COMPOSITIONS ARE BEING SOLD FOR A SONG: PROPOSED LEGISLATION AND NEW LICENSING OPPORTUNITIES DEMONSTRATE THE UNFAIRNESS OF COMPULSORY LICENSING TO OWNERS OF MUSICAL COMPOSITIONS

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Today's music business hardly resembles the industry in existence at the beginning of the twentieth century, yet musical composers remain bound by compulsory licensing laws enacted as part of the Copyright Act of 1909. Compulsory licensing permits an individual or company to record and sell any song without the composer's permission. The user need only meet a few simple requirements and pay the composer a statutorily determined royalty rate. Although infrequently invoked, this statutory licensing rate for compulsory licenses removes any bargaining leverage from the composers and effectively caps the rate composers can negotiate in the free market for reproductions of their songs. As new technology has expanded the available means for mechanical reproduction of musical works, the use of the compulsory license has become increasingly troubling to certain constituents in the music industry. In response, Congress recently considered the Section 115 Reform Act, which would establish a blanket licensing system for new digital music delivery technologies. Wakolbinger examines the perceived advantages and disadvantages of the proposed legislation before suggesting an alternative: the total elimination of the compulsory licensing system. He argues that eliminating compulsory licensing would correct the fundamental unfairness of the prior system and permit the music business and intellectual property laws more flexibility to adapt to future advances in music reproduction technologies.

I. INTRODUCTION

Music is everywhere. Previously unimaginable methods of obtaining and using music are constantly available. Satellite radio stations broadcast music around the world. Traditional cell phone ringtones are being replaced by snippets of popular recordings. Listeners download songs to their computers and transfer them to portable MP3 players in a matter of seconds—sometimes without paying for them. Today's music business hardly resembles the industry that existed at the turn of the

twentieth century, yet composers are still bound by compulsory licensing laws created over one hundred years ago and justified by the political climate and technologies of that era. From the days when sales of sheet music represented the primary source of income for publishers and composers, through innovations such as the player piano, long-playing vinyl records, cassette tapes, compact discs, and MP3s, the music business has fought to meet consumer demand. Copyright law has historically struggled to maintain pace with technology, and patchwork legislative fixes to the Copyright Act have often failed to provide for the realities of technology and business.

The law governing the licensing of musical compositions has long been a subject of debate. Beginning with the Copyright Act of 1909, federal law has provided a means for any person to record and sell a musical composition without the express permission of the composer—so long as that person complies with the terms of the statutory "mechanical license" (commonly referred to as a compulsory license) and pays the appropriate rate set by statute.[1] The terms of these provisions often spark debate between the owners of copyrights in musical compositions (who generally oppose compulsory licenses or desire higher statutory rates) and record companies (who tend to enjoy the benefits of compulsory licensing and lobby for lower rates). As new methods develop to deliver music to consumers—particularly those methods that fall under the umbrella of digital phonorecord deliveries (DPDs)[2]—dissatisfaction with the compulsory licensing system intensifies.

This note analyzes the compulsory licensing system from its inception and ultimately argues for its elimination. Part II traces the history of compulsory mechanical licensing, beginning with the Copyright Act of 1909, through the 1976 Act and its various amendments, and concluding with recently proposed legislation, the Section 115 Reform Act. Part II also summarizes this proposed act. Part III discusses the benefits and detriments of this legislative proposal from the perspectives of various groups within the music industry and analyzes the need—or lack thereof—for compulsory licensing in general. Finally, Part IV recommends that the compulsory licensing system be eliminated in light of changes in technology, the music business, and the societal concerns of today, all of which are markedly different from those that existed in the early 1900s when compulsory mechanical licenses first developed.

1. *See* Copyright Act of 1909, Pub. L. No. 60-349, §§ 1(e), 25(e), 35 Stat. 1075, 1075–76, 1081–82 (1909).

2. Digital phonorecord deliveries are recordings delivered by a digital transmission excluding real-time, noninteractive subscription transmissions. For a full definition provided by statute, see *infra* note 66.

II. BACKGROUND

To better understand why the need for compulsory mechanical licensing no longer exists, it is necessary to follow the development of the system from inception. Section A of this Part explains the advent of the compulsory license in the Copyright Act of 1909. Sections B and C then trace changes made to the provisions through the rewritten Act of 1976 and various amendments. Finally, Section D highlights key provisions of the Section 115 Reform Act, proposed legislation that would reform the compulsory licensing system.

A. The Development of Compulsory Mechanical Licenses

Prior to the Copyright Act of 1909 (the 1909 Act), composers and songwriters had no legal right to control the mechanical reproduction of their music. The copyright statute that preceded the 1909 Act afforded composers no rights with regard to mechanical reproductions.[3] In addition, the Supreme Court had specifically held that the making of piano rolls, wax cylinders, phonograph records, and other similar mechanical devices for reproducing music were not "copies" of copyrighted sheet music within the meaning of then-existing copyright laws.[4] This was not of grave concern to composers at the time because their income was derived primarily through sales of copyrighted sheet music.[5] However, the increasing prominence of piano rolls and phonographs helped create a strong incentive for composers to gain control over the mechanical reproduction of their music.[6]

In response to these concerns, the 1909 Act granted limited control of mechanical rights to copyright owners.[7] At the time, Congress felt the American public should continue to have access to popular songs but recognized the growing importance of technologies for reproducing music and wanted to guarantee that composers would be adequately compensated for their work.[8] Fearing the creation of a "mechanical-music trust," Congress tempered the newly granted mechanical rights by creating compulsory licensing provisions to prevent any one manufacturer from monopolizing the market for mechanical reproductions.[9]

3. *See* Act of Mar. 3, 1891, ch. 565, § 4952, 26 Stat. 1106, 1106–07 (repealed 1909).

4. *See* White-Smith Music Publ'g Co. v. Apollo Co., 209 U.S. 1, 17–18 (1908).

5. Paul S. Rosenlund, *Compulsory Licensing of Musical Compositions for Phonorecords Under the Copyright Act of 1976*, 30 HASTINGS L.J. 683, 690 (1979).

6. *See id.* at 686.

7. *See* Copyright Act of 1909, Pub. L. No. 60-349, §§ 1(e), 25(e), 35 Stat. 1075, 1075–76, 1081–82 (1909).

8. *See* Rosenlund, *supra* note 5, at 686 (citing H.R. REP. NO. 60-2222, at 7 (1909)).

9. *Id.* at 686–87 & nn.21–22 (noting that Congress was influenced by the antitrust climate of the era and was concerned by evidence that a large number of music publishers had assigned mechanical rights to one prominent manufacturer of piano rolls, the Aeolian Company, in anticipation of a grant of mechanical rights).

The new compulsory licensing scheme created a means whereby any person could secure the right to use a musical composition in a phonorecord, provided the copyright holder had authorized another such use and the person using the composition immediately filed a "notice of use" with the Copyright Office.[10] Any person who desired to use the composition needed only to send a "notice of intent to use" to the copyright proprietor and to the Copyright Office and pay the copyright proprietor two cents per "part"[11] manufactured.[12] Payments were required on a monthly basis, and monthly accounting records had to be made available under penalty of perjury.[13]

The compulsory licensing scheme in the 1909 Act was not mandatory; those who wished to record a musical composition were free to negotiate a license directly with the copyright owner.[14] In fact, because record companies considered the monthly accounting requirements to be overly burdensome, almost all mechanical licenses obtained while the 1909 Act was in effect were negotiated directly with copyright owners.[15] Because a record company always had the option of obtaining a statutory license through the Copyright Office, however, it was difficult for a publisher to demand more than the statutory rate for a negotiated license.[16] These provisions thus provided a distinct advantage to the record companies by effectively capping the royalty rate at two cents per recording.

B. The 1976 Act

By the time the Copyright Act of 1976 (the 1976 Act) went into effect, phonorecords had displaced sheet music as the primary medium for distributing popular compositions.[17] Consequently, mechanical royalties had become one of the most important income generators for songwriters.[18] Recognizing these and other changes in the industry, as well as arguments by author and publisher groups opposed to the statutory licensing scheme, the Register of Copyrights recommended complete elimination of compulsory licensing back in 1961.[19] Although copyright

10. *See* § 1(e), 35 Stat. at 1076.

11. The 1909 Act made royalties due for every "part" manufactured. *See id.* With the advent of long-playing records, "parts" were interpreted to mean "songs." *See, e.g.*, ABC Music Corp. v. Janov, 186 F. Supp. 443, 445 (S.D. Cal. 1960).

12. § 1(e), 35 Stat. at 1076.

13. *Id.*

14. *Id.*

15. Rosenlund, *supra* note 5, at 688 & n.33.

16. *Id.* at 689.

17. *Id.* at 690.

