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THE SECTION 115 MECHANICAL LICENSE AND THE COPYRIGHT MODERNIZATION ACT: THE HARDSHIPS OF LEGISLATING MUSIC INDUSTRY NEGOTIATIONS

I. INTRODUCTION

John Philip Sousa, the famous American composer, created great works such as “El Capitan” and “The Stars and Stripes Forever,” the national march of the United States, in 1896.1 Around the same time, inventions known as the player piano and the piano roll were gaining wide popularity in America.2 These inventions allowed third parties to mechanically reproduce a melody for which the perforated piano roll was cut.3 The piano roll inventors would produce thousands of rolls based on copyrighted musical works, and sell them without paying a penny to the copyright owners.4 Thus, a composer like Sousa would not be paid whenever someone copied his works onto a piano roll. This raised the question of whether a copyright owner’s rights in a musical work should go so far as to control mechanical copies of works made on piano rolls.5 Sousa was of the opinion that the

2. See White-Smith Music Publ’g Co. v. Apollo Co., 209 U.S. 1, 9 (1908) (“The manufacture of such instruments and the use of such musical rolls has developed rapidly in recent years in this country and abroad.”).
3. Id. at 9-10.
copyright owner’s rights should extend so far. However, unfortunately for music composers, in 1908, the United States Supreme Court held in *White-Smith Music Publishing Co. v. Apollo Co.* that the perforated piano rolls were not “copies within the meaning of the copyright act.” While this signaled a victory for the producers of player pianos and piano rolls, their glory was short-lived. One year later, after heated debates, Congress enacted the Copyright Act of 1909, which gave copyright owners of musical works control over mechanical piano roll reproductions.

While this gave music composers the protection they desired, Congress was worried that an exclusive right to make mechanical reproductions of musical works might result in a monopoly. This concern arose because a manufacturer of player piano rolls, the Aeolian Company, had been acquiring exclusive contract rights from composers and publishers. In order to avoid such exclusive contracts, the 1909 Act made it compulsory on the part of copyright owners to provide licenses for mechanical reproductions, stating:

> That whenever the owner of a musical copyright has used or permitted or knowingly acquiesced in the use of the copyrighted 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 . . .

6. 1906 Argument, supra note 4, at 24 (statement of John Philip Sousa, Composer).


8. 17 U.S.C. § 1(e) (1909) (current version at 17 U.S.C. § 115 (2006)) (“[Composition owner has the right] to make any arrangement or setting of it or of the melody of it in any system of notation or any form of record in which the thought of an author may be recorded and from which it may be read or reproduced.”).


Thus, a third party could only obtain a compulsory license for a mechanical reproduction of a copyright owner’s musical work if the copyright owner authorized the first mechanical reproduction. It is important to note that a royalty was payable to the copyright owner for each mechanical reproduction by a licensee, regardless of whether those reproductions were distributed.\textsuperscript{12} Furthermore, anyone seeking a compulsory license first had to file a notice of intent to use with the copyright owner, and a duplicate notice with the copyright office.\textsuperscript{13} There was also a notice requirement for the copyright owner. Section 1(e) created a duty upon the copyright owner to notify the copyright office if he made a mechanical reproduction of his musical work. Failure to do so resulted in a “complete defense to any suit, action, or proceeding for any infringement of such copyright.”\textsuperscript{14} Moreover, while the legislation was meant to address piano rolls, the mechanical license also applied to phonograph records.\textsuperscript{15} Finally, these rights granted to copyright owners via the mechanical license were not retroactive; this meant Section 1(e) only applied to works copyrighted after the 1909 Act went into effect.\textsuperscript{16} Thus, John Philip Sousa was not entitled to royalties for mechanical reproductions of some of his greatest works, something to which he staunchly objected.\textsuperscript{17}

Part I of this article describes the details of Section 115 of the Copyright Act of 1976, and gives a comparison to its predecessor legislation found in the Copyright Act of 1909. It also includes a discussion of the Digital Performance Right in Sound Recordings
Act of 1995, specifically the creation of the digital phonorecord delivery ("DPD") and what that meant for the Section 115 mechanical license. Following the discussion of DPDs is a detailed look at the parties interested in Section 115 reform and the competing interests between the various groups. Part II outlines the Section 115 Reform Act as included in the Copyright Modernization Act. Part III analyzes the Section 115 Reform Act, how it would affect the parties interested in reform, and why certain provisions ultimately led to the legislation's demise. Part IV discusses elimination of Section 115, as proposed by the Copyright Office, and why the parties did not agree to this solution.

II. BACKGROUND

A. The Copyright Act of 1976, Section 115

In the legislative history addressing the compulsory mechanical\(^18\) license in Section 115 of the Copyright Act of 1976, the argument shifted away from whether a compulsory licensing scheme should exist to how to relieve copyright owners of unnecessary burdens and what the specific royalty rate for the compulsory license should be.\(^19\) Some of the key changes from the 1909 Act are as follows.

First, a Section 115 compulsory license is not triggered until, under the authority of the copyright owner, phonorecords\(^20\) of the nondramatic musical work\(^21\) are distributed to the public.\(^22\) This is

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18. The terms "compulsory licence" and "mechanical license" are interchangeable and will be used as such when referring to the Section 115 license.


20. "Phonorecords' are material objects in which sounds, other than those accompanying a motion picture or other audiovisual work, are fixed by any method now known or later developed...." 17 U.S.C. § 101 (2006).

21. "Nondramatic musical work" is a term of art found frequently in the Copyright Act, though the Act does not define it. The term refers to both the musical composition and lyrics (if any) of a song. "Nondramatic musical work"
a departure from the 1909 Act, which triggered the compulsory license when the copyright owner "used or permitted or knowingly acquiesced in the use of the copyrighted work" for mechanical reproduction.\(^{23}\)

Second, the mechanical license is only available to licensees whose "primary purpose in making phonorecords is to distribute them to the public for private use."\(^{24}\) Therefore, phonorecords intended primarily for commercial use, including broadcasters and jukebox operators, will not be granted compulsory licenses.\(^{25}\)

Third, while the compulsory license permits the licensee to create his own sound recording of the musical work by using his own musicians and recording engineers, it does not permit the licensee to copy the sound recording of a musical work that was created by someone else.\(^ {26}\) This makes clear the distinction that a phonorecord can invoke two rights: (1) the right in the musical work; and (2) the right in the sound recording of that musical work.

Fourth, whereas under the 1909 Act, a failure by the copyright owner to file a notice of use "constituted a complete defense to any suit, action or proceeding for any infringement of such copyright,"\(^{27}\) under the 1976 Act, it only deprives the copyright owner of the ability "to receive royalties under a compulsory license."\(^ {28}\) On the other hand, under the current Act, failure of the licensee to provide notice of intention to obtain a compulsory license to the copyright owner\(^ {29}\) "forecloses the possibility of a

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and "musical work" are used interchangeably throughout this article.

25. Id. (citing H.R. REP. No. 1476, at 108 (1976)).
26. Id. § 8.04[E]; see also 17 U.S.C. § 115(a)(1) (2006) (requiring compulsory licensees to ensure the work is fixed lawfully and the sound recording is authorized by the copyright owner).
28. Id. (quoting 17 U.S.C. § 115(c)(1) (2006)).
compulsory license . . . ."^{30}

Fifth, while the 1909 Act provided that a royalty of two cents had to be paid by the licensee to the copyright owner for "each such part manufactured,"^{31} under the current Act, a royalty determined by the Copyright Royalty Judges is payable only for phonorecords made and distributed by the licensee, once the copyright owner is "identified in the registration or other public records of the Copyright Office."^{32} As Congress pointed out, "made" was intended "to include within its scope every possible manufacturing or other process capable of reproducing a sound recording in phonorecords."^{33} The term "distribution" means "any act by which the person exercising the compulsory license voluntarily relinquishes possession of a phonorecord . . . regardless of whether the distribution is to the public, passes title, constitutes a gift, or is sold, rented, leased, or loaned . . . ".^{34}

B. The 1990s and the Digital Phonorecord Delivery

By the mid 1990s, the technology by which musical works were embodied in sound recordings was in flux.^{35} Gone were the days of vinyl records and cassette tapes, as digital recordings embodied in compact discs (CDs) became the preferred medium.^{36} Beyond CDs, however, Congress contemplated that "new digital transmission technologies may permit consumers to enjoy performances of a broader range of higher-quality recordings than has ever before been possible."^{37} In response to the inadequacy of the then-existing copyright law to address new technologies regarding digital transmission of sound recordings and musical works, Congress created the Digital Performance Right in Sound

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^{33} 2 NIMMER, supra note 12, § 8.04[H][1] (quoting H.R. REP. NO. 1476, at 110 (1976)).
^{34} Id. (quoting H.R. REP. NO. 1476, at 110 (1976)).
^{35} Id. § 8.23[A][1].
^{37} Id. at 14.
Recordings Act of 1995 ("DPRA"). More specifically, the DPRA was created in part to "extend\[\] the mechanical compulsory license to digital phonorecord deliveries [hereinafter "DPDs"] . . . to maintain and reaffirm the mechanical rights of songwriters and music publishers . . . ." Section 115(d) defined a "digital phonorecord delivery" as:

\[E\]ach 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, regardless of whether the digital transmission is also a public performance of the 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.

