Testimony of

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Summary of
Statement of Marybeth Peters, Register of Copyrights
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The compulsory license governing the reproduction and distribution rights for nondramatic musical works has been in effect for 96 years, but it is now outdated and in need of holistic reform. Prior attempts to amend the present section 115 license in the Copyright Act and the Copyright Office's corresponding regulations have proven insufficient with respect to the emergence of online music services. The digital environment has exposed fatal defects in the current music licensing structure caused in major part by the artificial division between the licensing of public performance rights and the licensing of reproduction and distribution rights. The unavailability of certain musical compositions and the increased transactional costs engendered by this antiquated and complex system prevent the music industry from being able to combat piracy.
The Copyright Office and interested parties have explored a variety of means by which to remedy the problem. One option focuses on expanding the section 115 compulsory license, using as a model the section 114 compulsory license for sound recordings. Another option focuses on eliminating the section 115 license in favor of a collective licensing structure or free market negotiations. Each option has its unsettled issues and logistical concerns. The solution, however, must protect the rights of copyright owners while at the same time balancing the needs of the users in a digital world.

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Senator Hatch, Senator Leahy, and distinguished members of the Subcommittee, I appreciate the opportunity to appear before you to testify on the need to reform section 115 of the Copyright Act and possible ways to accomplish it. Section 115 governs the compulsory licensing of the reproduction and distribution rights for nondramatic musical works by means of physical phonorecords and digital phonorecord deliveries. This compulsory license has been in effect for 96 years. However, the means to provide music to the public have changed radically in the last decade, necessitating changes in the law to protect the rights of copyright owners while at the same time meeting the needs of the users in a digital world. The present language of section 115 is outdated, particularly as applied to the online environment. Reform is necessary not only to promote the availability of a wide variety of music to the listening public, but also to assist in the music industry's continuing fight against piracy.

This written statement contains three parts. The first chronicles the evolution of the compulsory mechanical license. The second discusses why a need for reform exists, and the final section sets forth some of the suggestions the Copyright Office and interested parties have proposed to accomplish the reform.

Evolution of the Compulsory Mechanical License

1. Mechanical Licensing under the 1909 Copyright Act

Starting in 1905, copyright owners began seeking legislative changes which would grant them the exclusive right to authorize the mechanical reproduction of their works. The impetus for this movement was the emergence of the player piano and the ambiguity surrounding the extent of copyright owners' right to control the making of copies of their works on piano rolls. Then, in 1908, the Supreme Court held in White-Smith Publishing Co. v. Apollo Co. that perforated piano rolls were not "copies" under the copyright statute in force at that time, but rather parts of devices which performed the work. This decision spurred Congress to take action and, in 1909, Congress granted copyright owners' wish in part by adding to the Copyright Act the right, but not an exclusive right, for copyright owners to make and distribute, or authorize others to make and distribute, mechanical reproductions (known today as phonorecords) of their nondramatic musical works.

However, due to concerns about potential monopolistic behavior, Congress also created a compulsory license to allow anyone to make and distribute a mechanical reproduction of a nondramatic musical work without the consent of the copyright owner provided that the person adhered to the provisions of the license, most notably paying a statutorily established royalty to the copyright owner. Section 1(e) of the 1909 Act allowed any person to make "similar use" of the nondramatic musical work upon payment of a royalty of two cents for "each such part manufactured." However, no one could take advantage of the compulsory license until the copyright owner had authorized the first mechanical reproduction of the work. Moreover, the original license placed notice requirements on both the copyright owners and the licensees. Section 101(e). The copyright owner had to file a notice of use with the Copyright Office - indicating that the musical work had been mechanically reproduced - in order to preserve his rights under the law, whereas the person who wished to use the license had to serve the copyright owner with a notice of intention to use the license and file a copy of that notice with the

Copyright Office. The license had the effect of capping the amount of money a composer could receive for the mechanical reproduction of his work. The two cent rate set in 1909 remained in effect until January 1, 1978, and acted as a ceiling for the rate in privately negotiated licenses. Such stringent requirements for use of the compulsory license did not foster wide use of the license. It is my understanding that the "mechanical" license as structured under the 1909 Copyright Act was infrequently used until the era of tape piracy in the late 1960s. During this period, the "pirates" inundated the Copyright Office with notices of intention to utilize the compulsory license, many of which contained hundreds of song titles. The music publishers refused to accept such notices and any proffered royalty payments since they did not believe that reproduction and duplication of an existing sound recording fell within the scope of the compulsory license. After this flood of filings passed, the use of the license appears to have again became almost non-existent; up to this day, the Copyright Office receives very few notices of intention.

2. The Mechanical License under the 1976 Copyright Act

The music industry adapted to the compulsory license in the intervening years and, by and large, sought its retention, opposing the position of the Register of Copyrights in 1961 to sunset the license one year after enactment of the omnibus revision of the copyright law. Music publishers and composers had grown accustomed to the license and were concerned that the elimination of the license would cause unnecessary disruptions in the music industry. Consequently, the argument shifted over time away from the question of whether to retain the license and, instead, the debate focused on reducing the burdens on copyright owners, clarifying ambiguous provisions and setting an appropriate rate. The House Judiciary Committee's approach reflected this trend and in its 1976 report on the bill revising the Copyright Act, it reiterated its earlier position "that a compulsory licensing system is still warranted as a condition for the rights of reproducing and distributing phonorecords of copyrighted music," but "that the present system is unfair and unnecessarily burdensome on copyright owners, and that the present statutory rate is too low."