18. *Id.*

19. *See* H. COMM. ON THE JUDICIARY, 87TH CONG., COPYRIGHT LAW REVISION: REPORT OF THE REGISTER OF COPYRIGHTS ON THE GENERAL REVISION OF THE U.S. COPYRIGHT LAW, at IX, 33, 36 (Comm. Print 1961) [hereinafter REGISTER REP.]. The 1976 Act was preceded by years of studies, hearings, and debates beginning in 1955, when Congress authorized the Copyright Office to begin conducting studies leading to a general revision of U.S. copyright law. *Id.* at IX.

scholars, authors, and composers supported the recommendation,[20] strong protests from the recording industry eventually carried the day, and compulsory licensing remained.[21]

Section 115 of the 1976 Act,[22] which is still in effect and relatively unchanged today, did not radically alter the compulsory license structure created in the 1909 Act. In drafting the 1976 Act, Congress sought to achieve three major objectives regarding compulsory licensing laws: (1) conforming compulsory licensing procedure to trade practices, (2) properly compensating composers for use of their works, and (3) creating strong remedies for compulsory license violations.[23] Arguably, only the third objective was successfully met.[24] Failure to pay royalties due under a compulsory license constituted an act of infringement under the 1976 Act, whereas before it was merely a breach of contract.[25] Under the 1976 Act, the infringer could be subjected to an injunction, the impoundment and disposal of the infringing phonorecords and manufacturing equipment, and damages, as well as payment of costs and attorneys' fees.[26] Additionally, a person found to have infringed a copyright "willfully and for purposes of commercial advantage or private financial gain" could be subjected to criminal liability.[27]

The first two objectives were not adequately met,[28] likely having fallen victim to compromise.[29] With regard to the second objective, the statutory increase in the royalty rate can hardly be viewed as a successful effort to better compensate composers. The rate was increased from two cents per recording to the greater of two and three-fourths cents per song or one-half cent per minute of playing time.[30] This raise—the first in almost seventy inflationary years—has been called "illusory, both in relative and absolute terms."[31] Also, to the benefit of record companies,

20. *See, e.g.*, H. COMM. ON THE JUDICIARY, 88TH CONG., COPYRIGHT LAW REVISION PART 2: DISCUSSION AND COMMENTS ON REPORT OF THE REGISTER OF COPYRIGHTS ON THE GENERAL REVISION OF THE U.S. COPYRIGHT LAW 241, 291, 303, 371, 395 (Comm. Print 1963) [hereinafter REGISTER REP. PT. 2] (statements of American Guild of Authors and Composers, Herman Finkelstein, Harry G. Henn, Melville B. Nimmer, and Samuel Tannenbaum).

21. Rosenlund, *supra* note 5, at 693.

22. Copyright Act of 1976, Pub. L. No. 94-553, § 115, 90 Stat. 2541, 2561–62 (codified as amended at 17 U.S.C. § 115 (2000 & Supp. V 2005)).

23. *See* H. COMM. ON THE JUDICIARY, 89TH CONG., COPYRIGHT LAW REVISION PART 6: SUPPLEMENTARY REPORT OF THE REGISTER OF COPYRIGHTS ON THE GENERAL REVISION OF THE U.S. COPYRIGHT LAW: 1965 REVISION BILL 53 (Comm. Print 1965).

24. Rosenlund, *supra* note 5, at 701.

25. *Compare* § 115 (c)(4), 90 Stat. at 2562, *and* § 501(a), 90 Stat. at 2584 (codified as amended at 17 U.S.C. § 501(a) (2000 & Supp. 2005)), *with supra* notes 10–16 and accompanying text (discussing contractual relationships formed between composers and compulsory licensees under 1909 Act).

26. §§ 502–505, 90 Stat. at 2584–86.

27. § 506, 90 Stat. at 2586.

28. *See* Rosenlund, *supra* note 5, at 701.

29. *See* Jessica D. Litman, *Copyright, Compromise, and Legislative History*, 72 CORNELL L. REV. 857, 885 (1987) ("[A]uthors' representatives reluctantly agreed to proliferation of the compulsory license device and its restriction of copyright owners' exclusive rights.").

30. § 115(c)(2), 90 Stat. at 2562.

31. Rosenlund, *supra* note 5, at 702.

royalties became due only on phonorecords "made and distributed" rather than on all phonorecords manufactured, as was previously the case under the 1909 Act.[32]

In trying to achieve the first objective of conforming compulsory licensing procedures to industry practices, Congress lessened the burden of invoking the compulsory license. The 1976 Act removed the requirement that the copyright owner file a notice of use, because the provision was not considered to serve any useful purpose.[33] Also, the licensee needed only to submit notice to the copyright owner and was no longer required to file a notice with the Copyright Office.[34] Additional time was provided for notifying the copyright owner to reflect the industry practice of recording the song first and obtaining the license second.[35]

These changes in licensing procedures have had little practical effect on the music industry: record companies still almost never invoke the compulsory license under the 1976 Act.[36] Labels find the monthly accounting provisions too burdensome and copyright owners prefer direct licenses rather than going through the Copyright Office.[37] The 1976 Act ultimately gave additional leverage to record companies because copyright owners knew that if direct negotiations failed, record labels could now invoke a less burdensome compulsory license than was previously available under the 1909 Act.

C. Developments Since the 1976 Act

The compulsory licensing structure has not changed substantially since the 1976 Act went into effect. In accordance with the Act, royalty rates were subject to review and modification by the Copyright Royalty Tribunal[38] in 1980, 1987, and then every ten years thereafter.[39] The rate

32. § 115(c)(1), 90 Stat. at 2561–62. For the purpose of determining royalties, "a phonorecord is considered 'distributed' if the person exercising the compulsory license has voluntarily and permanently parted with its possession." § 115(c)(2), 90 Stat. at 2562.

33. Rosenlund, *supra* note 5, at 695–96.

34. § 115(b)(1), 90 Stat. at 2561.

35. *See id.*; *see also* Rosenlund, *supra* note 5, at 696.

36. DONALD S. PASSMAN, ALL YOU NEED TO KNOW ABOUT THE MUSIC BUSINESS 213–14 (2000).

37. *Id.*

38. The Copyright Royalty Tribunal was established and guided by sections 801–810 of the 1976 Act. It was replaced by the Copyright Arbitration Royalty Panel (CARP) in 1993, which was itself later replaced by a system of three Copyright Royalty Judges. *See* U.S. Copyright Office, Licensing and CARP Information, http://www.copyright.gov/carp/index.html#carp (last visited Oct. 9, 2007). The Copyright Royalty Judges review compulsory mechanical royalty rates upon receipt of a petition to do so, which can be filed every fifth year beginning in 2006. Copyright Royalty and Distribution Reform Act of 2004, Pub. L. No. 108-419, § 3(a), 118 Stat. 2341, 2360 (codified as amended at 17 U.S.C. § 804 (2000 & Supp. V 2005)).

39. Copyright Act of 1976, Pub. L. No. 94-553, §§ 801(b)(1), 804(a), 90 Stat. 2541, 2594–95, 2597.

is currently set at 9.1 cents per song, effective through December 31, 2007.[40]

The music industry, on the other hand, has changed tremendously in the years following the 1976 Act. Developing technology has brought about "new formats, new business models, new revenue sources, new abilities for consumers to control their listening, and more places and more ways for people to find a broader array of music."[41] These new technologies and business models in the digital age include digital audio tapes, compact discs, download services (such as Apple's iTunes), satellite radio, streaming web radio stations, hybrid offerings,[42] kiosks,[43] and cell phone ringtones.[44] New problems have accompanied these new technologies, with piracy chief among them. Piecemeal legislation amending the copyright laws has been adopted in response.

When manufacturers announced the advent of digital audio tape technology offering the ability to record long-playing albums with virtually no loss in fidelity, wars between manufacturers and record companies led to the passage of the Audio Home Recording Act of 1992.[45] This compromise legislation amended the Copyright Act to provide for payment of royalties by manufacturers and importers of digital audio recording devices or recording media.[46] It also provided that noncommercial home recording by consumers was not an actionable offense.[47]

When technology made it possible for direct delivery of music in a digital format, Congress responded to concerns that these methods would supplant the market for physical products by creating a new exclusive right for copyright holders: the right to perform sound recordings publicly by means of a digital audio transmission.[48] The Digital Performance Right in Sound Recordings Act of 1995 (DPRA)[49] was created "to ensure that performing artists, record companies and others whose liveli-

40. *See* U.S. COPYRIGHT OFFICE, DOCUMENT M-200A, THE COPYRIGHT ROYALTY RATES: SECTION 115, THE MECHANICAL LICENSE (1998), *available at* http://www.copyright.gov/carp/m200a.pdf.

41. *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. 32 (2006) [hereinafter *SIRA Hearing*] (statement of Cary H. Sherman, President, Recording Industry Association of America, Inc.).

42. Hybrid offerings are defined *infra* at note 71.

43. Music kiosks are vending terminals located in retail and public locations that allow consumers to walk up, preview songs, create mixes of songs, and burn them to CDs within minutes. *See, e.g.*, Storefront Operating System, Overview, http://www.storefront.com/music_kiosk.html (last visited Oct. 9, 2007).

44. For a discussion regarding ringtones, see *infra* Part III.B.1.b.

45. 2 MELVILLE B. NIMMER & DAVID NIMMER, NIMMER ON COPYRIGHT §8B.01[A]–[C] (2007).

46. Audio Home Recording Act of 1992, Pub. L. No. 102-563, §§ 1003–1007, 106 Stat. 4237 (codified as amended at 17 U.S.C. §§ 1003–1007 (2000 & Supp. V 2005)).

47. *Id.* § 1008 (codified at 17 U.S.C. § 1008 (2000)).

48. 17 U.S.C. § 106(6) (2000 & Supp. V 2005); 2 NIMMER & NIMMER, *supra* note 45, § 8.21[A]–[B].