Thus, whenever a phonorecord is transmitted digitally to a consumer, the copyright owner of the musical work is entitled to a royalty payment under Section 115. Nevertheless, as the DPD definition recognizes, non-interactive subscription transmissions do not constitute a DPD. It is clear from the Senate Report that Congress was anticipating new technology such as webcasting or satellite radio. Furthermore, the report indicates that if

38. Id.
41. 2004 Hearing, supra note 5, at 21 (statement of Marybeth Peters, Register of Copyrights, U.S. Copyright Office); see also § 115(c)(3)(A).
42. See S. REP. NO. 104-128, at 45 (1995) ("For example, a transmission by a noninteractive subscription transmission service that transmits in real time a continuous program of music selections chosen by the transmitting entity, for which a consumer pays a flat monthly fee, would not be a "digital phonorecord
subscribers of such a service record the programming of the service through their own actions, this also would not constitute a DPD. 43

Another important aspect of the DPRA is found in Section 115(c)(3)(G)(i). 44 This section expands the statutory license for DPDs of a musical work embodied in a sound recording, allowing a licensee to digitally transmit the sound recordings of others, so long as the license in the sound recording is obtained. 45 Furthermore, the copyright owner of the sound recording may now license not only his own rights in the sound recording, but also the rights of the musical work embodied in the sound recording. 46

The DPRA also changed the royalty payment scheme, specifically addressing digital phonorecords as well as controlled composition clauses. 47 Beginning in 1998, the royalty rates for delivery . . . ”).

43. Id.
44. A digital phonorecord delivery of a sound recording is actionable as an act of infringement under section 501, and is fully subject to the remedies provided by sections 502 through 506 and section 509, unless—

(I) the digital phonorecord delivery has been authorized by the copyright owner of the sound recording; and

(II) the owner of the copyright in the sound recording or the entity making the digital phonorecord delivery has obtained a compulsory license under this section or has otherwise been authorized by the copyright owner of the musical work to distribute or authorize the distribution, by means of a digital phonorecord delivery, of each musical work embodied in the sound recording.” § 115(c)(3)(G)(i).

45. 2004 Hearing, supra note 5, at 22 (statement of Marybeth Peters, Register of Copyrights, U.S. Copyright Office).
46. Id.; see also § 115(c)(3)(I); S. REP. No. 104-128, at 43 (1995) (“The changes to section 115 . . . are intended to allow record companies to license not only their rights, but also, if they choose to do so, the rights of writers and music publishers to authorize digital phonorecord deliveries.”).
47. A controlled composition clause is a common agreement found in recording contracts whereby the singer/songwriter agrees to receive less than the
DPD license agreements could be voluntarily negotiated or, if the parties failed to reach an agreement, they could submit to arbitration governed by the Copyright Royalty Judges. The Copyright Royalty Judges would then be required to establish rates and terms that "distinguish between digital phonorecord deliveries where the reproduction or distribution of the phonorecord is incidental to the transmission which constitutes the digital phonorecord delivery, and digital phonorecord deliveries in general." Regarding controlled composition clauses, the DPRA provides that for DPDs, the rate mandated by the DPRA will be given effect in lieu of any negotiated controlled composition clauses. Nevertheless, there is an important exception. Controlled composition clauses will be given effect if the artist author enters into the contract "after the sound recording has been fixed in a tangible medium of expression in a form intended for commercial release."

C. The Parties Interested in Reform of Section 115

1. The Digital Media Association

The Digital Media Association (DiMA) is a national trade organization devoted to innovative digital media opportunities, but more specifically, to protecting the rights of the online audio and video industries. Among some of its members are online media

mechanical statutory rate from the record company that makes and distributes phonorecords containing the singer/songwriter’s work. 2 Nimmer, supra note 12, § 8.23[E].

48. Id. § 8.23[D][1]. From 1993-2004, the Copyright Arbitration Royalty Panel (CARP) governed arbitration. However, the Copyright Royalty and Distribution Reform Act of 2004 abandoned the CARP and implemented Copyright Royalty Judges to handle arbitration. See id. § 7.27.

49. 2004 Hearing, supra note 5, at 24 (statement of Marybeth Peters, Register of Copyrights, U.S. Copyright Office) (quoting § 115(c)(3)(D)).

50. 2 Nimmer, supra note 12, § 8.23[E] (citing § 115(c)(3)(E)(i)).

51. 2004 Hearing, supra note 5, at 23 (statement of Marybeth Peters, Register of Copyrights, U.S. Copyright Office) (citing § 115(c)(3)(E)).

giants such as AOL, Apple, Microsoft, Napster, RealNetworks, and Yahoo. These are just a few of the companies responsible for providing legally licensed music online to consumers. Led by Executive Director, Jonathan Potter, DiMA has been at the forefront of ensuring that the law, specifically Section 115 of the Copyright Act, does not disadvantage digital music providers. However, this has been an uphill battle that is far from over. Jonathan Potter and DiMA recognize that its member companies are up against a serious foe: the online black market for pirated music.

Across the world, there are over 360 legal digital music services providing over 3 million songs to consumers. For the United States, this amounted to a $1.1 billion market in 2005. However, the International Federation of Phonogram and Videogram Producers estimates that nearly twenty billion songs were illegally downloaded worldwide in 2005. Jonathan Potter and DiMA believe that by modernizing Section 115 of the Copyright Act, its member companies will be able to better compete with piracy in the marketplace.

In DiMA’s eyes, there are many problems with the current Section 115 compulsory mechanical license. First, the administrative requirements mandated by the statute and the Copyright Office are “so cumbersome as to be dysfunctional.” When only roughly twenty percent of musical works are registered with the Copyright Office, finding copyright owners to provide notice of intent to use, as required under § 115(b)(1), can be a tedious proposition. Moreover, copyright ownership information

54. See DiMA, Who We Are, supra note 52.
55. See 2004 Hearing, supra note 5, at 43 (statement of Jonathan Potter, Executive Director, Digital Media Association).
57. Id.
58. Id. at 4.
59. 2004 Hearing, supra note 5, at 43 (statement of Jonathan Potter, Executive Director, Digital Media Association).
60. Id. at 51.
61. Id. at 52.
for pre-1978 works is only available on card files at the Copyright Office, which requires a manual search for each individual song.\textsuperscript{62} For those copyright owners that are identified, licensees must send via certified or registered mail, monthly statements of use and royalty payments using a two-page form for each composition.\textsuperscript{63} Finally, for those unidentified copyright owners, the licensee must file a form with the Copyright Office, as well as pay a $12 administrative fee per composition.\textsuperscript{64} Taking into account the fact that roughly twenty-five percent of copyright owners cannot be located,\textsuperscript{65} the plight of the legitimate startup online digital music provider that wants to license 1 million songs all at once is obvious: If twenty-five percent of the copyright owners are not located, the digital music provider potentially faces $3 million in fees on 250,000 songs. Then consider that this legitimate licensee is competing with a black market that has no registration forms, no licensing fees, and will have every song illegally available online while the legitimate licensee spends weeks filling out forms and searching for copyright owners.\textsuperscript{66} In DiMA’s view, this scenario makes it far too cost prohibitive to compete with, and offer the same amount of content as, the black market.\textsuperscript{67}

However, administrative dysfunction is not the only factor plaguing DiMA’s member companies. The Section 115 compulsory license allows a licensee to “make and distribute” a reproduction of a nondramatic musical work.\textsuperscript{68} But as DiMA and its member companies recognize, “[f]or online services, . . . not every fixation or reproduction is intended for distribution, because many reproductions necessarily occur in the electronic process of delivering a download.”\textsuperscript{69} Therefore, a literal interpretation of Section 115 means that those reproductions that are necessary to the distribution process, but are not in themselves distributed, e.g.,

\textsuperscript{62} Id.
\textsuperscript{63} Id.; see also 17 U.S.C. § 115(c)(5) (2006).
\textsuperscript{64} 2004 Hearing, supra note 5, at 52 (statement of Jonathan Potter, Executive Director, Digital Media Association).
\textsuperscript{65} Id.
\textsuperscript{66} Id.
\textsuperscript{67} Id.
\textsuperscript{68} § 115(a)(1).
\textsuperscript{69} 2004 Hearing, supra note 5, at 53 (statement of Jonathan Potter, Executive Director, Digital Media Association).
server, cache, and buffer copies, are not subject to the compulsory license.\textsuperscript{70} If this is the case, it necessarily follows that online digital music providers are infringing on the rights of copyright owners who have not licensed, nor been paid royalties for, the use of such incidental copies.\textsuperscript{71} Indeed, at least one court has held that because server copies are not intended for distribution, Section 115 does not afford a right to a compulsory license for such copies.\textsuperscript{72} DiMA believes such a ruling is absurd because Congress could not have intended a compulsory license to "be accompanied by a direct license for the very same work with respect to the very same activity."\textsuperscript{73} Without clarifying that incidental copies necessary to the process of distributing a digital phonorecord online are part of the compulsory license, digital music providers could be subject to crushing liability, considering statutory damages can be as high as $150,000 per infringement of each copyrightable work.\textsuperscript{74}

DiMA member companies are also concerned about what rights are implicated in regards to on-demand streams and limited downloads.\textsuperscript{75} In 2001, in an agreement (hereinafter "The RIAA/HFA Agreement") between the Recording Industry Association of America ("RIAA"), the National Music Publishers' Association, Inc. ("NMPA"), and the Harry Fox Agency, Inc. ("HFA"), an "on-demand stream" was defined as:

\begin{quote}
[\text{A\text{\textcopyright}}n on-demand, real-time digital transmission of a sound recording of a single musical work to allow a user to listen to a particular sound recording chosen by the user at a time chosen by the user, using streaming technology . . . so that such transmission will not result in a substantially complete reproduction of a sound recording being made on a local storage device . . . so that such reproduction is}
\end{quote}

\textsuperscript{70} Id.