To address these concerns, Congress adopted a number of new conditions and clarifications in section 115 of the Copyright Act of 1976, including:

? making the license available only after a phonorecord has been distributed to the public in the United States with the authority of the copyright owner and only to someone whose primary intent is to distribute phonorecords to the public for private use (§ 115(a)(1));

? disallowing the duplication of a sound recording embodying the nondramatic musical work without the authorization of the copyright owner of the sound recording (§ 115(a)(1));

? allowing for the rearrangement of a nondramatic musical work "to the extent necessary to conform it to the style or manner of the interpretation of the performance involved," provided that the rearrangement "does not change the basic melody or fundamental character of the work" (§ 115(a)(2));

? allowing a licensee to file its notice of intention with the Copyright Office in the case where the public records of the Copyright Office do not identify the copyright owner and include an address (§ 115(b)(1));

? requiring service of the notice of intention on the copyright owner "before or within thirty days after making, and before distributing any phonorecords of the work" (§ 115(b)(1));
? requiring payment only on those phonorecords made and distributed after the copyright owner is identified in the registration or other public records of the Copyright Office (§ 115(c)(1));

? establishment of an independent rate setting body to adjust the rates; and

? allowing for termination of the license for failure to pay monthly royalties if a user fails to make payment within thirty days of the receipt of a written notice from the copyright owner advising the user of the default (§ 115(c)(6)).

This revised compulsory license worked reasonably well for the next two decades, but the use of new digital technology to deliver music to the public required a second look at the license to determine whether it continued to meet the needs of the music industry. During the 1990s, it became apparent that music services could offer options for the enjoyment of music in digital formats either by providing the public an opportunity to hear any sound recording it wanted on-demand or by delivering a digital version of the work directly to a consumer's computer. In either case, the possibility existed that the new offerings would reduce and perhaps even eventually replace the need for mechanical reproductions in the forms heretofore used to distribute nondramatic musical works and sound recordings in a physical format, e.g., vinyl records, cassette tapes and most recently audio compact discs. Moreover, it was clear that digital transmissions were substantially superior to, and therefore more desirable than, analog transmissions. In an early study conducted by the Copyright Office, the Office noted two significant improvements associated with digital transmissions: a superior sound quality and a decreased susceptibility to interference from physical structures such as tall buildings or tunnels.
3. The Digital Performance Right in Sound Recordings Act of 1995
By 1995, Congress recognized that "digital transmission of sound recordings [was] likely to become a very important outlet for the performance of recorded music." Moreover, it realized that "[t]hese new technologies also may lead to new systems for the electronic distribution of phonorecords with the authorization of the affected copyright owners." For these reasons, Congress made further changes to section 115 to meet the challenges of providing music in a digital format when it enacted the Digital Performance Right in Sound Recordings Act of 1995 ("DPRA"), Pub. L. 104-39, 109 Stat. 336. The amendments to section 115 clarified the reproduction and distribution rights of copyright owners of musical works as well as clarifying the role of producers and distributors of sound recordings, especially with respect to what the amended section 115 termed "digital phonorecord deliveries." Specifically, Congress wanted to reaffirm the mechanical rights of songwriters and music publishers in the new world of digital technology.
To accomplish this goal, Congress expanded the scope of the compulsory license to include the making and distribution by means of digital transmissions of phonorecords and, in doing so, adopted a new term of art, the "digital phonorecord delivery" ("DPD"), to describe the delivery to a consumer of a phonorecord by means of a digital transmission, which requires the payment of a statutory royalty under section 115. The precise definition of this new term reads as follows:
A "digital phonorecord delivery" is each individual delivery of a phonorecord by digital transmission of a sound recording which results in a specifically identifiable reproduction by or for any transmission recipient of a phonorecord of that sound recording, 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, nonintegrated 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. 17 U.S.C. § 115(d). What is noteworthy about the definition is that it includes elements related to the right of public performance and the rights of reproduction and distribution with respect to both the musical work and the sound recording. The statutory license, however, covers only the making and distribution of the phonorecord, and only with respect to the musical work. The definition merely acknowledges that the public performance right and the reproduction and distribution rights may be implicated in the same act of transmission, and that the public performance does not in and of itself implicate the reproduction and distribution rights associated with either the musical work or the sound recording. In fact, Congress included a provision to clarify that "nothing in this Section annuls or limits the exclusive right to publicly perform a sound recording or the musical work embodied therein, including by means of a digital transmission." 17 U.S.C. § 115(c)(3)(K).

The DPRA also clarified that the statutory license for digital phonorecord deliveries permits reproduction and transmission by means of a digital phonorecord delivery of a musical composition embodied in a sound recording owned by a third party, provided that the licensee obtains authorization from the copyright owner of the sound recording to deliver the DPD. Thus, the license provides for more than the reproduction and distribution of one's own version of a performance of a musical composition by means of a DPD. Under the expanded license, a service providing DPDs can in effect become a virtual record store if it is able to clear the rights to the sound recordings. More importantly, the DPRA allows a copyright owner of a sound recording to license the right to make DPDs of both the sound recording and the underlying musical work to third parties if it has obtained the right to make DPDs from the copyright owner of the musical work.