49. Digital Performance Right in Sound Recordings Act of 1995, Pub. L. No. 104-39, 109 Stat. 336.

hood depends upon effective copyright protection for sound recordings, will be protected as new technologies affect the ways in which their creative works are used."[50] Rather than a straightforward blanket performance right, however, DPRA represents a compromise of competing interests that is "riddled with exceptions and benefits."[51] DPRA was amended by the Digital Millennium Copyright Act[52] and again by the Small Webcaster Settlement Act of 2002.[53] Together, these amendments made statutory licenses available for internet radio stations and small webcasters.[54]

D. The Section 115 Reform Act

In June 2006, a congressional subcommittee drafted the Section 115 Reform Act (SIRA) to address the compulsory licensing system in light of new technologies for digital delivery of music.[55] This bill was introduced in the House Judiciary Committee's Subcommittee on Courts, the Internet, and Intellectual Property on June 8, 2006, and was reported unanimously and favorably to the full committee.[56] It was subsequently combined with two other measures in the Copyright Modernization Act of 2006.[57] However, after more than two years of work on the bill, it was derailed one day before its scheduled markup session.[58] Insider sources cited objections by the National Association of Broadcasters; an anonymous letter criticizing SIRA that circulated among the songwriting, recording artist, and publishing communities; and the proximity of the scheduled markup to the beginning of the 2006 election campaign as factors contributing to the bill's failure to escape committee.[59] SIRA never made it to the floor of the 109th Congress, and it appears unlikely that any such bill will pass in 2008—a major election year.[60]

50. S. REP. NO. 104-128, at 10 (1995), *as reprinted in* 1995 U.S.C.C.A.N 356, 357.

51. 2 NIMMER & NIMMER, *supra* note 45, § 8.21[B].

52. Digital Millennium Copyright Act, Pub. L. No. 105-304, 112 Stat. 2860 (1998).

53. Small Webcaster Settlement Act of 2002, Pub. L. No. 107-321, 116 Stat. 2780.

54. 2 NIMMER & NIMMER, *supra* note 45, § 8.22[F][1][b].

55. *See* Section 115 Reform Act of 2006, H.R. 5553, 109th Cong. (2006).

56. *See Markup of H.R. 5553, the Section 115 Reform Act of 2006: Hearing on H.R. 5553 Before the Subcomm. on Courts, the Internet, and Intellectual Property of the H. Comm. on the Judiciary*, 109th Cong. (2006) [hereinafter *SIRA Markup*] (unpublished transcript on file with the University of Illinois Law Review).

57. *See* Copyright Modernization Act of 2006, H.R. 6052, 109th Cong. (2006). The bill combines the Section 115 Reform Act with the Orphan Works Act of 2006, H.R. 5439, 109th Cong. (2006), and the Intellectual Property Enhanced Criminal Enforcement Act of 2006, H.R. 5921, 109th Cong. (2006).

58. Susan Butler, *Copyright Reform Bill Derailed; Broadcaster Objections, Music Group Delays Crimp Legislation*, BILLBOARD, Oct. 21, 2006, at 24.

59. *Id.*

60. Susan Butler, *Congressional Priorities: Webcasters, Artists, Publishers Unlikely to See Changes Soon*, BILLBOARD, Sept. 22, 2007, at 19.

The primary purpose of SIRA was to establish a blanket licensing system for DPDs.[61] In particular, the bill would have allowed record companies, download services, cell-phone companies, and other providers to clear the rights to entire catalogs of musical compositions.[62] Under current copyright laws, digital services and record companies must secure a mechanical license for each musical composition manufactured and sold, whether through tangible media such as compact discs or through DPDs.[63] These licenses must be obtained directly from copyright holders, through the Harry Fox Agency,[64] or through the Copyright Office in accordance with § 115's compulsory licensing procedures.[65]

Digital transmissions not recognized as DPDs[66] are ineligible for compulsory licensing under § 115.[67] The only exclusive rights subject to compulsory licensing are the rights to *make* and to *distribute* phonorecords.[68] The right to perform a work publicly by a digital transmission does not implicate § 115, although § 114 provides a separate statutory license for noninteractive streaming.[69] SIRA sought to clarify which categories of technologies are subject to compulsory licensing with the proposed blanket license applying to "full downloads, limited downloads, interactive streams, and any other form constituting a digital phonorecord delivery or hybrid offering."[70] Each of the aforementioned terms is defined in the proposed amendment.[71]

61. The stated purpose of House Bill 5553 is "[t]o amend section 115 of title 17, United States Code, to provide for licensing of digital delivery of musical works, and for other purposes." Section 115 Reform Act of 2006, H.R. 5553, 109th Cong. (2006); *see also* Susan Butler, *Legislation Landmark: Could a Bill that Just Cleared Subcommittee Cure All Your Licensing Woes?*, BILLBOARD, June 24, 2006, at 9. For a definition of digital phonorecord delivery, see *infra* note 66.

62. *See* H.R. 5553.

63. *See* discussion *supra* Part II.A.

64. The Harry Fox Agency (HFA) was established by the National Music Publisher's Association to "act as an information source, clearinghouse, and monitoring service for licensing musical copyrights." Harry Fox Agency, About HFA, http://www.harryfox.com/public/HFAHome.jsp (last visited Oct. 9, 2007). Although not all publishers are represented by HFA, HFA is responsible for licensing most of the mechanical and digital uses of musical compositions in the United States for CDs and digital services. *Id.*

65. *See* 17 U.S.C. § 115(b)(1) (2000).

66. A "digital phonorecord delivery" is defined in § 115:

> each individual delivery of a phonorecord by digital transmission of a 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.

Id. § 115(d).

67. *See id.* § 115(c)(3)(A).

68. *See id.* § 115.

69. *See id.* § 114(d)(2). Whether a particular method of music delivery falls within the scope of § 115 can have a profound effect on the music industry. *See, e.g.*, discussion *infra* Part III.B.1.b (discussing ringtones).

70. H.R. 5553, 109th Cong. § 2 (2006) (proposing codification at 17 U.S.C. § 115(e)(1)(A)).

71. A "full download" is "a digital phonorecord delivery of a sound recording of a musical work that is not limited in availability for listening by the end user either to a period of time or a number of

SIRA, as proposed, provides that the Register of Copyrights shall empower a general designated agent to be responsible for mechanical licensing and collection and distribution of royalties.[72] If some form of the act passes, the industry expects the Harry Fox Agency (a nongovernment agency that already licenses most of the mechanical and digital uses of musical compositions in the United States) to serve in this role.[73] The Register of Copyrights would also certify additional designated agents if the entity desiring certification can demonstrate that it holds at least a fifteen percent share of the music publishing market and is capable of performing the required functions of a designated agent.[74]

Another hotly contested aspect of SIRA concerns "incidental" reproductions, which include cached, network, and RAM buffer reproductions.[75] Any technology that requires copies incidental to the one that actually reaches the end user would necessitate a license for the incidental copy as well.[76] Although this incidental copy could be obtained royalty free in many cases, any service provider "that takes affirmative steps to authorize, enable, cause, or induce the making of reproductions of musical works by or for end users that are accessible by those end users for future listening" would not be eligible for the royalty-free license.[77] This would include essentially any provider that manufactures compatible devices with recording functionality.

The application of SIRA to incidental DPDs garners strong opposition from some major industry players. Satellite radio and digital cable providers vehemently oppose the bill due to the requirements that incidental copies of songs would require additional licensing.[78] These re-

times the sound recording can be played." *Id.* (proposing codification at 17 U.S.C. § 115(e)(14)(E)). A "limited download" is "a digital phonorecord delivery of a sound recording of a musical work that is only available for listening for a definite period of time (including a period of time defined by ongoing subscription payments made by an end user); or a specified number of times." *Id.* (proposing codification at 17 U.S.C. § 115(e)(14)(I)). An "interactive stream" is

> a stream of a sound recording of a musical work that does not qualify for a statutory license under section 114(d)(2) with respect to the sound recording embodied therein; and . . . includes a stream of a particular sound recording of a musical work that an end user has selected, and is transmitted to such end user, to listen to at or substantially at the time of making such selection or at some future time, whether or not as a part of a program specially created for the end user.

Id. (proposing codification at 17 U.S.C. § 115(e)(14)(G)). A "hybrid offering" is

> a reproduction or distribution of a phonorecord in physical form subject to a compulsory license under this section where a digital transmission of data by or under the authority of the licensee is required to render the sound recording embodied on the phonorecord audible to the end user or to enable the continued rendering of the sound recording after a finite period of time or a specified number of times rendered; or the phonorecord is made by or under the authority of the licensee at the request of a user for distribution to that user or the user's designee.

Id. (proposing codification at 17 U.S.C. § 115(e)(14)(F)).

72. *Id.* (proposing codification at 17 U.S.C. § 115(e)(9)(B)).

73. Butler, *supra* note 61. For information regarding the Harry Fox Agency see *supra* note 64.

74. H.R. 5553 § 2 (proposing codification at 17 U.S.C. § 115(e)(9)(C)).

75. *Id.* (proposing codification at 17 U.S.C. § 115(e)(1)(A), 115(e)(1)(B)(iii)).

76. *Id.* (proposing codification at 17 U.S.C. § 115(e)(3)).

77. *Id.* (proposing codification at 17 U.S.C. § 115(e)(3)(C)).

78. Although radio broadcasters and webcasters may take this license royalty free, satellite radio and any other service "that takes affirmative steps to authorize, enable, cause, or induce the making of

quirements also find strong disfavor with consumer groups such as the Electronic Frontier Foundation.[79] While opposition from these groups likely contributed significantly to the bill's failure to escape subcommittee and may serve as a continuing obstacle to future consideration, these provisions will not be discussed in depth in this note. Instead, the following analysis focuses on the proposed blanket license and general justifications for compulsory licensing.