\textsuperscript{71} Id.


\textsuperscript{73} 2004 Hearing, supra note 5, at 54 (statement of Jonathan Potter, Executive Director, Digital Media Association).


\textsuperscript{75} 2004 Hearing, supra note 5, at 24 (statement of Jonathan Potter, Executive Director, Digital Media Association).
available for listening other than at . . . the time of transmission.\textsuperscript{76}

A "limited download" was defined as:

[A] digital transmission of a time-limited or other use-limited download of a sound recording of a single musical work to a local storage device . . . using technology designed to cause the downloaded file to be available for listening only either (1) during a limited time . . . or (2) for a limited number of times . . . .\textsuperscript{77}

For on-demand streaming services, the copyright owner’s public performance right is implicated.\textsuperscript{78} Performance rights organizations such as the American Society of Composers, Authors, and Publishers ("ASCAP"), Broadcast Music, Inc. ("BMI"), and the Society of European Stage Authors and Composers ("SESAC") receive performance royalties for on-demand streams, which they then distribute to publishers and songwriters after subtracting a fee.\textsuperscript{79} However, "music publishers claim a mechanical right is implicated by the server copies and other reproductions of the composition which are merely intended to facilitate the licensed performance."\textsuperscript{80} In fact, the RIAA/HFA Agreement solidified the music publishers’ claim by providing that "[a] license with respect to a musical work includes all reproduction, distribution and DPD rights necessary . . . to make On-Demand Streams . . . ."\textsuperscript{81} Still, as the Copyright Office noted, the key issue is whether an on-demand stream fits the definition of

\begin{footnotes}
\item[	extsuperscript{77}] Id. § 1.3.
\item[	extsuperscript{78}] 2004 Hearing, supra note 5, at 24 (statement of Jonathan Potter, Executive Director, Digital Media Association).
\item[	extsuperscript{79}] Id.
\item[	extsuperscript{80}] Id.
\item[	extsuperscript{81}] RIAA, NMPA, HFA Agreement, supra note 76, § 1.3.
\end{footnotes}
a DPD.\textsuperscript{82} If an on-demand stream does not create a “phonorecord by digital transmission of a sound recording which results in a specifically identifiable reproduction by or for any transmission,” it cannot be considered a DPD regardless of what parties stipulate to through contract.\textsuperscript{83} In DiMA’s view, on-demand streams are like broadcast radio, and the only royalty that broadcast radio pays is performance royalties.\textsuperscript{84} Therefore, in DiMA’s view, online radio should be treated equal to broadcast radio, rather than be forced to pay a “double dip” mechanical royalty as well.\textsuperscript{85}

According to DiMA, there is also ambiguity under § 115(c)(4)\textsuperscript{86} as to whether limited downloads are licensable.\textsuperscript{87} The RIAA/HFA agreement specifically covers subscription services providing that limited downloads are licensable under § 115. DiMA companies, however, state that some publishers disagree.\textsuperscript{88} The question of § 115(c)(4)’s applicability to subscription services may stem from the fact that the “subscription payment is not tied to a specific work that is being licensed.”\textsuperscript{89} However, the Copyright Office believes that “the delivery of a digital download, whether limited or otherwise . . . appears to fit the statutory [DPD] definition, since

\textsuperscript{82} 2004 Hearing, supra note 5, at 12 (statement of Marybeth Peters, Register of Copyrights, U.S. Copyright Office); see also supra text accompanying note 40.

\textsuperscript{83} 2004 Hearing, supra note 5, at 12 (statement of Marybeth Peters, Register of Copyrights, U.S. Copyright Office) (quoting 17 U.S.C. § 115(d) (2006)).


\textsuperscript{85} Id.

\textsuperscript{86} “A compulsory license under this section includes the right of the maker of a phonorecord or a nondramatic musical work . . . to distribute or authorize distribution of such phonorecord by rental, lease, or lending . . . .” 17 U.S.C. § 115(c)(4) (2006).

\textsuperscript{87} 2004 Hearing, supra note 5, at 24 (statement of Jonathan Potter, Executive Director, Digital Media Association). Also note that the 2004 Hearing incorrectly labels the statutory section as 115(g)(4).

\textsuperscript{88} Id.; see also RIAA, NMPA, HFA Agreement, supra note 76, § 1.1.

\textsuperscript{89} 2004 Hearing, supra note 5, at 24 (statement of Jonathan Potter, Executive Director, Digital Media Association).
it must result in an identifiable reproduction in order for the recipient to listen to the work embodied in the phonorecord at his leisure.\textsuperscript{90}

2. The National Music Publishers Association and the Harry Fox Agency

With over 700 members, the National Music Publishers Association ("NMPA") is the largest music publishing trade association in the United States.\textsuperscript{91} Music publishers "represent[ ] the interests of songwriters by promoting their songs; by publishing their songs in sheet music; and by licensing the use of their songs for reproduction and distribution in CD's, on the Internet, through public performances, and exercising the other rights available under the copyright law."\textsuperscript{92} A typical arrangement between the music publisher and the songwriter splits all licensing royalties received, with about 75\% going to the songwriter and 25\% going to the publisher.\textsuperscript{93} The NMPA established the Harry Fox Agency ("HFA") in 1927, and it is now the dominant agency for mechanical licensing, collections, and distributions of royalties for music publishers.\textsuperscript{94}

Contrary to the views of DiMA, the NMPA and HFA painted quite a different picture of the functioning of the Section 115 mechanical license. At the 2004 hearing addressing Section 115, the NMPA stated that no changes to the compulsory licensing provisions were needed.\textsuperscript{95} According to the NMPA, the HFA does

\textsuperscript{90} Id. at 13 (statement of Marybeth Peters, Register of Copyrights, U.S. Copyright Office).


\textsuperscript{92} 2004 Hearing, supra note 5, at 31 (statement of Carey R. Ramos on behalf of the National Music Publishers Association).

\textsuperscript{93} Id.

\textsuperscript{94} About HFA, http://www.harryfox.com/public/HFAHome.jsp (last visited August 23, 2007). HFA represents more than 27,000 music publishers, which in turn represent more than 160,000 songwriters. March 2005 Hearing, supra note 84, at 11 (statement of David M. Israelite, President and CEO, Nat'l Music Publishers Assoc. ("NMPA")).

\textsuperscript{95} 2004 Hearing, supra note 5, at 33 (statement of Carey R. Ramos on behalf of the National Music Publishers Association).
bulk, electronic licensing with a turnaround time of four hours upon license request.\textsuperscript{96} As evidence that Section 115 is not an impediment to consumer demand for online music, the NMPA pointed to the success of iTunes.\textsuperscript{97} In fact, in the NMPA's view, "critics of section 115 should have spent less time lobbying Congress and more time developing products that U.S. consumers of music actually desired."\textsuperscript{98} Furthermore, the NMPA stressed that the HFA had "every economic incentive to issue as many licenses to new, legitimate Internet music services as possible."\textsuperscript{99} After all, the only way the music publishers are going to be compensated is though valid licensing agreements.\textsuperscript{100} Furthermore, by March 2004, through the HFA, the NMPA issued over 1.75 million licenses to thirty-nine digital music provider companies.\textsuperscript{101} Only a year later, the NMPA issued 2.85 million licenses to 215 different digital music licensees.\textsuperscript{102} Though there are many obscure songs not represented by the HFA and for which it cannot issue a license, the HFA licenses "over ninety percent of the commercially significant music that is distributed in the United States . . . ."\textsuperscript{103}

The NMPA and the HFA believe that they have taken the necessary steps to deter theft and provide licenses to legitimate online music services.\textsuperscript{104} As a testament to their dedication for licensing digital music to online providers, the NMPA points to the RIAA/HFA Agreement of 2001.\textsuperscript{105} That agreement "assist[ed] the launch of new subscription services by creating a framework for mechanical licensing of such services to offer tethered