Apart from the extension of the compulsory license to cover the making of DPDs, Congress also addressed the common industry practice of incorporating controlled composition clauses into a songwriter/performer's recording contract, whereby a recording artist agrees to reduce the mechanical royalty rate payable when the record company makes and distributes phonorecords including songs written by the performer. In general, the DPRA provides that privately negotiated contracts entered into after June 22, 1995, between a recording company and a recording artist who is the author of the musical work cannot include a rate for the making and distribution of the musical work below that established for the compulsory license. There is one notable exception to this general rule. A recording artist-author who effectively is acting as her own music publisher may accept a royalty rate below the statutory rate if the contract is entered into after the sound recording has been fixed in a tangible medium of expression in a form intended for commercial release. 17 U.S.C. § 115(c)(3)(E).

The amended compulsory license also extended to DPDs the already-existing process for establishing rates for the mechanical license. Under the statutory structure, rates for the DPDs can be decided either through voluntary negotiations among the affected parties or, in the case where these parties are unable to agree upon a statutory rate, by a Copyright Arbitration Royalty Panel ("CARP") - or now by the Copyright Royalty Judges ("CRJs"). Pursuant to section 115(c)(3)(D), the CRJs must establish rates and terms that "distinguish between (i) digital phonorecord deliveries where the reproduction or distribution of a phonorecord is incidental to the

transmission which constitutes the digital phonorecord delivery, and (ii) digital phonorecord deliveries in general." The difficult issue, however, is identifying those reproductions that are subject to compensation under the statutory license.

The Need for Reform

At its inception, the compulsory license facilitated the availability of music to the listening public. However, the evolution of technology and business practices has eroded the effectiveness of this provision. Despite several attempts to amend the compulsory license and the Copyright Office's corresponding regulations in order to keep pace with advancements in the music industry and in technology, the use of the section 115 compulsory license, other than as a de facto ceiling on privately negotiated rates, has remained at an almost non-existent level.

There is no debate that section 115 needs to be reformed to ensure that the United States' vibrant music industry can continue to flourish in the digital age. As evident from the numerous proposals for change recently submitted to the Chairman of the House of Representatives' Subcommittee on Courts, the Internet, and Intellectual Property ("House Subcommittee") by entities representing all aspects of the music industry, the operative question is not whether to reform section 115, but how to do so. Prior attempts to tinker with section 115's language to include online transactions have been useful band-aids, but Congress has had to continue to revisit the same issues as technology and business realities have changed the context. It is now time to modernize section 115 holistically not only to address immediate needs, but also to establish a functional licensing structure for the future.

Because section 115 and its predecessor have rarely been used as functioning compulsory licenses and have served simply as a ceiling on the royalty rate in privately negotiated licenses, it has placed artificial limits on the free marketplace. Until the digital revolution in the mid-1990s, the system worked well enough. As long as the function of section 115 was simply to set the rates for licenses between music publishers and record companies that wished to make and distribute sound recordings and to provide a rarely-used backup procedure for obtaining licenses, there was no compelling need to change the system. But with the rise of digital music services that seek to acquire the right to make vast numbers of already-recorded phonorecords available to consumers, section 115 is not up to the task of meeting the licensing needs of the 21st Century. A new mechanism is needed to make it possible quickly and efficiently to clear the necessary exclusive rights for large numbers of works.

For various reasons that made sense at one time, the domestic music licensing structure for nondramatic musical works has evolved as a two-track system, one for licensing public performance rights and the other for licensing the reproduction and distribution rights. This worked reasonably well when the two sets of rights rarely intersected. But the reality of digital transmissions is that in many situations today it is difficult to determine which rights are implicated and therefore whom a licensee must pay in order to secure the necessary rights. Faced with demands for payment from multiple representatives of the same copyright owner, each purporting to license a different right that is alleged to be involved in the same transmission, licensees end up paying twice for the right to make a digital transmission of a single work. Some have called this "double-dipping." I would not characterize it that way; I recognize that separate rights are involved - or at least alleged to be involved - and that copyright owners employ separate licensors for each of those rights. I also recognize that in at least some of these cases, there are reasonable arguments that the ability to license each of these rights has real value to the licensee. But whether or not two or more separate rights are truly implicated and deserving of compensation, it seems inefficient to require a licensee to seek out two separate licenses from

two separate sources in order to compensate the same copyright owners for the right to engage in a single transmission of a single work. That is not the case with respect to sound recordings, where the artificial division of the licensing regimes for performances and for reproductions and distribution does not exist, and where licensees can obtain all necessary rights to a work from a single licensor. I have recommended, and continue to recommend, that the law clarify the scope of the various rights, or at the very least provide some mechanism so that copyright owners who merely seek to be paid what they believe they are owed do not face charges of double-dipping. The increased transactional costs (e.g., arguably duplicative demands for royalties and the delays necessitated by negotiating with multiple licensors) also inhibit the music industry's ability to combat piracy. Legal music services can combat piracy only if they can offer what the "pirates" offer. I believe that the majority of consumers who have engaged in illegal peer-to-peer "file-sharing" of music would choose to use a legal service if it could offer a comparable product. Right now, illegitimate services clearly offer something that consumers want: lots of music at little or no cost. They can do this because they offer people a means to obtain any music they please without obtaining the appropriate licenses. However, under the complex licensing scheme engendered by the present section 115, legal music services must engage in numerous negotiations with publishers and record companies which result in time delays and increased transaction costs. In cases where they cannot succeed in obtaining all of the rights they need in order to make a musical composition available, the legal music services simply do not offer that selection, thereby making them less attractive to the listening public than the pirates. The recent Supreme Court decision in Metro-Goldwyn-Mayer Studios v. Grokster affords legitimate music services an opportunity to make great strides in further penetrating the market, but it is an opportunity that will necessarily be squandered if Congress does not modernize the section 115 licensing regime so that legitimate music services take advantage of the blow the Court has struck against illegitimate offerings, before other illegal sources arise. Reforming section 115 to provide a streamlined process by which legal music services can clear the rights they need to make music available to consumers will enable these services to compete with, and I believe effectively combat, piracy.

