**COMMENTS OF FUTURE OF MUSIC COALITION IN RESPONSE TO THE COPYRIGHT OFFICE'S MUSIC LICENSING STUDY**

**Docket No. 2014-3**

**May 16, 2014**

## I. Introduction

Future of Music Coalition (FMC) is pleased to submit the following comments to the Copyright Office in its Notice of Inquiry concerning the Music Licensing Study.

FMC is a nonprofit collaboration between members of the music, technology, public policy and intellectual property law communities. FMC seeks to educate the media, policymakers and the public about issues at the intersection of music, technology, policy and law while bringing together diverse voices in an effort to identify creative solutions to challenges in this space. FMC documents historic trends in the music industry, while highlighting emerging structures that may empower artists and establish a healthier music ecosystem.

As performing artists, composers, independent label owners, music publishers and advocates, FMC has paid close attention over the past 14 years to developments in the technology space and their impact on music creators. We have examined legal, policy and marketplace trends and have conducted original research[1] into how artist revenue streams have changed in response to these developments. We work closely with a highly engaged network of musicians, composers, music managers and artist advocates who possess a practical understanding of today's music ecosystem and how technology and the law shape outcomes for music access and creator compensation.

[1] "Artist Revenue Streams | a Multi-method, Cross-genre Examination of How US Based Musicians and Composers Are Earning a Living." Artist Revenue Streams. Future of Music Coalition, n.d. Web. 05 May 2014.

FMC commends the Copyright Office for initiating the Music Licensing Study, which we feel asks the right questions with regard to the many intersecting issues that affect our community. Moreover, we appreciate the opportunity to address persistent issues around licensing from the creators' perspective. Despite some differences with various parties, we are encouraged that many to a large part share the basic goal of nurturing and expanding the legitimate digital music marketplace. We see the Music Licensing Study as an important contribution to these efforts.

Our comments will address most of the specific questions raised by the Copyright Office in this Notice of Inquiry.

## II. Musical Works

### A. *Section 115 Statutory License*

The 115 statutory license aids a functional music marketplace in numerous ways. Without an efficient means for sound recording owners to obtain permission to reproduce and distribute songs to which they do not retain underlying composition rights, the delivery of catalog to services and consumers would be impeded.

Current debates about the efficacy of the compulsory mechanical license tend to obscure its benefits. While it isn't hard to understand why the major publishers would want the licensing of musical compositions to be subject to direct negotiation—as is the case with sound copyright owners and services—consolidation in the publishing sector means that under such a scenario, a small handful of publishers would be able to leverage their valuable and vast catalogs to the potential detriment of competition. Besides limiting opportunity for independents, this would also frustrate the ability for sound recording owners to bring their products to the marketplace, exacerbating tensions between labels, recording artists, and publishers. It could even lead to a lowering of rates as some publishers cut bargain-basement deals to remain competitive.

It is clear that the statutory license was a better deal for the owners of musical works in the heyday of physical media, due to the album bundle and the obligation for sound copyright owners to compensate publishers for each reproduction. The arcane calculus applied to mechanical rates for streaming services, to say nothing of the previous unbundling of the album on download services such as iTunes, has created challenges for publishers, especially when compared to the revenue opportunities available to sound copyright owners on the same platforms. However, labels have historically taken on a greater investment risk in the manufacturing, distribution and promotion of recorded music. The roles of intermediaries are less fixed than in previous decades, but a close examination of where value is offered versus where value is extracted should inform any amendment to the 115 mechanical license.

Rather than eliminate the 115 statutory in favor of direct deals, it may be more beneficial to examine *how* the rates are set. The value of musical works cannot be understated, and the writers and owners of these songs and compositions deserve to have this value reflected in revenue calculations. Yet even if it is determined that a "willing-seller, willing buyer" framework is desirable, there are persuasive reasons to retain government oversight over the rate-setting process to avoid fracturing of the licensing marketplace. FMC is unimpressed with implied threats of increased piracy as a negotiation tactic, but it does seem obvious that a breakdown in the ability to provide lawful access to music would be a huge step backwards for digital commerce.

The Songwriter Equity Act of 2014 (H.R. 4079)[2] is proposed legislation that would provide for a "willing seller, willing buyer" framework for the mechanical compulsory. This bill presents an opportunity for Congress (and the Copyright Office) to hear from a variety of stakeholders who would be impacted by these proposed changes. FMC believes that there is a need to bring compensation for musical works in line with contemporary market realities. Likewise, we support a

[2] Songwriter Equity Act of 2014, H.R. 4079, 113th Cong. (2014). Print.

more accurate reflection of the contribution of songwriters. To this end, we appreciate the goals of H.R. 4079, but believe that more discussion is required on how those goals should be achieved—especially considering that the bill also includes provisions to amend the rules governing the performance of musical works.