\textsuperscript{96} Id. at 32.
\textsuperscript{97} Id. at 33. By March 2004, iTunes had already made 30 million downloads since its launch less than a year prior. Id. at 32.
\textsuperscript{98} Id. at 34.
\textsuperscript{99} Id. at 33.
\textsuperscript{100} Id.
\textsuperscript{101} 2004 Hearing, supra note 5, at 33 (statement of Carey R. Ramos on behalf of the National Music Publishers Association).
\textsuperscript{102} March 2005 Hearing, supra note 84, at 12 (statement of David M. Israelite, President and CEO, NMPA).
\textsuperscript{103} 2004 Hearing, supra note 5, at 31 (statement of Carey R. Ramos on behalf of the National Music Publishers Association).
\textsuperscript{104} March 2005 Hearing, supra note 84, at 11 (statement of David M. Israelite, President and CEO, NMPA).
\textsuperscript{105} Id.; see also supra notes 75-90 and accompanying text.
downloads\textsuperscript{106} and on-demand streams despite the fact that agreement had yet to be reached as to the applicable royalty rates.”\textsuperscript{107} The agreement also stated that in the event the HFA does not have the authority to license a particular musical work, the HFA would make “reasonable efforts to secure the requested [l]icenses from the relevant non-HFA publisher-principals on the same terms as apply to HFA publisher-principals under this [a]greement.”\textsuperscript{108} Also, the HFA would provide licenses to the RIAA in bulk, thereby allowing subscription services to offer an extensive library of music to subscribers.\textsuperscript{109}

While endorsing the RIAA/HFA Agreement, the NMPA also sought to caution Congress from making legislative changes simply because technology had changed.\textsuperscript{110} For this argument, the NMPA attacked the Section 104 Digital Millennium Copyright Act Report\textsuperscript{111} (hereinafter DMCA Report) by the Copyright Office, which claimed that temporary buffer copies incidental to the streaming of copyrighted music have no economic value, and that such copies should fall under the fair use doctrine.\textsuperscript{112} The DMCA Report also claimed that because copyrighted owners and music publishers are already compensated for the public performance of a stream, they “appear to be seeking a second compensation for the same activity merely because of the happenstance that the transmission technology implicates the reproduction right, and the reproduction right of songwriters and music publishers is

\textsuperscript{106} A tethered download is, for all intents and purposes, the same as a limited download. See supra note 77 and accompanying text for a definition.

\textsuperscript{107} March 2005 Hearing, supra note 84, at 11 (statement of David M. Israelite, President and CEO, NMPA).

\textsuperscript{108} RIAA, NMPA, HFA Agreement, supra note 76, at § 3.5.

\textsuperscript{109} March 2005 Hearing, supra note 84, at 11 (statement of David M. Israelite, President and CEO, NMPA); see also RIAA, NMPA, HFA Agreement, supra note 76, § 3.1.

\textsuperscript{110} 2004 Hearing, supra note 5, at 35 (statement of Carey R. Ramos on behalf of the National Music Publishers Association).

\textsuperscript{111} The NMPA notes that the DMCA Report only acknowledged radio-style webcasting, but to the extent that the same logic might be applied to on-demand streams, the NMPA strongly argues against it. See id. at 34-35.

\textsuperscript{112} Id. at 34 (citing U.S. COPYRIGHT OFFICE, DMCA SECTION 104 REPORT at xxiv (2001), available at http://www.copyright.gov/reports/studies/dmca/dmca
castudy.html (follow “Volume 1” hyperlink) [hereinafter DMCA SECTION 104 REPORT]).
administered by a different collective than the public performance right." The NMPA pointed out that the DMCA Report predates the RIAA/HFA agreement, which states a mechanical license is implicated for on-demand streams. To hold that buffer copies made during streaming are fair use is, in the NMPA's view, legally incorrect and would violate the fair use doctrine. As the NMPA pointed out, the DMCA Report conceded "that the doctrine of fair use 'is limited to copying by others which does not materially impair the marketability of the work which is copied.'" According to the NMPA, on-demand streams have impaired the marketability of musical works by displacing record sales. Consumers need not purchase a CD when on-demand streams provide the songs consumers want when they want them.

Furthermore, the NMPA rejected the use of the term "temporary buffer copy." In 2002, the NMPA hired an expert in computer streaming technology. This expert determined that buffer copies are not exactly temporary because they are "saved permanently on the hard-drive of a consumer's computer in a 'cache.'" This provides to the consumer the benefit of "immediate playback on demand of the previously streamed content, and continuous playback in case the internet connection is unstable." The NMPA argued that because technology is constantly evolving, to categorically define temporary buffer copies as exempt from copyright law would be to provide a loophole by which technology companies could deprive copyright owners of their just compensation, simply by using technology barely meeting the

113. DMCA SECTION 104 REPORT, supra note 112, at 143.
115. Id.
117. Id.
118. Id.
119. Id. at 35.
120. 2004 Hearing, supra note 5, at 35 (statement of Carey R. Ramos on behalf of the National Music Publishers Association).
121. Id.
122. Id.
definition.\textsuperscript{123}

Ultimately, the NMPA believes that Section 115 compulsory licensing should be eliminated altogether, but due to Congress's unwillingness to entertain that possibility, the NMPA did vow, in subsequent congressional hearings, to assist in the Section 115 licensing reform for digital uses.\textsuperscript{124}

3. \textit{The Songwriters Guild of America}

The Songwriters Guild of America ("SGA") is the largest and oldest songwriters organization in the United States.\textsuperscript{125} It is run exclusively by and for songwriters, and consists of roughly five thousand members.\textsuperscript{126} The SGA's operations include music licensing, royalty collections, and auditing for its members.\textsuperscript{127} The plight of the songwriter can best be described by a statement issued by Rick Carnes, a songwriter and SGA's president, at a 2006 hearing discussing an early draft version of SIRA:

Under the present compulsory licensing provisions, a songwriter is to receive 9.1 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 $91,000 by statute. However, I split that money half and half with my music publisher by contract. That leaves me $45,000. Then I must split that in half again with the recording artist who co-wrote the song with me, leaving me with $22,750. Practically every artist now co-writes every song on his or her album with the primary songwriter, because the record labels

\begin{itemize}
\item \textsuperscript{123} \textit{Id.}
\item \textsuperscript{124} \textit{Discussion Draft of the Section 115 Reform Act (SIRA) of 2006: Hearing Before the Subcomm. on Courts, the Internet, and Intellectual Property of the H. Comm. on the Judiciary, 109th Cong. 11 (2006) [hereinafter 2006 Hearing] (statement of David M. Israelite, President and CEO, NMPA).}
\item \textsuperscript{125} \textit{Id.} at 20 (testimony of Rick Carnes, President, Songwriters Guild of Am. ("SGA")).
\item \textsuperscript{126} \textit{Id.}
\item \textsuperscript{127} \textit{Id.}
\end{itemize}
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... Thus, after all is said and done, I end up making less than $17,000 for having a song on a million selling CD. Of course, given that the retail charge to consumers for a CD may be as high as $18, a million sales will generate up to $18 million for someone.\textsuperscript{128}

Many songwriters these days are simply unable to support themselves, let alone their families, under the current royalty system and have had to leave the profession despite artistic success.\textsuperscript{129} This is due in part to the fact that the 1909 statutory mechanical royalty rate of two cents per song was not raised until 1978.\textsuperscript{130} Had the mechanical rate increased proportionate to the Consumer Price Index, the rate would currently be 40 cents per song, not 9.1 cents.\textsuperscript{131}

The SGA supports reform of Section 115 of the Copyright Act, as long as any new legislation addresses some of its concerns. Probably the most important issue to the SGA is resolving what it calls the "gatekeeper" problem.\textsuperscript{132} The gatekeeper problem refers to the "current ability of record companies to authorize the digital distribution of nondramatic musical works embodied in a sound recording."\textsuperscript{133} Many record companies sell digital music through providers like Apple's iTunes.\textsuperscript{134} The record company can provide both the right in the sound recording and the right in the underlying musical work to digital music providers under the

\begin{itemize}
\item \textsuperscript{128} Id. at 23.
\item \textsuperscript{129} Id. at 22.
\item \textsuperscript{130} 2006 Hearing, supra note 124, at 23 (testimony of Rick Carnes, President, SGA).
\item \textsuperscript{131} Id. at 8 (statement of David M. Israelite, President and CEO, NMPA).
\item \textsuperscript{132} Id. at 25 (testimony of Rick Carnes, President, SGA).
\item \textsuperscript{133} Id.
\item \textsuperscript{134} Id. at 36 (statement of Cary H. Sherman, President, Recording Indus. Assoc. Am. ("RIAA")).
\end{itemize}
current system, completely interposing themselves between the digital music providers and the songwriters and music publishers. The SGA believes part of the reason record companies do this is so they can continue to enforce controlled composition clauses in their artists’ contracts, and pay artists and songwriters seventy-five percent of the mechanical rate. Eliminating record companies’ ability to be the gatekeepers of the copyrighted works held by songwriters and music publishers will not only improve the fairness of royalty distribution, but it will also improve transparency, allowing for direct financial reporting and auditing rights between the digital music providers and the copyright owners of the musical works.