Interested parties expressed the need for reform during a hearing on March 11, 2004 before the House Subcommittee. A number of witnesses testified about the difficulties they have encountered in licensing the use of nondramatic musical works under this antiquated statutory scheme. Among other things, complaints were voiced about the difficulties in locating copyright owners to obtain licenses to reproduce and distribute nondramatic musical works; the procedural requirements for obtaining a compulsory license; the lack of clarity over what activities are covered by the compulsory license; difficulties in licensing the use of nondramatic musical works for sound recordings in new configurations; and problems created by the per-unit penny-rate royalty established by section 115.

Two of the issues highlighted at that hearing - issues that we at the Copyright Office have been hearing about for several years - involve problems arising when online music services wish to license activities that involve both reproduction and public performance, leading to demands for payment to two separate agents for the same copyright owner (i.e., the "double-dipping" concern); and the contrast between the relatively efficient licensing process for performance rights and the unsatisfactory process for licensing reproduction and distribution rights. While the three performing rights societies - the American Society of Composers, Authors and Publishers ("ASCAP"), Broadcast Music, Inc. ("BMI") and SESAC, Inc. - collectively are able to license public performances of virtually all nondramatic musical works, a significant percentage of

nondramatic musical works cannot be licensed from the main licensing agent for the reproduction and distribution rights - the Harry Fox Agency, Inc. ("HFA"). For this and other reasons, some of which I will address below, online music services that wish to obtain licenses to make available as many nondramatic musical works as possible find it impossible to obtain the necessary reproduction and distribution rights.

Because of the problems identified at the March 2004 hearing, the House Judiciary Committee ("House Committee") asked me last July to bring interested parties together to address the modernization of section 115. The House Committee asked that I survey areas of concern, identify areas of agreement, and identify the positions of various parties on areas where there was no agreement. I was asked to report on the results of these efforts in September.

Discussions involving the National Music Publishers' Association, Inc. ("NMPA") and its subsidiary The Harry Fox Agency, Inc. ("HFA"), the Digital Media Association ("DiMA") and the Recording Industry Association of America, Inc. ("RIAA") began on July 16, 2004, and continued throughout the summer. At the start of these discussions, there was general agreement within the group that any change to section 115 should be structured along the lines of the section 114 license, including the use of a blanket license and a designated agent to collect and distribute the royalty fees. The group then focused on several key areas, including the scope of a statutory license, collection and distribution of the royalty fees, controlled composition clauses, sublicensing, and rate setting options. In general, the parties reached no consensus on any particular issue, stating instead that their position on any particular issue would depend on how a proposal handled other key concerns.

Nevertheless, the parties discussed a number of options for the scope of a section 115 blanket license, ranging from the broadest possible coverage, including traditional product and musical works in all digital transmissions and new product offerings, to a slight modification of the current license to extend coverage only to online subscription services offering "tethered" downloads and/or on-demand streams. User groups favored the broader approach, seeing it as a way to streamline the licensing process and move new product offerings and media formats into the marketplace with the expectation that they will be a viable option to piracy. NMPA, on the other hand, favored a modest change in the current law, noting its fear that even limited change will harm publishers and traditional business practice. Thus, it supported a blanket license but only to the extent that such a license be administered by a single designated agent and not include physical product.

Besides the scope of a blanket license, other controversial issues involved the administrative aspects associated with collecting and distributing the royalty fees, the process for selecting a designated agent, and the extent to which the designated agent could use the funds for its own licensing practices or lobbying efforts. All participants agreed that a single entity should assume the responsibility for collecting and distributing the royalty fees, but they could not agree on how that entity should be selected or whether or to what it extent it should shoulder the costs of creating a new database for fulfilling its responsibility. To address the later problem, NMPA suggested that the statute provide a means for the designated agent to recover its start-up costs. It also expressed concern over a perceived free-rider problem and suggested that opt-outs not be allowed as a solution to this problem. Participants, however, were unwilling to endorse any proposal on these issues without additional knowledge about the scope of the license, e.g., whether it would be sufficiently broad to generate adequate funds to cover the set-up costs of the program, or a decision on the availability of the information in the database to others.

Two other issues hotly debated among the participants were the abolition of the controlled

composition discount and the right to sublicense. Not surprisingly, NMPA favored nullification of the controlled composition clause in recording contracts with respect to any activities covered by blanket licenses, whereas the record companies, who by virtue of the controlled composition clauses in recording contracts are able to pay the songwriters and publishers less than the statutory rate, opposed any such change. The recording companies contended that the elimination of controlled composition clauses would seriously diminish their flexibility in licensing which, in turn, would have a negative effect on their ability to conduct business and invest in new talent. Users and copyright owners likewise differed on the sublicensing question. Publishers sought a restriction on the right of a recording company to sublicense use of a musical work covered by a blanket license and stated a preference that services deal directly with the designated agent or music publishers when making digital deliveries under a blanket license. Not surprisingly, the recording companies opposed this position. Their preference was to retain the option of offering services an opportunity to sublicense through them rather than have the service seek out and deal with yet another licensor. They maintained that it would be extremely difficult to market a new product if they could not provide all licenses for use of the product.