III. ANALYSIS

SIRA was supposed to "begin the process of bringing the music industry, a multibillion-dollar business, into the digital age."[80] Emphasis was placed on providing a means to offer a full range of music to consumers through legal music services.[81] The bill was also intended to benefit digital music providers, retailers, and songwriters.[82] Section A of this Part will analyze SIRA in terms of its effects on each of these aforementioned groups, paying particular attention to the opposing viewpoints of each group. In light of these opposing viewpoints, Section B will then discuss whether the compulsory licensing system is justified in the context of today's music business.

A. SIRA: Support and Opposition

Although the music industry as a whole generally agrees that the compulsory licensing system is in need of reform, individual interest groups disagree about key aspects of the proposed legislation. In general, a blanket compulsory licensing scheme is supported by consumers, digital music providers, music publishers, and songwriters. Such a scheme, however, is generally opposed by the recording industry. The advantages or disadvantages such a system would provide to each group are discussed below.

reproduction of musical works by or for end users" for future listening may not obtain the royalty-free license. *See* H.R. 5553 § 2 (proposing codification at 17 U.S.C. § 115(e)(3)(C)).

79. The Electronic Frontier Foundation (EFF) is a non-profit group dedicated to confronting issues by defending free speech, privacy, innovation, and consumer rights in the networked world. Elec. Frontier Found., About EFF, http://www.eff.org/about (last visited Oct. 9, 2007). For a letter expressing the opposing views of EFF, the aforementioned satellite and digital cable providers, and various other industry groups, see Letter from Elec. Frontier Found. et al. to Lamar Smith, Chairman, Subcomm. on Courts, Intellectual Prop. & the Internet, and Howard Berman, Ranking Member, Subcomm. on Courts, Intellectual Prop. & the Internet (June 6, 2006), *available at* http://www.eff.org/IP/legislation/letter_on_draft_SIRA.pdf.

80. *SIRA Markup*, *supra* note 56 (statement of Rep. Lamar Smith, Chairman, Subcomm. on Courts, the Internet, and Intellectual Property).

81. *Id.*

82. *Id.*; *see also* David Israelite & Jonathan Potter, Commentary, *SIRA Provides Framework for Digital Music Future*, BILLBOARD, July 29, 2006, at 4.

1. Consumers and Digital Music Providers

While introducing the SIRA bill in subcommittee, Representative Smith stated, "No longer will licensing issues limit services like iTunes, Real, Yahoo and others from offering consumers what they want when they want it."[83] The policy considerations underlying the licensing of musical compositions appear to have changed little in the past one hundred years: "Music licensing reform is necessary to pay artists what they are due and to make legal copies of all music available to every consumer."[84] The fundamental utilitarian goal of intellectual property legislation in the United States has always been to "promote the Progress of Science and useful Arts"[85] by ensuring public access to intellectual creation while providing sufficient incentive for the creation of new works.[86] To the extent that music is not readily available to every consumer, Congress seems eager to remedy the situation while still maintaining adequate incentive for the creation of new compositions and recordings.[87]

The primary advantage of the blanket license proposed by SIRA is that it would simplify the process of clearing rights necessary for DPDs. The appeal to digital music providers is obvious: continued access to musical compositions but with greater ease in obtaining and administering licenses. Additionally, digital music providers would be granted access to works that copyright owners have until now refused to license. Certain uses of music do not fall directly within the terms of § 115 and thus have not been subject to compulsory licenses.[88] SIRA would broaden this coverage. A blanket licensing scheme unquestionably benefits many digital music providers so long as the statutory rate does not greatly exceed the rate providers are able to negotiate in the marketplace.

In light of these advantages to providers, it is easy to see how such a system could benefit consumers as well. With DPDs on the rise and record sales in decline, more and more consumers are getting music from digital music providers.[89] If providers are given unhindered access to musical compositions, they can consequently offer a larger selection of music to the consuming public. Easier access to larger catalogs of music may result in significant decreases in piracy. Many in the industry feel that piracy is motivated primarily by consumer desires to have easy ac-

83. *SIRA Markup*, *supra* note 56.

84. *Id.*

85. U.S. CONST. art. I, § 8, cl. 8.

86. JULIE E. COHEN ET AL., COPYRIGHT IN A GLOBAL INFORMATION ECONOMY 7 (2d ed. 2006) ("Copyright law exists to provide a marketable right for the creators and distributors of copyrighted works, which in turn creates an incentive for production and dissemination of new works.").

87. *See SIRA Hearing*, *supra* note 41, at 56 (statement of U.S. Copyright Office) ("The most critical and time-sensitive issue is the current unavailability of an efficient and reliable mechanism whereby legitimate music services are able to clear all of the rights they need to make large numbers of musical works quickly available by an ever-evolving number of digital means while ensuring that the copyright holders are fairly compensated.").

88. *See id.* at 55.

89. *See* discussion *infra* Part III.B.3.

cess to whatever they want whenever they want it, rather than by an unwillingness to pay for music.[90] Although use of actual sound recordings would still require licenses from record companies, composers and publishers would no longer stand between consumers and legal DPDs.

2. Composers and Publishers

Although the publishing community advocates the elimination of compulsory mechanical licensing,[91] it has stated that until Congress is ready to repeal compulsory licensing, it will support § 115 reform that would include a blanket licensing scheme for digital music services.[92] Music publishers support SIRA because it attempts to resolve two critical problems that exist under current law: (1) the fact that interactive streaming is not clearly classified as a digital phonorecord delivery that is licensable under § 115, and (2) the present ability of record companies to serve as "middlemen or bankers when the digital service provider can take a license and pay the music publisher directly."[93]

The songwriting community is generally supportive as well. According to testimony from Rick Carnes, President of the Songwriters Guild of America (SGA), songwriters are cognizant of the record label "gatekeeper" problem and support efforts to eliminate it.[94] Additional songwriter concerns pertain to the governance of the general designated agent[95] and licenses for server copies.[96]

At least one entertainment lawyer, Wallace Collins, recommends that composers and publishers strongly oppose the legislation until their expressed concerns are addressed.[97] Collins fears that "the giant cellular companies and other digital licensees with lobbying muscle in Washington, DC, could strong-arm Congress into enacting legislation that strips control of property rights from songwriters . . . under the guise of simpli-

90. *See SIRA Markup*, *supra* note 56 (statement of Rep. Rick Boucher, Member, Subcomm. on Courts, the Internet, and Intellectual Property) ("There are some studies that show that the music-consuming public values the availability of a large inventory and the assurance of a quality download which the lawful services can offer more than they value the price of the service itself.").

91. *See SIRA Hearing*, *supra* note 41, at 6 (testimony of David M. Israelite, President and CEO, National Music Publishers' Association).

92. *Id.*

93. *Id.* at 12–13 (statement of David M. Israelite, President and CEO, National Music Publishers' Association).

94. *See id.* at 20 (testimony of Rick Carnes, President, Songwriters Guild of America).

95. The SGA wants a statutory provision mandating that the general designated agent shall be governed by a board of directors, which would include at least four music publishing representatives and one representative with a fiduciary duty to the songwriting community. *Id.* at 25 (statement of Rick Carnes, President, Songwriters Guild of America).

96. Regarding incidental copies, the SGA feels that server copies are undervalued and should be distinguished from those copies that are truly incidental. *Id.* at 26–27.

97. *See* Wallace Collins, Commentary, *Proposed Digital-Music Licensing Legislation Presents Problems for Songwriters, Publishers*, ENT. L. & FIN., Aug. 2006, at 1, 1.

fying the business model in order to make licensing digital rights easier and less costly for themselves."[98]

3. Recording Companies

The primary opposition to SIRA's proposed blanket licensing comes from record companies, which have struggled to adapt to the changing technologies and consumer demands of the music industry. Even with digital sales almost doubling in 2006, the overall revenue of record companies has continued to decline.[99] With the rise of illegal downloading sites such as Napster and Grokster, sales by record companies dropped by as much as seven percent in both 2002 and 2003 and have continued downward.[100] Compact disc sales for the first quarter of 2007 were down twenty percent from the previous year.[101] The rise in digital music sales is simply not enough to offset the decline in CD sales.[102] Even when sales of ringtones, subscription services, and other "ancillary" goods are factored in, sales in the first quarter of 2007 were down as much as nine percent compared to the previous year.[103] Aided by new technology, piracy has "led to declining sales, deprived the public of creative new music, and cost thousands of jobs."[104] Record companies have struggled to adapt, a fact that the Recording Industry Association of America (RIAA)[105] attributes partly to frustrations with a mechanical licensing system that "does not let them respond quickly or efficiently to marketplace demands."[106]

Though in favor of compulsory licensing, the RIAA identifies several problems with the state of the industry under the current version of § 115, which it calls "a relic of a different time."[107] First, no process is in place for timely resolution of questions of law regarding the licensing process for new technologies, including online music services, ringtones,[108] DVDs, DualDiscs, locked content, music videos, and hybrid of-

98. *Id.* at 6.

99. Katie Allen, *Still Waiting: Record Labels Long for Digital to Rescue Dwindling Sales: Downloads Reach $2bn Last Year Yet Market in Decline: Mobiles and Broadband Access May Reverse Trend*, GUARDIAN, Jan. 18, 2007, at 27. Downloads to cell phones, computers, and personal digital music players accounted for ten percent of global sales last year. *Id.*

100. *Id.*

101. Ethan Smith, *Sales of Music, Long in Decline, Plunge Sharply*, WALL ST. J., Mar. 21, 2007, at A1.

102. *Id.*

103. *Id.*

104. *SIRA Hearing*, *supra* note 41.