Another important piece to any new legislation, according to the SGA, is that if an interactive stream is to be licensable under Section 115, it should be clarified that an interactive stream constitutes a DPD. This is important because when determining the value of interactive streams, the songwriters and music publishers want to be discussing the value of a DPD, something everyone can understand. Furthermore, when determining the value of the server copies that facilitate interactive streaming, the SGA believes significant weight should be given to previous negotiated rates for server copies. This is important because in the first place, the SGA does not believe that server copies must necessarily fall under the mechanical compulsory license. For support, the SGA cites Rodgers and Hammerstein Organization v. UMG Recordings, Inc., which held that licensing for server copies was outside Section 115’s scope and that such licensing is among the exclusive rights held by copyright owners. Therefore, if the

135. Id.
136. 2006 Hearing, supra note 124, at 20 (testimony of Rick Carnes, President, SGA).
137. Id. at 25.
138. Id. at 26.
139. Id. at 44-45 (statement of David M. Israeliite, President and CEO, NMPA).
140. Id. at 27 (testimony of Rick Carnes, President, SGA).
141. Id. at 26.
SGA is going to concede that server copies are licensable under Section 115, the SGA wants to ensure a fair rate for such copies.\textsuperscript{143}

4. The Recording Industry Association of America

The Recording Industry Association of America ("RIAA") is the trade organization representing record companies.\textsuperscript{144} Its member companies create and/or distribute roughly ninety percent of all legitimate sound recordings sold in the United States.\textsuperscript{145} Because the RIAA’s mission is “to foster a business and legal climate that supports and promotes [its] members’ creative and financial vitality,” it fights to protect intellectual property rights throughout the world.\textsuperscript{146} As the RIAA recognizes, piracy is a big issue in the music industry.\textsuperscript{147} From 1999 to 2004, record companies had seen their revenue decline by over fifteen percent.\textsuperscript{148} In order to combat piracy, RIAA members are doing their part by creating new products that they hope will excite consumers and steer them away from illegal downloading.\textsuperscript{149}

One of the new products record companies began trying to offer in 2004 was the multisession disc.\textsuperscript{150} These discs have the ability to contain a traditional CD album on one side and the same album for DVD players on the other side.\textsuperscript{151} Record companies hope that offering a product with a higher quality than a CD, which allows consumers to play the music on whatever players they have, will give consumers a compelling reason to turn away from piracy.\textsuperscript{152} Yet, while it was the belief of the record companies that the

\begin{itemize}
\item \textsuperscript{143} Id. at 27 (testimony of Rick Carnes, President, SGA).
\item \textsuperscript{144} See RIAA, Who We Are, http://www.riaa.com/aboutus.php (last visited Aug. 20, 2007).
\item \textsuperscript{145} Id.
\item \textsuperscript{146} Id.
\item \textsuperscript{147} 2004 Hearing, supra note 5, at 39 (statement of Cary H. Sherman, President, RIAA).
\item \textsuperscript{148} 2006 Hearing, supra note 124, at 37 (statement of Cary H. Sherman, President, RIAA).
\item \textsuperscript{149} 2004 Hearing, supra note 5, at 41 (statement of Cary H. Sherman, President, RIAA).
\item \textsuperscript{150} Id. at 40.
\item \textsuperscript{151} Id.
\item \textsuperscript{152} Id.
\end{itemize}
Section 115 mechanical license governed multisession discs and only one royalty payment per disc should be required, the HFA argued that a mechanical license was needed for each separate session.153 Therefore under the HFA’s view, a mechanical license should be required for a song in CD format and another mechanical license should be required for the same song in DVD format, even though both formats are on the same disc.154 In fact, the HFA refused to grant licenses for multisession discs without specific publisher consent.155 As a result, record companies were prevented “from issuing new products for which there was consumer demand that could have helped everyone in the music industry sell more physical goods.”156 Only until recently have publishers begun to agree that multiple mechanical licenses should not be required for multisession discs.157 Still, the RIAA would like to codify this understanding to prevent future problems.158

According to the RIAA, another problem lies in the infeasibility of applying a penny-rate royalty to some of the newer product offerings.159 Record companies concede that the penny-rate royalty worked well when there were only a few types of physical products.160 However, now there is a range of products, “including not only multisession discs but preloaded offerings that consumers can ‘unlock’ through online transactions; offerings with bonus material; products with digital rights management systems that allow limited personal use copying, and subscription devices that offer both streams and limited downloads for a single monthly fee.”161 The RIAA argues that because such products are “distributed through different channels and have different economics,” the penny rate will often be “impossible and

153. Id.
154. Id.
156. 2006 Hearing, supra note 124, at 38 (statement of Cary H. Sherman, President, RIAA).
157. Id. at 41.
158. Id. at 41-42.
159. 2004 Hearing, supra note 5, at 40 (statement of Cary H. Sherman, President, RIAA).
160. Id.
161. Id.
economically infeasible” to apply. On the other hand, the RIAA believes that a percentage royalty which can offer the flexibility to adjust rates frequently, as well as readily address new product offerings, is much more suitable.

III. H.R. 6052: THE SECTION 115 REFORM ACT WITHIN THE COPYRIGHT MODERNIZATION ACT

On September 12, 2006, Representative Lamar Smith of Texas introduced the Copyright Modernization Act, which was referred to the Committee on the Judiciary. Title I of this legislation, the Section 115 Reform Act, the sole subject of this article, attempts to address the mechanical licensing of musical works in digital delivery form by amending Section 115 of the Copyright Act. The legislation governs “the making and distribution of general and incidental digital phonorecord deliveries in the form of full downloads, limited downloads, interactive streams, and any other form constituting a digital phonorecord delivery or hybrid offering . . . .” To be clear, the legislation specifically includes that the license will cover incidental reproductions such as cached, network, and RAM buffer copies for the deliveries listed above. However, for noninteractive streams, the legislation creates an exemption, providing that digital music providers cannot be found to have infringed the exclusive rights of copyright owners of musical works when they make server or incidental reproductions, i.e., cached, network, or RAM buffer copies, “to facilitate noninteractive streaming or terrestrial radio analog broadcasts . . . .” The legislation provides further that this exemption will not apply if the digital music provider engaging in noninteractive streaming takes affirmative steps to allow an end user to make reproductions of the musical works for future listening.

162. Id. at 41.
163. Id.
165. See id. § 102.
166. Id. § 102(e)(1)(A).
167. Id. § 102(e)(1)(B)(iii).
168. Id. § 102(e)(3)(A).
169. Id. § 102(e)(3)(A)(ii).
To administer the license, the legislation creates a General Designated Agent and allows for additional designated agents.\textsuperscript{170} The General Designated Agent is the default agent responsible for administering licenses and collecting and distributing royalties to copyright owners.\textsuperscript{171} Appointed by the Register of Copyrights, it will be the duty of the "mechanical licensing and collection agency representing music publishing entities that represent the greatest share of the music publishing market . . . to establish and operate the General Designated Agent."\textsuperscript{172} All designated agents are authorized to, in the interest of music publishers and songwriters, "engage in . . . industry negotiations, ratesetting proceedings, litigation, and legislative efforts; and apply any administrative fees or other funds it collects to support the activities . . . ."\textsuperscript{173} Additionally, the Copyright Royalty Judges will determine a mechanism for cost-sharing as well as the amounts to be paid by licensees to designated agents.\textsuperscript{174} The legislation provides that a five-member board of directors consisting of representatives of music publishing entities and two professional songwriters will govern the General Designated Agent.\textsuperscript{175} Furthermore, "[a]ll members of the board of directors have a fiduciary duty to the publishing entities and songwriters that the board represents."\textsuperscript{176}

Copyright owners may elect to be represented by a designated agent other than the General Designated Agent provided the Register of Copyrights certifies the agent.\textsuperscript{177} In order to be certified, additional designated agents must "represent at least a fifteen percent share of the music publishing market . . . ."\textsuperscript{178} Each designated agent will maintain a database, available free of charge to licensees, that contains information about the musical works available for licensing, which the agent represents.\textsuperscript{179} Upon receipt of a properly completed application by a digital music provider, a

\begin{enumerate}
\item H.R. 6052 § 102(e)(9)(A).
\item \textit{id.} § 102(e)(9)(B)(i)(II).
\item \textit{id.} § 102(e)(9)(B)(i)(I).
\item \textit{id.} § 102(e)(9)(D)(ii), (iii).
\item \textit{id.} § 102(e)(12)(A)
\item \textit{id.} § 102(e)(9)(B)(i)(III)(aa), (bb).
\item H.R. 6052 § 102(e)(9)(B)(i)(III)(dd).
\item \textit{id.} § 102(e)(9)(C)(ii)(I).
\item \textit{id.} § 102(e)(9)(C)(i)(I).
\item \textit{id.} § 102(e)(9)(H)(i)
\end{enumerate}
designated agent will administer a blanket license for all copyrighted nondramatic musical works represented by the agent.\textsuperscript{180} Licensees may assume that any musical work not found to be represented by any designated agent is represented by the General Designated Agent.\textsuperscript{181} Licensees will prepare quarterly reports to the appropriate designated agent of the “usage of musical works under the license, and make royalty payments by reason of such usage.”\textsuperscript{182} Designated agents will then distribute to copyright owners on a quarterly basis royalties collected from the licensees.\textsuperscript{183} Additionally, designated agents must annually provide copyright owners the information from the quarterly reports received from the digital music providers.\textsuperscript{184} Those royalties for which designated agents cannot reasonably locate the entitled copyright owner will be held for at least three years, allowing a copyright owner time to come forth and claim the funds.\textsuperscript{185}