One other key issue discussed during these talks concerned the rates and the process to set them. Users wanted a statutory change to clarify that the rate setting body could establish a rate based on percentage-of-revenue. They also wanted clarification as to whether a service must pay for server copies and intermediate reproductions under the law or whether one type of reproduction or both were exempt. This last issue was of particular interest to certain user groups who would potentially have to participate in more than one ratesetting proceeding to set rates applicable to a single activity, i.e., webcasting.

Formal discussions concluded in early September and, on September 17, I reported my observations to Representatives Sensenbrenner, Conyers, Smith and Berman, noting that these parties were willing to explore legislation to establish a blanket licensing scheme in section 115 to facilitate the licensing of copyrighted nondramatic musical works even though significant differences remained among the parties regarding the appropriate scope of such a license and regarding operational and economic issues. My letter also noted that the parties were willing to continue discussions among themselves and with the Copyright Office in an effort to arrive at consensus legislation. The outgrowth of these discussions were a number of different proposals on how to reform section 115 submitted to Representative Smith in recent months by various organizations representing publishers, songwriters, performing rights societies, record companies, online music services, and record retailers. In general, those proposals appear to reflect the same disparity of views that I reported on last September. The only consensus appears to be that the interested parties would be amenable to a blanket license with one designated agent and the filing of only one notice to use any number of works. In light of the facts that the interested parties agree that section 115 does not adequately meet the current and future needs of the music industry, that the parties are unable to agree upon a solution, and that prior amendments to the Copyright Act and the Copyright Office's regulations have not fully remedied the problems, the time has now come to revise section 115 holistically. And, as noted above, the recent decision in MGM v. Grokster provides the music industry with an opportunity to capitalize on the Court's unanimous condemnation of illegitimate services that set out to exploit the market for mass infringement. It can do so by offering consumers easily available and affordable access to the music that consumers want. Removing the impediments to the licensing of legitimate online services is a necessary step in making that marketplace work.

Proposed Legislative Solutions

Any solution to the crisis in music licensing must make it easy for licensees to obtain, from a single source or at least a manageable number of sources, all the necessary rights for all the musical compositions licensees wish to offer to the public. Such "one-stop shopping" is essentially available today with respect to performance rights. However, nothing approaching "one-stop shopping" exists with respect to reproduction and distribution rights. And as noted above, a music service must obtain separate licenses for (1) the performance and (2) the reproduction and distribution of the same musical works, even when the performance, reproduction and distribution all take place in the course of a single transmission. True "one-stop shopping" would involve (1) all the musical compositions one wishes to license, and (2) all necessary rights one wishes to license.

As I see it, there are two ways to accomplish such "one-stop shopping." First, a solution along the lines of our discussions last year, transforming the section 115 compulsory license into a section 114-style blanket license with royalty payments funneled through a single designated agent could simplify the licensing process. Alternatively, the section 115 compulsory license could be abandoned - at least with respect to digital phonorecord deliveries - and replaced with a system of collective licensing similar to systems in place in many other countries. Each option has its pros and cons, as well as a host of controversial issues and logistical concerns. Regardless of whichever option is selected, further discussion with interested parties will necessarily be required in order to minimize disruption to the industry. Because our discussions last year centered on a blanket statutory license, I will first address that alternative.

1. Expansion of the Section 115 Compulsory License

a. A Blanket Compulsory License

Section 114 of the Copyright Act may provide a useful model for licensing of reproduction and distribution of nondramatic musical works. Under section 114, an eligible music service may obtain a license to transmit certain kinds of performances of all sound recordings by filing a ent to use the statutory license with the Copyright Office. Royalty rates and terms of payments are established by the Copyright Royalty Judges through the mechanism set forth in Chapter 8 of the Copyright Act. The royalty payments are made to a designated agent of copyright owners and performers (currently SoundExchange, which is controlled equally by record companies and performers), which distributes the royalties to the copyright owners and performers.

A similar mechanism under section 115 would permit a digital music service to obtain a license to make digital phonorecord deliveries of any musical composition (or at least of any musical composition that has been distributed to the public in the United States under the authority of the copyright owner; see 17 U.S.C. §115(a)(1)) simply by serving or filing a notice of intent to use the statutory license. Royalty payments would be made to a single entity which would then redistribute those royalties to the copyright owners, and the royalty rates and terms of payment would be established under the Copyright Royalty Judge system.

Last year I tried without success to guide the interested parties to consensus on such a proposal, and I have not given up hope that agreement may ultimately be reached. However, the interested parties thus far have not been able to resolve their differences, and I suspect that in order for such a solution to be accomplished, it may be necessary for Congress to make some important decisions notwithstanding the lack of consensus among all the affected parties.

My 2004 testimony before the House Subcommittee addressed such an approach, among others. Interested parties have also recently submitted to the House Subcommittee various proposals for further amendment. The two points of agreement among the interested parties seem to be a desire to have a blanket licensing scheme with one designated agent and a single notice procedure

regardless of the number of musical works to be utilized pursuant to the statutory license. I agree with the consensus on these two fundamental points.