105. The RIAA is the trade group representing the U.S. recording industry. *See* Recording Indus. Ass'n of Am., Who We Are, http://www.riaa.com/aboutus.php (last visited Oct. 9, 2007). "Its mission is to foster a business and legal climate that supports and promotes [its] members' creative and financial vitality." *Id.* Its members "create, manufacture, and/or distribute approximately 90% of all legitimate sound recordings produced and sold in the United States." *Id.*

106. *SIRA Hearing*, *supra* note 41.

107. *Id.* at 33.

108. The issue regarding ringtones has since been resolved. *See* discussion *infra* Part III.B.1.b.

ferings that combine physical and online elements.[109] Second, the current mechanical licensing system generates high transaction costs and enormous waste.[110] Currently, record companies must obtain mechanical licenses on a work-by-work, configuration-by-configuration basis. With multiple songwriters contributing per album and the frequency of split ownership, record labels often must deal with dozens of copyright owners to clear the rights for a single album.[111] Licensors and licensees maintain overlapping redundant databases at their own expense.[112] This system, the RIAA argues, makes little sense when a large number of tracks needs to be cleared and the return from any one track is often low.[113] Third, the "one-size-fits-all cents rate royalty" no longer works in light of the broad range of products on the market today.[114] This problem is aggravated by uncertainty as to exactly which products fall within the scope of the compulsory license provisions.

The RIAA does not view SIRA as a bill that sufficiently addresses the aforementioned problems. It claims that online download and subscription music business only accounts for 5.3% of total record shipments and that SIRA does not address the remaining 95%.[115] In addition, it asserts that SIRA would prohibit record companies from licensing their own recordings for use in their own online promotional activities.[116] Essentially, it appears the RIAA is complaining that a bill intended to address concerns particular to DPDs does not provide additional benefit to the record companies' brick-and-mortar business models. The National Music Publishers Association finds RIAA's concerns regarding physical products to be unfounded because "[u]nlike digital music providers, record labels are not in the position of suddenly needing licenses for a million different CDs."[117]

The RIAA's remaining objections to SIRA express its dissatisfaction that the proposed legislation would essentially strip record companies of the position they have held in the music industry for years. As discussed in Part II.B above, record companies enjoy a highly advantageous negotiating position under current copyright laws with regard to mechanical licenses. In addition to negotiating mechanical licenses below the statutory royalty cap, record companies benefit in DPD licensing deals. For example, digital download services such as Apple's iTunes currently obtain a complete product with all necessary rights through the record companies, which handle the responsibility of obtaining all neces-

109. *SIRA Hearing*, *supra* note 41, at 33.
110. *Id.*
111. *Id.*
112. *Id.* at 33–34.
113. *Id.* at 33.
114. *Id.* at 34.
115. *Id.* at 35.
116. *Id.* at 36.
117. *Id.* at 13 (statement of David M. Israelite, President and CEO, National Music Publishers' Association).

sary mechanical licenses.[118] Record companies are free to negotiate any rate for the sound recordings or decline to license them at all. Compensation for composers and publishers is thus dependent on the record companies' negotiations with digital providers. The record labels presently enjoy this role as "gatekeepers" of copyrighted musical compositions, and SIRA threatens this current position within the industry.[119]

The RIAA also complains that SIRA would nullify existing license agreements negotiated with copyright owners in the current marketplace and place unfair administrative burdens and costs on record companies.[120] This is a legitimate concern; any drastic comprehensive copyright legislation will necessitate a phase-in period.

The RIAA has suggested alternate proposals to SIRA. It requests first that rather than applying only to DPDs, the blanket license should extend to all products and services covered by mechanical compulsory licenses, including physical products (i.e., CDs) and hybrids.[121] Failing this, it would prefer that the blanket license system be limited only to subscription services, arguing that the download business works well under the present system.[122] Ultimately, RIAA views SIRA as "at best a gesture—and at worst a money grab—rather than a real solution."[123]

In light of the opposing interests of groups within the music industry and the legislature's penchant for letting the industry work out differences through compromise legislation,[124] reform seems unlikely to occur anytime soon. Congress would be better served to evaluate the legitimacy of the system as a whole, rather than continue along the path of applying Band-aid fixes to a system created in a time when the music industry was vastly different from the industry that exists today.

B. Is Compulsory Licensing Justified?

Congress is still attempting to strike the appropriate balance between granting public access to creative works and providing an incentive for the creation of those works. This goal was expressed in 1909 when mechanical rights were first granted[125] and remains the primary goal of copyright law today. It also remains that the various industry players are unable to agree on the best method for achieving that optimum balance. Compulsory licensing was Congress's solution to this balancing problem when mechanical rights were granted in the 1909 Act. Although the mu-

118. *Id.* at 36 (statement of Cary H. Sherman, President, Recording Industry Association of America, Inc.).

119. *Id.* at 25–26 (statement of Rick Carnes, President, Songwriters Guild of America).

120. *Id.* at 37–39 (statement of Cary H. Sherman, President, Recording Industry Association of America, Inc.).

121. *Id.* at 39.

122. *Id.* at 40.

123. *Id.* at 42.

124. *See* discussion *infra* notes 133–34 and accompanying text.

125. *See* H.R. REP. NO. 60-2222, at 7 (1909).

sic business has changed dramatically, compulsory licensing has remained. This section evaluates the legitimacy and necessity of compulsory licensing in light of the current state of the music industry.

Although willing to work toward reform of the compulsory licensing system,[126] the music publishing community maintains the long-held position that the compulsory licensing regime under § 115 should be eliminated entirely.[127] Compulsory mechanical licensing has been debated since its inception; bills called for its elimination as early as 1925.[128] Compulsory licensing was "the most controversial issue in the 1909 Act,"[129] and discussion of whether to retain the provisions remained a major issue preceding enactment of the 1976 Act.[130] Many arguments were brought forth advocating its elimination, but the congressional committee ultimately concluded that a compulsory license system should be retained.[131]

The legislative history indicates that this decision was likely the result of intense lobbying efforts by the recording industry rather than any determination that compulsory licensing is a fundamentally necessary condition on the grant of mechanical rights to composers.[132] Beyond the normal lobbying inherent in most legislation, the 1976 Act "reflects an anomalous legislative process designed to force special interest groups to negotiate with one another"[133] and is "chock full of specific, heavily negotiated compromises."[134] This negotiation-centered approach is alive and well today as the process of drafting SIRA, and its failure to get out of subcommittee, demonstrate.[135]

The arguments for the elimination of compulsory licensing put forth while Congress was considering the 1976 Act are still largely relevant today. Those arguments were summarized—for purposes of rebutting them—by the RIAA in a statement advocating retention of compulsory licensing in the 1976 Act:

> (a) Copyright should be exclusive in the field of recording rights just as it is in every other field where Congress has seen fit to grant copyright protection.

126. *See supra* Part III.A.2.

127. *SIRA Hearing*, *supra* note 41, at 6 (testimony of David M. Israelite, President and CEO, National Music Publishers' Association).

128. Theresa M. Bevilacqua, Note, Time to Say Good-Bye *to Madonna's* American Pie: *Why Mechanical Compulsory Licensing Should Be Put to Rest*, 19 CARDOZO ARTS & ENT. L.J. 285, 292 (2001).

129. H.R. REP. NO. 90-83, at 66 (1967).

130. *Id.*

131. *Id.* at 67.

132. *See* Bevilacqua, *supra* note 128, at 297.

133. Litman, *supra* note 29, at 862.

134. *Id.* at 859.

135. *See supra* Part II.D.

(b) The copyright proprietor cannot prevent the issuance of phonograph records containing arrangements of the copyrighted work that distort its character.

(c) Financially irresponsible phonograph record manufacturers are free to use copyrighted musical material and the copyright proprietor has no effective means for collecting royalties from them.

(d) The monopoly problem that impelled Congress to enact the compulsory license provisions in 1909 no longer exists.[136]

The remainder of this section will analyze each argument in turn with consideration given to the present state of the music industry.

1. All Copyrights Should Be Exclusive

Opponents of compulsory licensing argue that, like other authors afforded protection for their works, composers should enjoy the exclusive right to license their intellectual property for use by others. This argument is analyzed below in terms of fundamental fairness and in terms of economic fairness, using the relatively new market for cell phone ringtones as an illustration.

a. Is Compulsory Licensing Unconstitutional?

The Constitution provides that "Congress shall have the power . . . [t]o promote the Progress of Science and the useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries."[137] According to the Supreme Court, once an author publishes or authorizes the publication of a work, rights to further control that work are purely statutory.[138] Because these rights came from Congress, Congress can also take these rights away.

Some scholars have argued, however, that although copyrights are only valid insofar as they are provided for by legislation, the Constitution limits Congress to the grant of "exclusive" rights.[139] That is, Congress need not grant any right at all, but if it does, that right must be exclusive. The American Society of Composers, Authors and Publishers (ASCAP) put forth this argument during hearings preceding the 1976 Act.[140] The RIAA called this argument "purely philosophical" and denied that Con-

136. H. COMM. ON THE JUDICIARY, 88TH CONG., COPYRIGHT LAW REVISION PART 4: FURTHER DISCUSSIONS AND COMMENTS ON PRELIMINARY DRAFT FOR REVISED U.S. COPYRIGHT LAW 429 (Comm. Print 1964) [hereinafter REGISTER REP. PT. 4] (statement of Record Industry Association of America, Inc.).

137. U.S. CONST. art. I, § 8, cl. 8.

138. *See* Wheaton v. Peters, 33 U.S. (8 Pet.) 591, 656 (1834).

139. *See* 1 NIMMER & NIMMER, *supra* note 45, § 1.07.