In the event of a dispute concerning whether a licensee has underpaid a designated agent, the designated agent may conduct a royalty compliance examination of the licensee.\textsuperscript{186} The designated agent is responsible for notifying the licensee of any claim resulting from the examination, but only after considering any written rebuttal by the licensee.\textsuperscript{187} The licensee will bear the costs of the examination if the designated agent determines that the licensee underpaid royalties by ten percent or more.\textsuperscript{188} Otherwise, the designated agent will bear the costs of the examination.\textsuperscript{189} If a licensee fails to submit quarterly usage reports or fails to pay royalties for such usage of musical works when due, a designated

\textsuperscript{180} Id. § 102(e)(5).
\textsuperscript{181} Id. § 102(e)(9)(H)(i).
\textsuperscript{182} H.R. 6052 § 102(e)(10)(A)(i).
\textsuperscript{183} Id. § 102(e)(11)(A).
\textsuperscript{184} Id. § 102(e)(10)(D). In the case where the music publisher is the copyright owner, the designated agent must, upon request, provide the same information received from the digital music provider to the songwriter. Id. § 102(e)(11)(E)(i).
\textsuperscript{185} Id. § 102(e)(11)(B)(ii)(I).
\textsuperscript{186} Id. § 102(e)(10)(B).
\textsuperscript{187} Id. § 102(e)(10)(B)(iii).
\textsuperscript{188} H.R. 6052 § 102(e)(10)(B)(iv).
\textsuperscript{189} Id.
agent may provide notice that if the default is not remedied within thirty days, the license will automatically terminate.\textsuperscript{190} Those musical works that are the subject of the default will then be actionable as acts of infringement, subject to the remedies of sections 502 through 506 and 509 of the Copyright Act.\textsuperscript{191}

A copyright owner may also elect to have their royalties distributed directly to a record company by submitting a letter of direction to the designated agent.\textsuperscript{192} Letters of direction permit recording companies to recoup advances made to copyright owners in the course of a contract made between a copyright owner and a recording company.\textsuperscript{193} Furthermore, for any contract between a sound recording company and digital music provider whereby the sound recording company is already licensing musical works embodied in particular sound recordings for use in the form of a DPD, the sound recording company may elect to retain the right to be paid directly by the digital music provider and thereby distribute the necessary royalties to the copyright owner of the musical work.\textsuperscript{194}

The Copyright Royalty Judges will initiate a proceeding to determine the royalty rates and terms for all activities licensable under SIRA.\textsuperscript{195} For any activity licensable under SIRA, a digital music provider will, “upon filing a valid application with the relevant designated agent, have a license . . . to engage in the activity . . .” regardless of whether final royalty rates or terms have been set for the activity.\textsuperscript{196} This is subject to the establishment of an interim royalty rate, which can be negotiated between the digital music provider and the designated agent or be determined by the Copyright Royalty Judges.\textsuperscript{197} Additionally, the Copyright Royalty Judges are responsible for determining a mechanism by which the licensee digital music providers will share in the costs associated with the administration of the license by the designated

\textsuperscript{190} Id. at § 102(e)(10)(C)(i)(I), (II).
\textsuperscript{191} Id.
\textsuperscript{192} Id. at § 102(e)(9)(I)(i)(I).
\textsuperscript{193} Id.
\textsuperscript{194} H.R. 6052 § 102(e)(13)(A)(i).
\textsuperscript{195} Id. § 102(e)(8)(C)(i).
\textsuperscript{196} Id. § 102(e)(8)(D)(i).
\textsuperscript{197} Id. § 102(e)(8)(D)(ii)(I), (II)(bb).
IV. ANALYSIS

On September 27, 2006, Representative Lamar Smith pulled the Copyright Modernization Act from consideration for a vote, but vowed to resume discussions in 2007. The failure of this bill to leave committee can be attributed to a host of issues upon which the parties involved ultimately could not reach agreement. Detailed below is a discussion about the major parts of the bill, some of which were agreed upon, but most of which were hotly contested.

A. The Blanket License

Perhaps one of the most important issues in the legislation, and one that actually everyone could agree upon, was the idea of a blanket license for musical works. If there was one issue truly preventing DiMA member companies from licensing a large amount of works at one time, it was the restrictions under the current Section 115, which require licensing of musical works on a song-by-song basis, by notifying each individual copyright owner. Even if the HFA can license a majority of the most popular musical works through a blanket license, that still does not compete with the availability of all the musical works one could ever desire that can be found on a number of pirate websites. The ability to license a large amount of works by filling out one or a few applications to the various designated agents not only cuts down on the administrative costs suffered through individual song licensing by digital music providers, but it also increases the speed and efficiency by which digital music providers can offer content. One of the most beneficial qualities of the blanket license, proposed in Section 115(e)(9)(H)(i), allows for the licensing of all musical works, regardless of whether the copyright owner could be

198. Id. § 102(e)(12)(A).
found. The current system, basically paralyzed the HFA from licensing musical works where the copyright owner could not be found. However, under the proposed legislation, digital music providers could assume the General Designated Agent represented any works found not to be in control of any of the designated agents. This permits digital music providers to offer a wide array of musical works without the risk of an infringement lawsuit.

B. The Copyright Royalty Judges

This legislation was significant as much for what was left out as what was actually delineated within it. Atop the list of those issues left unaddressed was royalty rates. While the proposed legislation allows the Copyright Royalty Judges to initiate ratemaking proceedings for any activity licensable under the legislation, it does not specify the type of rate to be used. This leaves open the possibility of a penny-rate royalty, as under the current legislation, or the flexibility to move to a percentage of revenue based system. One of the issues digital music providers and record companies have with the current Section 115 is how to apply a penny-rate royalty to some of the new products being offered. Rather than have that fight now, the parties agreed to fight later over which royalty system would work best for each product. Another benefit is that because the license would be granted upon receipt of a properly completed application, digital music providers and record companies don’t have to fight over the royalty rate of a new product before that product reaches the market. The legislation allows them to offer the product and then initiate a proceeding with the Copyright Royalty Judges.

Not only does the absence of royalty determinations benefit those entities trying to offer new products to consumers, but it benefits music publishers and songwriters as well. More products reaching the market means more royalties to copyright owners. Had the legislation been technology specific, unknown future products would face difficulties in obtaining licenses, which is exactly the problem faced by digital music providers and record companies today. Had the bill been royalty specific to current

201. See supra text accompanying note 180.
202. See supra text accompanying notes 159-63.
products, the fights it would generate amongst the parties would most likely prevent the legislation from ever being passed.\textsuperscript{203} While this was another bright spot in the legislation, other elements spawned disagreement.

**C. The General Designated Agent and Additional Designated Agents**

The administration of licenses by designated agents was, in theory, something the parties agreed on. Part of its appeal stems from the legislation's attempt to equate mechanical licensing with performance licensing by ASCAP, BMI, and SESAC. If there is one thing all the parties would concede, it would be that performance rights licensing is much easier to do than mechanical licensing. The performance rights societies are able to license virtually all musical works via a blanket license, while the HFA has been unable to license mechanical rights for a significant amount of musical works, due in part to the refusal of many publishers to grant the HFA the necessary authority.\textsuperscript{204} The legislation remedies this by providing that the General Designated Agent can license all musical works not found to be licensed by other designated agents.\textsuperscript{205} The General Designated Agent would be the HFA, as it currently licenses the largest percentage of music in the United States, meeting the legislation's requirements.\textsuperscript{206} The NMPA, of course, does not object to this, as the HFA is its wholly owned subsidiary. DiMA and the RIAA should follow in support. Ostensibly, the HFA is in the best position to implement the mechanisms necessary to administer the licenses, as they already have much experience in doing so. The only difference now, a

\textsuperscript{203} Specifically important to publishers and songwriters is the value of server copies for interactive streams. Had a determination been made that these copies had no value, both these parties would drop their support of the bill. \textit{See supra} text accompanying notes 138-43.

\textsuperscript{204} \textit{2006 Hearing, supra} note 124, at 18 (statement of Jonathan Potter, Executive Director, Digital Media Association).

\textsuperscript{205} \textit{See supra} text accompanying note 181.