One of the main points of contention, however, is the envisioned scope of the compulsory license. As explained in my recounting of last summer's multiparty discussions, the music publishers in general seem to favor a narrow expansion to address only the most critical issues (online subscription services offering limited downloads and on-demand streams), while the record companies and user groups seem to favor a more holistic approach to encompass all issues such as audiovisual works, server and other intermediate copies, ringtones and promotional uses. Although I am not yet prepared to take a position on all of these specific issues, I do in general favor an approach that will provide a workable solution not just for immediate concerns, but for the foreseeable future. I do, therefore, believe that at a minimum the compulsory license should be clarified to expressly include within its scope all intermediate reproductions of a nondramatic musical work made within the course of any digital phonorecord delivery, including buffer, cache and server copies.

Similarly, consideration should be given to amending the section 115 license to provide that reproductions of nondramatic musical works made in the course of a licensed public performance are either exempt from liability or subject to the statutory license. When a webcaster transmits a public performance of a sound recording of a musical composition, the webcaster must obtain a license from the copyright owner for the public performance of the musical work, typically obtained from a performing rights organization such as ASCAP, BMI or SESAC. At the same time, webcasters find themselves subject to demands from music publishers or their representatives for separate compensation for the reproductions of the musical work that are made in order to enable the transmission of the performance. I have already expressed the view that there should be no liability for the making of buffer copies in the course of streaming a licensed public performance of a musical work. On the other hand, RIAA and the Harry Fox Agency have reached an agreement that buffer copies and server copies made for purposes of or in the course of the streaming of performances are included within the scope of the section 115 compulsory license. But perhaps more important than the decision whether to provide an exemption for such copies or to include them within the section 115 license is the need to clarify the status of such copies one way or another. Any reform of section 115 should definitively resolve that issue.

Another issue to consider is the administration of an expanded section 115 license. It is not clear to me whether all the affected parties subscribe to the notion that a blanket section 115 license should be available to any qualified service that files or serves a notice of intent to use that license, or whether a service wishing to use the license must somehow obtain the license from the copyright owner or its representative. Within a statutory licensing scheme, I see no reason why prospective licensees should have to do anything to obtain the license other than serve notice of their intent to use the license and comply with all the requirements of that license.

In any event, how to set up the entity that would collect the royalties and disburse them to copyright owners is a key issue. One model is the section 114 model, in which a new entity representing and controlled by copyright owners would be created to serve this function. Existing entities (e.g., The Harry Fox Agency or one of the performing rights societies) might also be able to play this role. Another, more established model is found in sections 111 and 119 of the Copyright Act and in the Audio Home Recording Act: royalties are paid to the Copyright Office, which disburses them to eligible copyright owners. Distributions are made either when all eligible copyright owners agree on the division of royalties or, failing that, in a distribution

proceeding conducted by the Copyright Royalty Judges. This is a function that the Copyright Office could easily perform.

b. Extending Section 115 to Include Certain Performances

While enacting a section 114-style license for the reproduction and distribution of phonorecords would resolve one of the two key issues - i.e., the desirability of giving licensees a single source from which to obtain such licenses for all musical works - it would do nothing to address the problems created by the competing claims of performing rights societies and The Harry Fox Agency (and/or music publishers) that online transmissions of music require separate licenses for the performance right and for the reproduction and distribution rights. As I have already suggested, although it is easy to see how this practice serves the purposes of the two groups of licensing agents, it is difficult to understand how it serves the legitimate interests of copyright owners.

To the extent that a particular form of digital transmission involves both the performance right and the reproduction and distribution rights, the copyright owner should be entitled to reap the actual value of both sets of rights. As I have already indicated, there will be occasions where one of the rights is technically implicated, but where there is no legitimate reason to require that compensation be paid for the exercise of that right. An online music service that engages in streaming under a license of the performance right should not be required to pay as well for the right to make the buffer and cache copies that are incidental to the performance that is being streamed. An online service that offers downloads under a license of the reproduction and distribution rights should not also be required to pay for what may also technically constitute a public performance even though the recipient of the download does not contemporaneously cause the downloaded work to be performed.

In those cases, the license of the predominant right should automatically be accompanied by, in effect, a royalty-free license of the incidental right. But even when both rights are legitimately involved and the licensee is simultaneously obtaining economic value from both the performance and reproduction of a musical work by means of the same transmission, there is no justification for requiring the licensee to obtain two separate licenses from two different middlemen acting on behalf of the same copyright owner. The licensee should be able to obtain a single license for all the necessary rights, and to pay the full value of the license in a single payment to a single entity, which will then see to it that the copyright owner receives the compensation to which he or she is due.

In the context of an expanded section 115 statutory license, it makes most sense to provide that for any digital transmission of music in which not only the reproduction and distribution rights, but also the performance right are involved, the section 115 statutory license will cover (and obtain appropriate compensation to the copyright owner for) all the necessary rights. It should be left to the collecting agent - whether that be an entity established by the copyright owners or whether it be the Copyright Office acting in accordance with rate-setting and distribution orders of the Copyright Royalty Judges - to see to it that the royalties reach the copyright owners to whom they are due.

Another approach - but a more difficult one to administer in light of constantly changing technology - would be to determine by statute (or by administrative regulation) for each kind of digital audio transmission whether the transmission should be considered a performance or a reproduction, but never to characterize any particular kind of transmission as requiring compensation for both types of rights. But in addition to the administrative difficulties in making such determinations and keeping them up to date, such a resolution would overlook the

likelihood that there will be occasions when both types of rights are implicated and where the copyright owner deserves to be compensated for the exercise of both types of rights. For that reason, I believe it makes more sense to give the copyright owner the full value of the rights that are exercised, but to do so in a single payment that eliminates at least one of the middlemen. Again, the key concern should be with compensating the copyright owner, not with ensuring the continued viability of any particular intermediary's business plan.