140. REGISTER REP. PT. 2, *supra* note 20, at 61.

gress had any such limitations.[141] Historically, ASCAP's argument has not been well taken and it appears settled that the phrase "the exclusive right" is a grant of authority, not one of limitation.[142]

Compulsory licensing has also been critiqued on Fifth Amendment grounds.[143] The argument correctly identifies copyrights as property and suggests that denial of the owner's exclusive right in that property for public use constitutes a government taking.[144] By setting a ceiling on the price composers can negotiate in the free market, compulsory licensing fails to provide just compensation within the terms of the Fifth Amendment.[145] Although the argument has been raised by scholars and industry players,[146] it is not one that has been taken seriously by Congress or the courts.

Constitutionality aside, it remains that the owners of copyrights in musical compositions do not have the exclusive right to prevent others from using their work. To usurp this most fundamental of property rights goes against the primary function of copyright, which is "[i]n essence, . . . the right of an author to control the reproduction of his intellectual creation. . . . enabl[ing] him to prevent others from reproducing his individual expression without his consent."[147] Unlike writers, painters, and other creative artists, composers are not entitled to the exclusive control of their creations for the full copyright duration.[148] The composer alone is subject to "a mandatory non-negotiable contract where [he] is forced to give virtually unlimited use of his work in exchange for a rate he cannot determine because a ceiling is set by the legislature."[149] This large-scale usurpation of rights is fundamentally unfair to owners of copyrights in musical compositions.

b. The Market for Ringtones Highlights the Economic Unfairness of Compulsory Licensing

On October 16, 2006, the Register of Copyrights issued a memorandum opinion to resolve the dispute over whether a ringtone was a digital phonorecord delivery subject to compulsory licensing under the

141. REGISTER REP. PT. 4, *supra* note 136.

142. 1 NIMMER & NIMMER, *supra* note 45, §1.07.

143. The Fifth Amendment provides, in part, "nor shall private property be taken for public use, without just compensation." U.S. CONST. amend. V, § 4.

144. Bevilacqua, *supra* note 128, at 294.

145. *Id.*

146. *See*; REGISTER REP. PT. 2, *supra* note 20, at 62 (statement of Herman Finkelstein) ("If, in a given case, the public interest requires that a particular right in a copyright be made available in the public interest, it would seem to me, then, that the United States should have to take over that copyright under the laws of eminent domain."); Bevilacqua, *supra* note 128, at 294.

147. REGISTER REP., *supra* note 19, at 3.

148. Scott L. Bach, Note, *Music Recording, Publishing, and Compulsory Licenses: Toward a Consistent Copyright Law*, 14 HOFSTRA L. REV. 379, 386 (1986).

149. *See* Bevilacqua, *supra* note 128, at 299.

Copyright Act.[150] In a decision with broad implications, she decided in the affirmative.[151]

Ringtones have come to occupy a significant position within the music industry, with sales in the United States reaching $600 million in 2006.[152] Record labels now offer "mastertones," which are partial-copy excerpts of actual sound recordings.[153] Over 6.5 million mastertones are sold each week in the United States.[154] Ringtones have gone triple-platinum[155] and have topped Billboard singles charts.[156]

Because ringtones are now officially recognized as songs, rights to use a composition can be obtained in accordance with § 115.[157] Polyphonic ringtones[158] and mastertones typically have "retail[ed] between $1.99 and $2.99 per track."[159] Prior to the recent decision of the Register of Copyrights, ringtone providers negotiated voluntary licenses with the publishers of the musical work, generally paying ten percent of retail price or ten cents, whichever was greater.[160] Thus, for a ringtone that retailed at $2.99, the publisher typically collected thirty cents per sale.[161] Following the Register's decision, ringtone providers can now obtain compulsory licenses to use these songs for a mere 9.1 cents per sale of each ringtone.[162]

This decision highlights how compulsory licensing undermines free enterprise. For publishers that commanded market rate for their compositions, this decision could mean a significant drop in revenue—perhaps as much as $3 million per month for the entire publishing industry.[163] The Harry Fox Agency does not license ringtones, forcing companies wishing to use ringtones to obtain licenses directly from copyright owners

150. *In re* Mechanical and Digital Phonorecord Delivery Rate Adjustment Proceeding, 71 Fed. Reg. 64,303, 64,303 (Library of Congress Copyright Office Nov. 1, 2006) (final order).

151. Joseph Salvo & Campbell Austin, *Ringtones Copyright Decision: Music to Record-Firm Ears*, N.Y. L.J., Nov. 8, 2006, at 4.

152. News Release, Broadcast Music, Inc., *BMI Projects Downturn in 2007 Ringtone Sales* (Mar. 27, 2007), *available at* http://www.bmi.com/news/entry/534672. BMI predicts $550 million in retail ringtone sales for 2007. *Id.*

153. *In re* Mechanical and Digital Phonorecord Delivery Rate Adjustment Proceeding, 71 Fed. Reg. at 64,305.

154. *See* Salvo & Austin, *supra* note 151, at 4.

155. Rapper Chamillionare earned the first triple-platinum award on Billboard's Hot Ringtones chart for selling three million copies of a ringtone. *Id.*

156. In May 2005, a ringtone, the "Crazy Frog" rendition of the Beverly Hills Cop movie theme, bumped rock group Coldplay out of the top of the U.K. singles chart. *Id.*

157. *In re* Mechanical and Digital Phonorecord Delivery Rate Adjustment Proceeding, 71 Fed. Reg. at 64,307.

158. Polyphonic ringtones consist of both melody and harmony. They are synthesized and are not a portion of the actual recorded version of the song. *Id.* at 64,305.

159. Salvo & Austin, *supra* note 151, at 4.

160. *Id.*

161. *Id.*

162. *Id.*

163. Susan Butler, *Compulsory Considerations: Pondering Ringtone Ripple Effects*, BILLBOARD, Nov. 4, 2006, at 14.

or comply with the formal terms of § 115.[164] The requirements of § 115 no longer seem quite so burdensome, however, when a compulsory license permits acquiring the same work for a third of the former price.

The one-size-fits-all statutory rate fails to take into account the reality that not all composers are created equal. Individual composers have varying degrees of skill, accomplishment, and negotiating power.[165] What is fair for one composer may be inherently unfair for another.[166] Compulsory licenses "generalize[] the value of every composer's work at a single rate, ignoring individual achievement and barring free negotiation."[167] Furthermore, it is unfair to apply the same rate to all media. A fair rate to use a song on a CD may not be fair compensation for using that same song as a ringtone or providing access to it through an online subscription service.

The Copyright Royalty Board will determine compulsory license rates for a variety of media, including CDs, digital downloads, and ringtones in 2008.[168] Publishers and songwriters have urged the Royalty Board to retain the penny rate for mechanical licenses but increase it to the greater of 12.5 cents per song or 2.4 cents per minute of playing time, periodically adjusted for inflation.[169] They request a separate rate for permanent downloads that is higher than the mechanical rate (15 cents per song or 2.9 cents per minute).[170] For master ringtones, they desire the greater of (1) 15 percent of revenue, (2) 33.3 percent of the total content costs paid for licenses, or (3) 15 cents per ringtone.[171]

The RIAA, on the other hand, argues that current rates are too high. Pointing to the drop in CD prices, the increase in mechanical rates, and the fact that sales have been reduced drastically by piracy, the RIAA requests a rate of 7.8 percent of labels' wholesale revenue for each track, download, or ringtone, a system the RIAA suggests will provide greater flexibility with new formats.[172]

Arguments about appropriate rates for mechanical reproductions date back to the 1976 Act.[173] Owners of copyrights in musical compositions desire better compensation, yet record companies want to use their compositions at a lower cost. While considering the proper royalty rate to be set by the 1976 Act, the House Committee on the Judiciary recog-

164. *Id.*
165. Bach, *supra* note 148, at 398.
166. *Id.*
167. *Id.*
168. Susan Butler, *Destination Unknown: Lawyers Ponder DiMA, Apple Strategies*, BILLBOARD, Jan. 26, 2008, at 18.
169. Susan Butler, *Debate Over U.S. Compulsory License Rates Heats Up*, BILLBOARD, Dec. 16, 2006, at 16.
170. *Id.*
171. *Id.*
172. *Id.*; Susan Butler, *License Rate Debate: Publishers, Labels, Digital Media Make Their Cases*, BILLBOARD, Dec. 9, 2006, at 17.
173. *See* S. REP. NO. 94-473, at 91–94 (1975); H.R. REP. NO. 90-83, at 69–74 (1967).

nized that the statutory rate operates as a ceiling but still granted only a nominal increase to "widen the copyright owner's bargaining range without destroying the value of compulsory licensing to record producers."[174]

Congress appears unwilling to change its tune and upset the status quo. The recording industry has always operated under a system of compulsory licensing, and this system is certainly not without advantage. It allows producers to record a song first, knowing that they will be able to clear the rights later for a set rate. It provides economic predictability. It purports to pass savings on to consumers.[175] Whether this system is fundamentally necessary or is simply a matter of convenience for which the record labels have developed a sense of entitlement is debatable. The ringtone situation suggests that licensees are willing to pay higher prices to licensors when they do not have the leverage afforded by the statutory rate ceiling. This suggests that compulsory licensing is economically unfair to publishers and composers.