\textsuperscript{206} \textit{See} Copyright Modernization Act of 2006, H.R. 6052, 109th Cong. § 115(e)(9)(B)(i) (2006) ("[T]he Register of Copyrights shall designate a mechanical licensing and collection agency representing music publishing entities that represent the greatest share of the music publishing market").
difference welcomed by DiMA and the RIAA, is that the HFA can license those works for which the copyright owners cannot be found. The proposed legislation also seeks parity with performance rights societies by requiring that any designated agent represent at least a fifteen percent share of the publishing market.\textsuperscript{207} This ensures that there would not be a large number of designated agents, making it easier to find which agent owns which musical works. This process would also be made easier because all designated agents would be required to keep searchable electronic databases of the musical works they represent.\textsuperscript{208}

Certain issues regarding designated agents, however, would have been a cause for concern had the legislation passed. One such issue is the scope of a designated agent’s authority to conduct royalty compliance examinations.\textsuperscript{209} Broad sweeping, unchecked authority is given to the designated agent to not only perform the examination, but also to make the decision as to whether or not the licensee has complied with the terms of the license. As the Copyright Office pointed out, royalty compliance determination in the context of other compulsory licenses is entrusted to independent auditors.\textsuperscript{210} Many question why this compulsory license should be any different. Certainly, it would be difficult for designated agents to maintain impartiality when they are the ones allegedly cheated by licensees. The designated agents would also have an incentive to find errors that amount to ten percent or more of a discrepancy in royalty payments, since the licensee will then be forced to bear the costs of the examination. There is also no appeal process available to licensees under the legislation, should they wish to dispute the ruling of a designated agent. The legislation appears to provide no recourse short of refusal to pay, which would undoubtedly result in not only termination of the license, but costly legal action against the licensees as well.

Another issue which should be of particular concern to songwriters as well as digital music providers is the amount of authority given to designated agents to not only apply

\begin{itemize}
\item \textsuperscript{207} See supra text accompanying note 178.
\item \textsuperscript{208} See supra note 179 and accompanying text.
\item \textsuperscript{209} See supra notes 186-91 and accompanying text.
\item \textsuperscript{210} 2006 Hearing, supra note 124, at 65 (statement of the U.S. Copyright Office).
\end{itemize}
“administrative fees or other funds” collected to support administration of licenses, but to also use those funds for “such additional activities in the interest of music publishers and songwriters as the designated agent considers appropriate, including industry negotiations, ratesetting proceedings, litigation, and legislative efforts . . . .” Designated agents should not be created for the purpose of lobbying congress. If publishers or songwriters represented by a designated agent want to engage in legislative efforts, they may choose to do so through their own organizations like the NMPA or the SGA. The proposed language permitting designated agents to use “other funds it collects to support” its activities suggests that the agent may use copyright owners’ royalties to fund such legislative efforts. While the SGA never addressed these provisions, songwriters should be weary of any legislation that treats the use of royalties in such a cavalier manner. They should insist that the designated agents be restricted to expending funds for their main purpose: to “grant and administer licenses and collect and distribute royalties” to copyright owners.

Furthermore, the legislation is ambiguous as to whether designated agents could use administrative fees collected from licensees via the cost sharing provision. When the Copyright Royalty Judges are determining cost sharing amounts to be paid by licensees, they can consider “the actual, reasonable costs of creating and maintaining an infrastructure for activities of designated agents . . . .” The term “activities” has been given a broad definition under the legislation, which suggests that digital music providers could be helping to finance legislative lobbying. Because the interests of digital music providers as licensees will often conflict with the interests of designated agents as licensors, the digital music providers could in effect be supporting lobbying of legislation against their own interests. However, the provision is ambiguous because the Copyright Royalty Judges are also to consider “the actual, reasonable costs to designated agents

211. See H.R. 6052 § 102(e)(9)(D)(i)-(iii).
212. Id. § 115(e)(9)(D)(iii).
213. Id. § 115(e)(9)(B)(i)(II).
214. Id. § 115(e)(12)(A)(i)(I).
specifically associated with the administration of licenses..." 215 which suggests, perhaps, that money contributed by digital music providers would only be used to fund the administration of licenses. However, absent express language restricting the use of cost sharing funds to administration of licenses, this legislation is a gamble for digital music providers and, ultimately, one they chose not to accept.

As the Copyright Office pointed out, another issue is the lack of language describing how digital music providers would allocate royalty payments among designated agents, and how designated agents would distribute royalties to copyright owners. 216 This would be especially pertinent if the Copyright Royalty Judges implemented a percentage-of-revenue royalty system for some offerings, which would make calculations more difficult than when dealing with a penny-rate system. 217 The reason the legislation may not have addressed this issue is because royalty rates, under the legislation, were to be determined at a later time by the Copyright Royalty Judges. 218 Thus, the drafters may have believed it sensible to allow the Copyright Royalty Judges to also determine the manner of distribution. In any event, however, this should have been explained in the legislation rather than left to mere conjecture. 219

D. The Gatekeeper and the Continued Enforcement of Controlled Composition Clauses

As discussed earlier, songwriters would like to eliminate what they call the gatekeeper problem, which allows record companies to authorize the digital distribution of musical works embodied in a sound recording. 220 By doing so, record companies can enforce their controlled composition clauses that exist in the recording

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216. 2006 Hearing, supra note 124, at 66 (statement of the U.S. Copyright Office).
217. Id.
218. See supra note 195 and accompanying text.
219. 2006 Hearing, supra note 124, at 67 (statement of the U.S. Copyright Office).
220. See supra text accompanying notes 132-37.
artists' contracts, which allow the record companies to pay the artist seventy-five percent of the statutory mechanical rate of 9.1 cents. On the one side, there is the desire of the record companies to continue to enforce their negotiated contracts with recording artists. On the other side is the desire of the songwriters to be justly compensated for their efforts. The legislation, through both the "Letters of Direction" clause and the "Election to Retain Right to be Paid by Licensee" clause, would allow the record companies to continue enforcement of controlled composition clauses. Most likely, had this legislation passed, in nearly every new recording contract there would be a clause stating that for works written by the artist, the artist must submit a letter of direction instructing the designated agent to pay royalties due to the copyright owner to be paid directly to the recording company. This would allow the record company to take its twenty-five percent of the mechanical royalty before distributing the other seventy-five percent to the copyright owner, thereby enforcing its controlled composition clause. In fact, such a clause would probably be a deal breaker, with the recording company insisting on the clause before it agrees to sign the artist.

This brings up another point. Are controlled composition clauses actually "negotiated"? What is the incentive for a recording artist to agree to such a clause, other than that the artist's deal may depend on it? The answer is that to say these clauses are negotiated is to completely ignore the disparity in bargaining power between a new recording artist and the record company. The record company holds all the cards. It has the money to not only advance royalties to an artist to record an album, but also to print the album, distribute the album, market the album, and get the artist out on the road touring. Even if one recognizes that the cost of recording has gone down with the advent of sophisticated home recording equipment; even if one recognizes that the cost of distribution has gone down because of the internet and websites such as myspace.com, which allow an artist to stream its songs and make them available for sale; one still cannot underestimate the power of marketing and touring, both of which are very expensive. It is seldom that a new artist will have the money to support his own tour, let alone advertise it. Under this context, the artist sits down with the record company to negotiate.
Even if the publishers and songwriters managed to eliminate the “Letters of Direction” clause from SIRA, they would still be impeded by the “Election to Retain Right to be Paid by Licensee” clause. Not only does this clause allow the record company to continue to be the gatekeeper between publishers/songwriters and digital music providers, but it also leaves ambiguity as to whether the record companies can create new contracts with digital music providers to provide all the necessary rights for DPDs. It is one thing to honor the contracts already created between the digital music providers and the record companies, but it is a completely different animal to allow record companies to create new contracts with the digital music providers. The absence of language prohibiting such contracts could, in effect, be a giant loophole through which record companies could continue to impose on the rights owned by songwriters and publishers.

The other side of this argument touts the efficiency of the record companies’ gatekeeper role. One of the policies behind SIRA was to make licenses easier to obtain than under the current system. If record companies are already successfully providing both the rights in the sound recording and the musical work to digital music providers such as iTunes, why disrupt that practice? In fact, by requiring digital music providers to go to one licensing agent to obtain the rights in the sound recording, and another licensor for the rights in the musical work, more administrative costs would burden the digital music providers. Furthermore, as the RIAA pointed out, all deals between record companies and the digital music providers are negotiated in the market place, and rates differ from contract to contract.\(^{221}\) To nullify these contracts would only increase the administrative burdens. It would force digital music providers to not only obtain separate licenses for rights in the sound recording and musical work, but it would also force them to renegotiate rates for the rights in the sound recordings.

Still, while such administrative burdens may be of concern to the RIAA, they may not be to DiMA. DiMA simply wants more licenses, regardless of how it gets them.\(^{222}\) Certainly, transparency

\(^{221}\) 2006 Hearing, supra note 124, at 37 (statement of Cary H. Sherman, President, RIAA).

\(^{222}\) Id. at 19 (statement of Jonathan Potter, Executive Director, Digital Media Association) (“DiMA members are ready, willing and able to pay
and auditing functions would be enhanced if publishers and songwriters were dealing directly with digital music providers. Through such direct dealings, publishers and songwriters would have first hand knowledge of all reported uses of their copyrighted works and would be in a better position to question reported usage. However, whether that is reason enough to nullify the contracts between record companies and digital music providers is another issue. Increased access for publishers and songwriters to reports prepared by digital music providers for record companies under existing contracts could increase transparency without going so far as to nullify those existing contracts. In any event, the above-discussed provisions could ultimately not be agreed upon and were no doubt part of the reason this bill did not pass.