2. Repeal of the Section 115 Compulsory License

a. Collective Licensing

Another option to consider is eliminating the section 115 compulsory license and perhaps replacing it with a collective licensing structure. When I met several weeks ago with the Chairman of the House Subcommittee to discuss the various proposals made by interested parties, I suggested that such an approach might be preferable. The Chairman requested that I explore this concept further by preparing initial model legislative language. He then requested that I testify as to the benefits of this concept, which I did on June 21.

This collective licensing structure does have a certain amount of appeal because a fundamental principle of copyright law is that the author should have the exclusive right to exploit the market for his work, except where doing so would conflict with the public interest. The Copyright Office has long taken the position that statutory licenses should be enacted only in exceptional cases, when the marketplace is incapable of working. One could argue that it is difficult to say that the marketplace is incapable of working with respect to reproduction and distribution of nondramatic musical works when the marketplace has never been given a chance to succeed. The moment the copyright owner's right to control mechanical reproductions of a nondramatic musical work in the form of phonorecords was created, it was accompanied by the compulsory license.

Our compulsory license in the United States is also an anomaly. Virtually all other countries that at one time provided for this compulsory license have eliminated it in favor of private negotiations and collective licensing administration. Many countries permit these organizations to license both the public performance right and the reproduction and distribution rights for a musical composition, thereby creating "one-stop shopping" for music licensees and streamlined royalty processing for copyright owners.

The United States also has collective licensing organizations, such as ASCAP, BMI and SESAC, which appear to function quite successfully. These performing rights organizations license the public performance of musical works - for which there is no statutory license - providing users with a means to obtain and pay for the necessary rights without difficulty. It seems reasonable to ask whether a similar model would work for licensing of the rights of reproduction and distribution.

The discussion draft that I presented to the House Subcommittee attempted to strike the appropriate balance between the rights of copyright owners and the needs of the users in a digital world. Its overarching purpose was to remove the barriers which inhibit the music industry's ability to clear rights in order to open the licensing structure to free market competition.

The discussion draft set forth rights and obligations for newly-defined music rights organizations ("MRO"). An MRO would be authorized, and required with respect to digital audio transmissions which the Copyright Office has been told present the greatest need for licensing reform, to license the reproduction and distribution rights of any nondramatic musical work for which it was also authorized to license the public performance right. In essence, this would mean that MROs would be authorized to license downloads and other reproductions (e.g., server, cache and buffer copies) made in the course of digital audio transmissions, even when there is no

public performance involved or where the proportion of the public performance right implicated in relation to the reproduction or distribution rights is questionable. This should lead to "one-stop shopping" for any online music service seeking to license rights to a work. This structure would create an efficient mechanism for copyright owners to license and for potential licensees to obtain all of the necessary rights to make nondramatic musical works available to the listening public, particularly in the context of the Internet and other digital transmission media. It would also leave evolving business terms to the flexibility of marketplace negotiations. The discussion draft continued to recognize the rights of copyright owners, who would appropriately retain the right to license their works themselves whether or not they chose to engage an MRO. It also would provide incentives for effective notice of an MRO's repertory of works available for licensing.

Substituting the MRO structure for the section 115 compulsory license would address the two themes that I have already identified as central to the current crisis: the conflicting demands made by copyright owners' agents for the licensing of performance rights and by their agents for the licensing of reproduction and distribution rights, and the contrast between the ability of performing rights societies collectively to license performance rights for virtually all nondramatic musical works and the inability of any organization or combination of organizations to do the same with respect to reproduction and distribution rights.

The model legislation has generated a sizable response. The majority of the feedback has praised its goals, namely to increase efficiency and promote the free market, but many interested parties have expressed concern as to its actual implementation.

One concern that has been raised is the potential proliferation of an unmanageable number of MROs. Although I recognize that this would theoretically be possible, I do not believe that it would be likely. The current performing rights society market has been open to any number of entities for the better part of a century, yet only three actually exist. Similarly, only one major mechanical rights licensing entity exists even though nothing in the law prohibits more. I assume that the same market forces that prompted the formation of these existing collective organizations and inhibited more from arising - namely administrative efficiency, substantial start-up costs and the songwriters' and publishers' recognition that they have more bargaining power as a unified group - would likely discourage excessive fractionalization of the MRO marketplace. Meanwhile, even if a few more MROs were to exist than the current number of collective entities, I consider it unlikely that this would be an unmanageable number and it would still provide "one-stop shopping" for any user needing to clear all of the rights to a particular musical composition. Additional MROs might even provide a competitive environment in favor of the individual songwriter in choosing which intermediary would be best in administering the rights in her musical works. However, the responses from the performing rights societies and others have certainly raised a genuine prospect that there might be a multiplicity of MROs and that some or many music publishers might withdraw from the existing performing rights societies under the system described in the discussion draft. It would be prudent to investigate this further before deciding whether such a course of action would be desirable.