2. Distortion of Copyrighted Works

A compulsory license removes a composer's power to object to the recording of her song, raising concerns that the integrity of the original will be lost in subsequently recorded versions.[176] Section 115(a)(2) provides that "[a] compulsory license includes the privilege of making a musical arrangement of the work to the extent necessary to conform it to the style or manner of interpretation of the performance involved."[177] Notwithstanding concerns for the integrity of the original given these relatively light restrictions,[178] the only statutory limitation is that "the arrangement shall not change the basic melody or fundamental character of the work, and shall not be subject to protection as a derivative work."[179] The legislative history provides little clarification on what constitutes a change in the fundamental character of a work, stating only that the arrangement should be "reasonable" and not "distort, pervert or make a travesty of the work."[180] Unfortunately, neither statute nor judicial decision has sought to define what it means to "distort, pervert or make a travesty of" a copyrighted work.[181]

With little guidance regarding permissible adaptation of musical compositions, composers are virtually powerless to stop another from compromising the integrity of their works. So long as the maker of the subsequent recording complies with the terms of the compulsory license,

174. H.R. REP. NO. 90-83, at 74.
175. *See* S. REP. NO. 94-473, at 92–93; H.R. REP. NO. 90-83, at 71–72.
176. *See* Bevilacqua, *supra* note 128, at 302–06.
177. 17 U.S.C. § 115(a)(2) (2000).
178. *See* Bevilacqua, *supra* note 128, at 305.
179. 17 U.S.C. § 115(a)(2).
180. H.R. REP. NO. 94-1476, at 109 (1976).
181. *See* Bevilacqua, *supra* note 128, at 306.

a copyright offers no real protection or remedy other than 9.1 cents per recording in compensation to the composer.[182] The Berne Convention, an international agreement regarding copyright laws, protects an author's right "to object to any distortion, mutilation or other modification of, or other derogatory action in relation to, the said work, which would be prejudicial to his honor or reputation."[183] Most countries, including the United States, are parties to this agreement, but unfortunately for composers, the United States took a very minimalist approach toward complying with some of its terms.[184] Consequently, the Copyright Act grants such "moral rights" only to authors of visual works of art.[185] The Copyright Act does not afford composers similar rights to maintain the integrity of their creations. Rather, compulsory licensing removes the composer's ability to preemptively object to use of her works.

3. Piracy Problems

During hearings leading up to the 1976 Act, opponents of compulsory licensing argued that the system contributed to piracy of musical compositions by limiting liability to the statutory rate. Counsel for the Harry Fox Agency asserted that "not once" has a legitimate record company made use of the compulsory license.[186] Rather, "irresponsible outfits" used the compulsory license when publishers refused to grant them individual licenses.[187] Prior to 1972, there was no federal copyright protection for sound recordings.[188] Because no permission was necessary to use a sound recording, the concern at that time was that commercial pirates could copy and sell already-released recordings simply by paying the statutory rate of the underlying musical composition. In addition to retaining protection of sound recordings, the 1976 Act specifically provided that the statutory license is unavailable for duplication of phonorecords[189] and that failure to pay the statutory royalties constitutes an act of

182. *See* 17 U.S.C. § 115(c).

183. Berne Convention for the Protection of Literary and Artistic Works art. 6*bis*, Sep. 9, 1886, S. Treaty Doc. No. 99-27 (*as amended on* Sep. 28, 1979).

184. COHEN ET AL., *supra* note 86, at 409. There are currently 163 contracting countries to the Berne Convention. *See* World Intellectual Property Org., Treaties and Contracting Parties: Berne Convention, http://www.wipo.int/treaties/en/ShowResults.jsp?lang=en&treaty_id=15 (last visited Nov. 20, 2007).

185. *See* 17 U.S.C. § 106A.

186. H. COMM. ON THE JUDICIARY, 88TH CONG., COPYRIGHT LAW REVISION PART 3: DISCUSSION AND COMMENTS ON THE REPORT OF THE REGISTER OF COPYRIGHTS ON THE GENERAL REVISION OF THE U.S. COPYRIGHT LAW 216 (Comm. Print 1964) [hereinafter REGISTER REP. PT. 3] (statement of Julian Abeles).

187. *Id.*

188. 1 NIMMER & NIMMER, *supra* note 45, § 2.10[A][1] & n.16.

189. 17 U.S.C. § 115(a) ("A person may not obtain a compulsory license for use of the work in the making of phonorecords duplicating a sound recording fixed by another, unless: (i) such sound recording was fixed lawfully; and (ii) the making of the phonorecords was authorized by the owner of copyright in the sound recording . . . .").

infringement.[190] As a result of these changes, commercial-pirate record-pressing operations no longer pose the threat they once did.

Despite these developments, piracy remains a huge problem. The problem today exists in illegal downloading by consumers, not in the illegal duplication of phonorecords by commercial pirates. It is estimated that a billion songs are illegally acquired online every month.[191] If illegal downloading truly is motivated by a desire to have *easy* access to music more than a desire to have *free* access to music, the creation of a blanket license for musical compositions may deter piracy.[192] The National Music Publishers Association sees piracy as the biggest threat to the music industry and views SIRA as a means of allowing digital music providers to better compete with illegal networks that today offer a wider variety of music.[193] Even the RIAA, which generally opposes the proposed blanket license, concedes that greater access to new products and services may help deter piracy.[194]

4. Potential for Monopoly

The original grant of mechanical rights and the creation of the compulsory license came in response to monopoly concerns in the mechanical reproduction industry.[195] Fear of monopoly by a prominent manufacturer of piano rolls appeared to be the sole reason the compulsory license was ever created.[196] Later, prior to the 1976 Act, the Register of Copyrights observed that the compulsory license was no longer needed to protect the public from a monopoly in musical recordings and that no other public interest justified its retention.[197]

Although the prospect of a single company possessing mechanical licenses for the majority of publishers may have justified a fear of a monopoly in 1909, those concerns are simply not justified in today's industry, where record labels are the primary mechanical licensees. One manufacturer dominated the market for mechanical reproductions of music in the early 1900s.[198] Today the RIAA represents over 1500 record labels.[199] Many of these are actually sublabels of one of the major record companies; indeed, the "big four" music groups control approximately

190. *See* discussion *supra* Part II.B.

191. Smith, *supra* note 101, at A14.

192. *See supra* notes 89–90 and accompanying text.

193. Israelite & Potter, *supra* note 82, at 4.

194. *SIRA Hearing*, *supra* note 41, at 42 ("Without new products to excite consumers, we risk losing an entire generation of music lovers to piracy.").

195. REGISTER REP., *supra* note 19, at 33.

196. *Id*.

197. *Id.* at 35.

198. *See supra* note 9 and accompanying text.

199. *See* Recording Indus. Ass'n of Am., Distributed Labels of Recording Companies, http://www.riaa.com/aboutus.php?content_selector=aboutus_members (last visited Oct. 16, 2007) (listing 1633 record companies).

eighty percent of the United States music market.[200] However, although the majority of mechanical licenses may be in the hands of just four companies, "merely possessing monopoly power is not itself an antitrust violation."[201] The Sherman Act,[202] in its relative infancy when the compulsory licensing provisions were enacted, is now firmly entrenched in American jurisprudence. Record labels are certainly not entitled to unlawfully monopolize the music industry, but legitimate monopolization concerns can be addressed through antitrust laws. The Copyright Act is not the appropriate means to address these concerns. The Copyright Act effectively strips composers of their fundamental property rights out of fear that record labels—not the composers bound by the provisions—will violate the antitrust laws.[203]

The RIAA addressed the issue of monopolization in depth, prior to the enactment of the 1976 Act, positing that the elimination of compulsory licensing would present monopolistic tendencies, such as pressure toward vertical integration and potential holdout problems.[204] The RIAA also attempted to analogize recording rights to performing rights. It claimed that similar considerations justified the need for access to the two distinct rights and that the history of antitrust litigation associated with performing rights organizations justified the use of compulsory licensing to similarly restrain mechanical rights.[205]

This argument fails to consider the distinct differences between how recording and performing rights are granted and administered. In addition to the exclusive rights implicated when a record company wants to record another version of a previously released musical composition, composers have the exclusive right to perform their copyrighted works publicly.[206] This right is implicated whenever a composition is performed or transmitted to the public.[207] This includes—perhaps most importantly—radio broadcasts. Recognizing that it would be terribly inefficient, if not impossible, to negotiate individual licenses for every use of every musical composition, performing rights organizations (PROs) were created in the private sector to license compositions for public perform-

200. The "big four," which control rights to over seventy percent of the world's music, are Warner Music Group, EMI, Sony BMG, and Universal Music Group. Janet Whitman & Holly M. Sanders, *Jobs: You Can't Police Piracy*, N.Y. POST, Feb. 7, 2007, at 36.

201. United States v. Microsoft Corp., 253 F.3d 34, 51 (D.C. Cir. 2001).

202. Sherman Antitrust Act, ch. 647, 26 Stat. 209 (1890) (codified as amended at 15 U.S.C. §§ 1–7 (2000 & Supp. 2005)).

203. *See* REGISTER REP. PT. 2, *supra* note 20. "[H]ere you find the monopolist has a right to exact from the individual author a compulsory license." *Id.* at 62 (statement of Herman Finkelstein). "[Congress] penalized the author and composer and publisher of music because the Aeolian Co. had violated the antitrust laws. . . . [T]he author, the composer, and the publisher, as well as the record company, ought to be free to do business in the American fashion, on the basis of fair competition, not upon the basis of the statutory appropriation of property." *Id.* at 64 (statement of John Schulman).

204. REGISTER REP. PT. 4, *supra* note 136, at 437.

205. *See id.* at 440–44.

206. 17 U.S.C. § 106(4) (2000 & Supp. V 2005).