E. The Arbitrary Distinction between Interactive and Non-interactive Streaming

The proposed legislation makes a distinction between interactive and non-interactive streaming. The rationale for doing so, however, is based more upon business negotiation than statutory definition. Interactive streams are considered DPDs, and all of the copies necessary to facilitate the streams are licensable.223 However, the copies necessary to facilitate non-interactive streaming are exempt from licensing, allowing digital music providers to make such royalty-free copies without infringing the exclusive rights of copyright owners.224 This agreement reached between the parties does have its benefits, insofar as it offers clarification on a widely disputed issue. It allows digital music providers to proceed with business plans and the offering of products knowing exactly which products require licenses. Without such a clarification, digital music providers would be forced to engage in protracted negotiations, with publishers arguing that interactive streams do constitute DPDs requiring a mechanical license, leaving digital music providers forced to concede that point and argue the value of the license. The

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223. See supra text accompanying notes 166-67.
224. See supra text accompanying notes 168-69.
frightening alternative to that scenario for the digital music providers is to refuse to pay mechanical licenses for interactive streams and risk the threat of an infringement lawsuit.

However, the real question is whether under the statutory definition, a stream of any kind can be considered a DPD. In other words, the question is whether a stream constitutes "a specifically identifiable reproduction by or for any transmission recipient of a phonorecord." The answer to this question, at least in the NMPA's view of on-demand streams, seems to turn on whether those interactive streams displace record sales. As an initial matter, the proposed legislation equates non-interactive streaming, i.e., webcasting, with terrestrial radio, by making it exempt from the mechanical license. This recognizes that what is distributed in webcasting is not a DPD, but a performance subject to performance royalties only. While the NMPA is ready to concede that point in the legislation, they believe there is an important distinction when dealing with on-demand streams: the ability of a consumer to request a performance of a song whenever the consumer wants it. However, the consumer is still only receiving the performance, not a "specifically identifiable reproduction." Reproductions are made in the form of server copies and other incidental copies, but they are not distributed. They are of no use to the end user, except to the extent that those copies help facilitate the distribution of the performance, for which the copyright owner of the musical work already receives a royalty.

Furthermore, it is a questionable proposition to say that on-demand streams displace record sales, digital or physical, to any recognizable extent. Even if they do, this should not be the benchmark for determining whether a mechanical license is needed. In the context of the digital world when a DPD is made and delivered via a download, or in the physical world when a phonorecord, in this example a CD, is sold to an end user, an important benefit is received that is absent in an on-demand stream: the ability to make a copy. Whether the copy is used for a portable mp3 player, for a CD player in a car, or to give to a friend, and regardless of the legality in making the copy, the ability to make the copy is an important feature of owning a downloaded

225. See supra text accompanying note 40.
226. See supra text accompanying notes 117-18.
song or a physical CD. A stream, even if it is on-demand, does not offer that benefit, and because of that, it will not significantly displace phonorecord sales. Even if on-demand streams do displace phonorecord sales to a limited extent, this still should not be the benchmark for determining whether a mechanical license is implicated, unless the legislature is going to change the definition of a DPD, because like non-interactive transmissions, there is "no reproduction of the sound recording or [] musical work embodied therein [] made from the inception of the transmission through to its receipt by the transmission recipient in order to make the sound recording audible."  

Also, an argument concerned solely with displacement of record sales fails to recognize that even though one form of revenue may be decreasing, i.e., mechanical royalties, another form of revenue is increasing, i.e., performance royalties. In no case should digital music providers be required to pay twice just because copies of a musical work, which have no value without the delivery of the performance, are created in conjunction with the performance, interactive or non-interactive.

On the other hand, if one reaches the conclusion that interactive streams are not a DPD and therefore not covered by the Section 115 mechanical license, then the server copies made by digital music providers, which are not distributed but merely facilitate performance, would appear to be within the exclusive rights of the copyright owner. It then follows that copyright owners of musical works would be able to negotiate licenses for the server copies that facilitate interactive streams. If as argued above, interactive streams and non-interactive streams should be treated equally, it follows that server copies that facilitate non-interactive radio-style streaming should also require a negotiable license. What all this boils down to is that while perhaps server copies have no value independent of the performance, they may add value to the performance. The proposed legislation's attempt to recognize this for interactive streams while creating an exemption for non-interactive streams may make sense as a business negotiation, but whether this solution should be recognized through statute is another question. Ultimately, this was another reason the various parties could not come to agreement.

V. A SOLUTION REJECTED

Virtually every country that has had in place a mechanical compulsory licensing system for musical works has rejected it in favor of marketplace negotiations and collective administration, licensing not only the reproduction and distribution rights, but the public performance right as well. Here, since 1909 when the copyright owner's right to control mechanical reproductions of his music works was created, the right has always been supplemented by a compulsory license. The view of the Copyright Office is that the Constitution speaks of securing authors' exclusive rights, and compulsory licenses should only be implemented "in exceptional cases, when the marketplace is incapable of working." In harmony with that view, the Copyright Office proposed a drastic change in 2005: The elimination of the statutory mechanical license. The general idea of the proposal was to use the collective licensing model used for performance rights, which all parties agree works well, and extend that system to reproduction and distribution rights.

This appeared to be a solution free from government intervention. The marketplace could determine the exact worth of a musical work without the need to quibble over whether a performance right or a distribution right was implicated. The organization administering the license would have the authority to license both rights, thereby eliminating the bifurcated system where one organization fights to get paid for the distribution right, while another fights to get paid for the performance right. Authors would no longer be bound to a license rate set by the government! Surely, this would be a solution everyone could agree upon, right? Wrong. DiMA, the NMPA, the SGA, and the RIAA all came out

229. *Id.* at 19.
230. *Id.* at 18 (referring to U.S. CONST. art. I, § 8).
231. *See id.* at 56-68.
232. *Id.* at 20 (statement of Marybeth Peters, Register of Copyrights, U.S. Copyright Office).
against the Copyright Office’s proposal. Among the chief concerns mentioned was that the proposal did not guarantee parity with performance rights licensing. Every party was unwilling to replace a system they all believed unworkable with a system of which the operation they all believed was uncertain. Furthermore, exactly which groups would benefit from the proposal was a concern as well. Certainly, a solution that allows an organization to license the reproduction, distribution, and performance rights would mean someone would lose. Competition would erupt between ASCAP, BMI, SESAC, and the HFA, as well as any new comers attempting to take advantage of the free market, and the market shares of these entities would shift as each tried to become the dominant collective administrator. Meanwhile, DiMA and the RIAA were worried that new administrative burdens would arise, making it more difficult to license rights than under the current Section 115. These organizations recognize that one of the aspects making performance rights licensing so easy is the fact that only a few licensors exist. DiMA and the RIAA fear that a free market would bring a multiplication of collective administrators, creating the need for licensees to go to a variety of licensors, making the new system just as cumbersome, if not more so, than the current system.

VI. CONCLUSION

The United States Constitution granted Congress the authority “To promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries.” This authority “to grant to individual authors the limited monopoly of copyright is predicated upon the dual premises that the public benefits from the creative activities of authors, and that the copyright monopoly is a necessary condition to the full realization of such creative activities.” This recognizes a balance between an author’s

233. See id. at 18.
234. See Copyright Office Views, supra note 228 at 59-60 (letter from RIAA).
236. 1 NIMMER, supra note 12, § 1.03[A].
ability to create and make a living from his works on the one hand, and the public’s right to access to those works on the other hand. Since the inception of the 1909 Copyright Act, with respect to mechanical licenses of nondramatic musical works, Congress has attempted to strike a proper balance between these competing interests. The ultimate question that arises from SIRA is whether the proper balance has been struck.

From the bitter fights that erupted over this legislation, that answer is a resounding no. The biggest problem is that SIRA has not protected those who deserve protection: the authors. It is the authors upon which the entire music business depends. Without them there would be no songs to record, nor any songs to distribute digitally or otherwise. Yet, the authors have been forced to accept a small statutory fee of currently 9.1 cents for their musical works, (which would be forty cents had the fee risen with the consumer pricing index) while record companies are allowed to freely negotiate for the price of the recordings embodying the musical works.

An underlying theme can be drawn from the fights over SIRA, the Copyright Office’s proposal, and every hearing that has considered Section 115 reform: Each party interested in Section 115 wants reform, but they want reform on terms that benefit their organization, usually at the expense of every other party interested. The mere fact that SIRA represents eighty-six pages of the Copyright Modernization Act, a one hundred page bill, is evidence of just how difficult it is to reach agreement on the issue. It is also indicative of the need, as the Copyright Office suggested, to eliminate Section 115 from the Copyright Act. DiMA, the NMPA, the SGA, and the RIAA have not tried to create a piece of legislation. They have tried to hammer out a business contract, which they should be allowed to do, but without the intervention of government.

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