Another concern related to antitrust issues is whether the existing antitrust decrees governing ASCAP and BMI might be expanded to take into account the new functions of ASCAP and BMI as music rights organizations and/or to apply to other MROs. I have taken no position on whether the existing consent decrees should be extended, for example, to subject the royalty rates offered by an MRO for a reproduction and distribution license to review by a rate court. I recognize that antitrust concerns are integral to this or any other legislative concept, and have

begun consulting with the Antitrust Division of the Department of Justice.
Regardless of whether formal consent decrees would apply to MROs, many parties have expressed a desire for the MROs' rate to be subject to some sort of oversight, be it by arbitration, a rate court, the Copyright Royalty Board or otherwise. I think this provision definitely warrants further consideration, although I note that greater Government-dictated oversight diminishes the ability of the free market to function. On the other hand, I recognize that the more market power that an MRO would have, the greater would be the justification for supervision by a rate court or other governmental entity. And it is my understanding that collective administration organizations abroad are usually subject to some form of government oversight.
I have also heard criticism expressing concern that the MRO proposal would create uncertainty. Obviously, it would be necessary to work with all interested parties to minimize the negative ramifications, while realizing that any change would necessarily have some negative consequences for some party or parties. For example, I have heard the argument that without the statutory license in place, more popular songwriters would receive greater payments than less popular ones. While this could well be true, it is also the very essence of the free market. The more desired an item is, the higher price it can command. I have also heard the argument that some licensing agents could lose market share if large copyright owners chose to license their works directly, an option which I point out happens to be currently available as well.
The bottom line is that if the section 115 license were to be eliminated, some current music industry participants may have to adjust their business practices to maintain their current levels of profitability without the artificial rate ceiling afforded by the statutory license. Not meaning to minimize this practical reality, I wish to emphasize that the overriding goal of any licensing scheme should be to compensate copyright owners properly and provide an efficient and effective means by which licensees can obtain rights to make nondramatic musical works available to the listening public. Ancillary support organizations are important to the process, and in any new licensing regime they will necessarily continue to serve their roles, albeit perhaps with modifications induced by the increased competition present in a free market. As always, my focus is primarily on the author. The author should be fairly compensated for all non-privileged uses of his work. Intermediaries who assist the author in licensing the use of the work serve a useful function. But in determining public policy and legislative change, it is the author - and not the middlemen - whose interests should be protected.
I recognize that the licensing scheme in my discussion draft was a radical departure from the current structure. However, given the problems that seem to inevitably arise every few years with the section 115 compulsory license and the interested parties' apparent inability to reach consensus on the majority of issues regarding how best to further revise section 115 to meet the industry's needs, I believe that such an approach has considerable merit. In any event, at the very least this proposal and the feedback we have received will assist in reaching a clearer understanding of how best to modify the system that is already in place.
I also recognize that the discussion draft did not address some of the issues raised in the proposals that music industry representatives recently submitted to the House Subcommittee. Some of those issues relate to ringtunes, promotional uses, multi-format discs, percentage royalty rates, lyric displays, licensing of music for audiovisual works, locked content and accounting logistics. I consider these to be business or economic issues which are best resolved in the free marketplace. Eliminating the section 115 compulsory license creates this marketplace, and the case can be made that there is no need for Government to legislate what the parties can negotiate themselves.

b. Simple Repeal of the Compulsory License

Should the concept of free marketplace negotiations for reproduction and distribution rights for nondramatic musical works appear to be desirable, then a variation on this legislative concept might also be worthwhile to explore. One might ask whether it would further benefit the industry as a whole simply to repeal, yet not replace, the section 115 compulsory license. Then reproduction and distribution rights would truly be left to marketplace negotiations. A sunset period of several years would likely be prudent to permit the industry to develop a smooth transition. My prediction would be that music publishers would voluntarily coalesce into music rights organizations, or perhaps would create a single online clearinghouse (or a handful of such clearinghouses) which would permit one-stop shopping while nevertheless permitting each publisher to set its own rates. It might be wise to couple repeal of section 115 with incentives designed to promote one of these alternatives that would result in one-stop shopping or something close to it.

In principle, I favor this approach. After all, the Constitution speaks of authors' "exclusive rights to their Writings," and in general authors should be free to determine whether, under what conditions and at what price they will license the use of their works. But for the past few years, the music industry has been in a state of crisis, as unauthorized mass infringement has become all too easy and, unfortunately, all too tempting to engage in. Consumers, used to being able to obtain any musical work they want at little or no cost, will demand no less from the legitimate marketplace. The Supreme Court's decision two weeks ago may offer some breathing room to the music industry, but that breathing room should not be squandered. Rather, it offers at best a limited opportunity to reform the system of music licensing in a way that will meet the demands of a public that knows how to get what it wants one way or another. A laissez-faire approach that gives each musical copyright owner the complete freedom to decide whether and how to license his or her works may be too risky in the current environment.

3. Other Issues

Other questions and proposed remedies have been raised that address more technical or business-related issues, but these are matters more appropriately addressed once an overall approach has been selected. They include whether and under what terms to permit controlled composition clauses, whether percentage versus penny rates should apply, and notice and accounting procedures. Some interested parties' proposals have also raised tangential issues such as defining the term interactive in Section 114 or creating a public performance right for analog transmission of sound recordings. While such issues may well deserve attention, I understand that today's hearing is to evaluate the defects of section 115, not all topics relating to music licensing in general.

Conclusion

I commend you, Mr. Chairman, for convening this hearing to discuss the problems associated with the use of the section 115 license in a digital environment. I look forward to working with you, members of the Subcommittee, and the industries represented at this table to find effective and efficient solutions to make improvements in the licensing of musical works that will better enable consumers to enjoy the music that our songwriters and composers create and that will compensate our songwriters and composers in a way that continues to provide them with ample incentives to continue to create and make available the music that we all enjoy.