from synchronization uses reflects the fact that a free market licensing scheme works, and is more efficient than government mandates.

15. Could the government play a role in encouraging the development of alternative licensing models, such as micro-licensing platforms? If so, how and for what types of uses?

The government can play a role in encouraging the development of a blanket or collective licensing entity (or entities) created by the rights holders. A free market entity would be much more efficient and fair than an imposed blanket licensing scheme.

16. In general, what innovations have been or are being developed by copyright owners and users to make the process of music licensing more effective?

17. Would the music marketplace benefit from modifying the scope of the existing statutory licenses?

As stated earlier, IPAC supports the repeal of Section 115 and would like to see all rates set based on willing seller/willing buyer negotiations. As streaming erodes traditional income sources for copyright owners, the free market must be allowed to establish a licensing system that will allow all parties to flourish rather than continuing to atrophy.

V. Revenues and Investment

18. How have developments in the music marketplace affected the income of songwriters, composers, and recording artists?

The proliferation of digital music distribution models has resulted in the loss of control of the product by musical work copyright stakeholders (songwriters, composers, music publishers), and has consequently lead to the profound devaluation of income streams upon which these stakeholders solely rely. Where many recording artists have alternative income streams such as live appearance ticket sales, merchandise sales, and endorsements, non-performing songwriters and music publishers do not participate in those revenue streams. Moreover, the decline in revenue from physical album sales, to downloads, and ultimately streaming, has drastically reduced the income opportunities for songwriters and composers. The reduction in income has, and will continue to, discourage young people from pursuing careers as songwriters. It is vital that the government remove mandated impositions on the free market, because songwriters are the backbone of the entire music business.

19. Are revenues attributable to the performance and sale of music fairly divided between creators and distributors of musical works and sound recordings?

Revenues attributable to the performance and sale of music are not fairly divided between creators and distributors of musical works and sound recordings. In large part this is because the owners of sound recordings conduct free market negotiations related to the license fees associated with the use of sound recordings, while the owners of the underlying musical works are subject to the rate setting process for uses under Section 115 and the consent decrees with respect to the public performance fees. With respect to other uses of musical compositions and sound recordings, for example, the use of recorded music in a television program, the musical composition and sound recording each receive an equal amount as licensing fees.

20. In what ways are investment decisions by creators, music publishers, and record labels, including the investment in the development of new projects and talent, impacted by music licensing issues?

Music publishers are increasingly forced to offer lower guaranteed advances to songwriters, as the ability to recoup such investments is continually eroded by governmental interference with the free market. Additionally, music publishers are forced into investing in other areas of the music business in order to compensate for the decline in traditional music publisher revenue sources. Moreover, the loss of control of our product, low streaming rates, and consequent devaluation of income streams have increased the risks and lowered the potential returns on investment associated with new music projects and talent. The higher risk and lower availability of capital is having a chilling effect on investment in new talent, which is resulting in fewer professional quality musical choices for consumers.

21. How do licensing concerns impact the ability to invest in new distribution models?

Copyright stakeholders will continue to be reluctant to invest in, and contribute projects to new distribution models until we are confident that we will be compensated on a fair market basis.

VI. Data Standards

22. Are there ways the federal government could encourage the adoption of universal standards for the identification of musical works and sound recordings to facilitate the music licensing process?

The federal government should encourage the adoption of the ISWC (International Standard Work Code) – for the underlying composition and the ISRC (International Standard Recording Code) – for the sound recording. Each recording is unique and so is each musical composition. If the sound recording owners were required to submit and register their individual sound recordings and identify the specific ISWC for each musical composition, this information would be a valuable resource for those trying to obtain licenses and pay royalties for sound recordings and the underlying musical compositions.

VII. Other Issues

23. Please supply or identify data or economic studies that measure or quantify the effect of technological or other developments on the music licensing marketplace, including the revenues attributable to the consumption of music in different formats and through different distribution channels, and the income earned by copyright owners.

24. Please identify any pertinent issues not referenced above that the Copyright Office should consider in conducting its study.

We would like to see the next Copyright Act reject the "registration" approach and adopt the "application" approach for the effective registration of a copyright in satisfaction of the requirements of §411(a) so that an author can proceed to enforce his exclusive rights against an internet infringer by means of a truly operative takedown notice to the service provider.

We suggest Congress should amend the proviso of §512(g)(2)(C) so as to state that for purposes of §411, a copyright is deemed to be registered when the person who is eligible to notify the service provider under subsection (c)(1)(C) files with the Copyright Office an application in appropriate form to register the copyright claim to the material identified as required by subsection (c)(3)(A)(iii).

Respectfully submitted,

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By: 

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