207. *See id.* § 101.

ance and pay royalties to their owners.[208] Artists voluntarily enter into agreements with PROs.[209] The PROs issue blanket licenses to entities, such as radio stations, wishing to perform the works publicly.[210] A blanket license entitles the licensee to perform publicly anything in that particular PRO's catalog for a specified term.[211] The PROs then track the performances of the works in their catalogs and distribute royalties based on the number of times a composer's works are performed.[212]

PROs are no strangers to antitrust litigation. As a result of numerous allegations of anticompetitive conduct beginning in 1934, the activities of ASCAP[213] and BMI[214] are substantially controlled by consent decrees.[215] Under the terms of these decrees, PROs may not receive exclusive licenses from their members, who retain the right to license public performances individually.[216] PROs are prohibited from insisting on blanket licenses, and any user is free to negotiate with individual composers rather than obtain blanket licenses from PROs.[217] If acting within the terms of these decrees, PROs do not violate the Sherman Act merely by setting the prices of licenses for musical compositions.[218]

Thus, with a little guidance from the judiciary, PROs are able to operate in the private sector without violating antitrust laws. This system for managing performance rights serves a similar end as compulsory licensing. Both provide a means for those who wish to use a composition to do so without the express consent of the composer, as well as a means for ultimately compensating the composer. However, PROs are distinguishable for at least two important reasons: (1) performing rights are negotiated completely within the private sector, and (2) composers can effectively object to uses of their music by not registering their work with a PRO. The different treatment between the two licensing systems has been justified in part by the idea that radio stations and performers require immediate access to compositions, without the delay of negotiations with individual composers.[219] Recording rights, by their nature, can be negotiated on an individual basis.[220]

208. PASSMAN, *supra* note 36, at 233. There are three major PROs in the United States: the American Society of Composers, Authors, and Publishers (ASCAP); Broadcast Music Incorporated (BMI); and SESAC (which originally stood for the Society of European State Authors and Composers). *Id.*

209. *See id.*

210. *Id.* at 234.

211. *Id.*

212. *Id.* at 234–36.

213. American Society of Composers, Authors, and Publishers. *See supra* note 208 and accompanying text.

214. Broadcast Music Incorporated. *See supra* note 208 and accompanying text.

215. Broad. Music, Inc. v. Columbia Broad. Sys., Inc., 441 U.S. 1, 10–11 (1979).

216. *Id.*

217. *Id.*

218. *Id.* at 24.

219. *Id.* at 22 & n.37 ("The disk-jockey's itchy fingers and the bandleader's restive baton, it is said, cannot wait for contracts to be drawn with [individual publishers and authors]." (quoting Sigmund

As new technologies have begun to blur the lines between performance and reproduction, this difference in treatment is less justifiable. New music delivery models require immediate access to a vast array of musical compositions without being hindered by the process of prior negotiation. Congress's proposed response to this problem is to create another statutory license.[221] If Congress would leave the licensing of music to the private sector, publishers could negotiate mechanical licenses on behalf of composers who have voluntarily assigned these rights. Alternatively, elimination of compulsory licensing may result in the development of separate mechanical-rights organizations that would fill a need in the market in a manner similar to PROs. A proposal to eliminate compulsory licensing will be discussed in the recommendation below.

IV. RECOMMENDATION

This note advocates that Congress abolish compulsory licensing of mechanical rights. Lack of consensus among adverse lobbying groups makes it unlikely that Congress will pass needed reform any time soon. The industry has changed far too substantially in the past fifteen years for gradual change to be effective,[222] and constantly evolving technology makes it increasingly difficult for the laws to keep pace with the realities of the market. Revision of licensing laws can take decades, by which time considerations are outdated, given the evolving market.[223]

The system is in desperate need of simplification. Rather than spend decades creating new laws that fail to keep pace with technology, Congress should eliminate compulsory mechanical licensing entirely. This would simplify copyright laws and restore to composers the exclusive right to control the use of their intellectual creations. The value of a song would no longer be set by the legislature, while other authors negotiate prices for their works in a free market. Composers would no longer be powerless to prevent others from distorting their works. Record companies would no longer abuse their role as "gatekeepers" at the expense of composers and publishers. Composers would no longer be forced to accept the argument that antitrust concerns justify the wholesale usurpation of their "exclusive" rights. No longer would a complicated system—which has never truly served its goals—be considered the proper method of controlling unrealized monopolies.

This note does not suggest that the elimination of a one-hundred-year-old system is a simple matter of repealing a statute, nor does it pre-

Timberg, *The Antitrust Aspects of Merchandising Modern Music: The ASCAP Consent Judgment of 1950*, 19 LAW & CONTEMP. PROBS. 294, 297 (1954))).

220. *Id.* at 22 n.37.

221. *See* discussion *supra* Part II.D.

222. *Copyright Update a Decade's Job, Senate IP Counsel Says*, WARREN'S WASH. INTERNET DAILY, Oct. 23, 2006, at 1, *available at* http://www.enough.org/objects/wwid1023.pdf.

223. *Id.*

sent a complete plan ready for implementation. This note merely recommends that Congress take a serious look at current laws governing mechanical licenses. Congress should reconsider whether compulsory licensing is justified as a proper means of preventing the monopolization of mechanical rights in today's rapidly changing and competitive music landscape. This note unequivocally suggests that it is not.

The recommendation of the Register of Copyrights to eliminate compulsory licensing in the 1976 Act fell victim to compromise before Congress could seriously consider the issue.[224] The current Register of Copyrights has again advocated elimination of the compulsory license, although she claims that to do so immediately "would bring chaos" to the industry.[225] Attempts to avoid such chaos have resulted, and will result again, in ineffective compromises and stalemates between lobbying groups with adverse interests. This note recommends that Congress recognize the fundamental unfairness that has always existed in compulsory licensing, declare that this unfairness will not continue, set a date for the repeal of § 115, and then proceed with determining how best to effectuate its elimination. To evaluate the fundamental fairness of the current system requires no expert opinions or forecasts from the music industry. Congress can and should make this determination on its own. Only after it makes this decision should Congress seek input from the music industry regarding the best way to effectuate the transition.

Such a profound shift in the manner in which mechanical rights are negotiated cannot occur overnight. Congress will need to phase in the elimination of compulsory licensing. Congress can provide that the repeal of § 115 will take effect after a suitable time for the industry to make adjustments. Alternatively, Congress could establish a temporary period during which all compositions will be subject to compulsory licensing for a limited term of years. After that term expires, the author would have the exclusive right to control the mechanical reproduction of her work.

Drastic measures often call for compromise. The current Register of Copyrights has made multiple suggestions regarding reform of § 115.[226] This note does not treat any of them in depth. Although such a compromise may serve as a necessary transition from the present model to one that operates free of the compulsory license, none would be an appropriate permanent solution. The concern with compulsory licensing is not how to provide maximum benefit to all groups within the industry; it

224. *See supra* notes 17–21 and accompanying text.

225. *Reforming Section 115 of the Copyright Act for the Digital Age: Hearing on 17 U.S.C. § 115 Before the Subcomm. on Courts, the Internet, and Intellectual Property of the H. Comm. on the Judiciary*, 110th Cong. 18 (2007) (testimony of Marybeth Peters, Register of Copyrights, U.S. Register of Copyrights).

226. These suggestions include empowering record companies to operate as sublicensors of musical composition rights and providing a safe harbor with regard to infringement and amending § 115 to mirror the blanket royalty-pooling statutory license for noninteractive streaming of musical performances in § 114. *Id.* at 19.

is a fundamental question of whether compulsory licenses are justifiable limitations on composers' exclusive rights. On that issue, the answer is clear: they are not.

The elimination of compulsory mechanical licenses could have an adverse effect on various groups in the music industry. It may ultimately even serve to the detriment of composers and publishers, the very groups that advocate its elimination. These potential economic ramifications are simply not relevant in evaluating the fundamental fairness of the system. The licensing provisions are not justified, and they are not fair.

> [The system] restricts one of the fundamental rights of the composer, making it less than "exclusive." It gives record companies valuable rights at less than their fair worth. It is absolutely unnecessary as a means of precluding restraints of trade. [And i]t is not needed in an industry where nonexclusive licensing is dictated by self interest.[227]

It is not now, nor has it ever been, a just method of addressing potential monopoly concerns. These provisions should be eliminated.

V. CONCLUSION

For as long as composers have possessed the right to control the mechanical reproduction of their music, that right has been limited by the existence of compulsory licenses. Although these licenses are rarely invoked, they serve to the detriment of composers and publishers by effectively capping the rate at which licenses can be negotiated in the free market. Digital phonorecord deliveries in various new formats have highlighted the inadequacy of compulsory licensing provisions. Congress's most recent response proposal was the Section 115 Reform Act, which would have established a blanket-licensing system for DPDs.

Although the appeal of a blanket mechanical license for DPDs is understandable, the complexities of the music industry and the adverse interests of the parties involved make it unlikely that Congress will successfully overhaul the system in the foreseeable future. Technology will not wait for the law. Patchwork legislative fixes to the Copyright Act have resulted in increasingly complex laws with increasing limitations on the exclusive rights of composers and publishers.

Compulsory licensing should be eliminated. Early twentieth-century antitrust concerns—the sole motivation for the creation of the compulsory mechanical license—are inapplicable in today's competitive music business. These provisions are, and always have been, fundamentally and economically unfair to composers and publishers. Rather than attempt to adapt the compulsory licensing provisions to the growing va-

227. REGISTER REP. PT. 2, *supra* note 20, at 257 (comment from the Authors League of America, Inc.).

riety of music delivery formats, Congress should reconsider whether compulsory licensing is still justified—if indeed it ever was.