*B. Blanket Licensing for Mechanicals*

Blanket licensing of the mechanical right may offer greater efficiencies depending on the breadth of works covered. The existing arrangement relies heavily on the Harry Fox Agency for the licensing of mechanical royalties for physical and digital reproductions of underlying musical works. However, not every publisher is a member of the Harry Fox Agency, nor does HFA possess up-to-date records of every music publisher.[3] Therefore, there are challenges to the collection and distribution of royalties that persist regardless of song-by-song or blanket licensing frameworks. Metadata standardization and improvements in recordation and interoperability would likely improve conditions regardless of the licensing mechanism employed.

*C. Combining Rights*

We have not yet seen evidence to suggest that combining the performance right for musical works with mechanical licensing would produce greater efficiencies or reduce the complexities of rate-setting. Rather than have a single body administrate licenses for these two rights, it may be more useful to have arbitration and dispute resolution mechanisms take place under the same court, perhaps the Copyright Royalty Board. A persistent complaint among music publishers is that evidence from sound recording rate determinations is not admissible in the performance royalty negotiations for musical works—this is part of what the Songwriter Equity Act would address. Putting aside the fact that many publishers pushed for the exact opposite when the Digital Performance Right in Sound Recordings Act of 1995 was passed, it seems that the goal of rate parity would be better served by having these processes overseen by the same rate court under direct Congressional jurisdiction.

[3] "Help Us Find Publishers." Help Us Find Publishers. Harry Fox Agency, n.d. Web. 06 May 2014.

*D. Public Performances of Musical Works*

Another area of contention is the rate-setting process for the licensing of musical works for public performance on digital non-interactive services. As FMC comprises composers and independent publishers, we are highly attuned to revenue from the use of musical works in any broadcast or radio-like service. We feel that the value of these works must be reflected in compensation, and that songwriters must have equity within these systems. However, revenue is not the only factor to consider. Issues of leverage, transparency and method of payment are also important. As the Copyright Office and Congress examine how the licensing of songs for public performance might be improved, it is important to consider how songwriter and composer interests are served by existing structures. As FMC pointed out in a recent opinion piece at Billboard:[4]

> "It is important not to lose sight of the benefits of systems that have been in place for decades and the reasons for them. Take, for example, the consent decrees that set the parameters for radio services and music publishers. Under these rules, songwriters are paid their share directly, meaning the songwriters' money doesn't go through the publishers—it's cash in pocket to the people who composed the song. This system also means that smaller, independent publishers can just as easily make catalog available as their multinational peers. That kind of leverage is crucial.
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> "The 'blanket licenses' within the consent decrees are what made radio possible to begin with, and this arrangement remains useful to new services that may not have the capital or clout to cut direct deals. The incredible growth of Internet radio, for example, would have been inconceivable had fledgling webcasters been compelled to negotiate with the all of the music publishers individually. Without an easier way to obtain permission to play songs, Internet radio might never have happened."

There are also ongoing debates about whether publishers can pull certain digital catalog from Performing Rights Organizations such as ASCAP and BMI in favor of licensing directly with services, because they feel that they can obtain more favorable deals than a PRO can negotiate on their behalf. The National Music Publishers

[4] Rae, Casey. "The Blanket 'Problem': Balancing the Needs of Songwriters with New Forms of Radio (Guest Post)." Billboard. N.p., 21 Apr. 2014. Web. 06 May 2014.

Association (NMPA) is in favor of such maneuvers, likely believing that direct deals will "lift the floor" of compensation, with higher rates serving as evidence in future proceedings before the rate court. At issue is whether publishers are allowed to remove catalog used in non-interactive digital transmissions, while staying with a PRO for other services (such as collecting money from AM/FM radio and venues).

In reality, direct deals can make it harder for new services to enter the marketplace and well as for artists to know how they're getting paid, when and by whom. Such arrangements can also drive rates down, as rightsholders trade lowered percentages for exclusivity or other specialty arrangements. This phenomenon doesn't just affect the songwriter/publisher universe—similar deals threaten to undermine the public performance marketplace for sound recordings.[5]

It may be that the consent decrees should be examined with full consideration of how the marketplace has evolved since the Second Amended Final Judgment of 2001[6], which maintained a rate court process first established in 1950[7]. Even so, there would be no compelling reason to completely eliminate the consent decrees and the important limitations they place on PROs and publishers from engaging in anticompetitive behavior. Likewise, the provisions found in the ASCAP member agreements must also be preserved to ensure that the writers' share is paid directly and fairly. Going further, there are legitimate worries that direct deals unencumbered by any regulation would not be transparent and could work against the interests of songwriters. The efficiencies made possible by the blanket licensing under the consent decrees, as well as the guarantees of direct and equitable distribution of monies remain useful. Any further amendments to the consent decrees must be done with complete transparency and with a thoughtful consideration of the impact on

[5] "Guest Opinion: Clear Channel/Big Machine Deal Is Step In Right Direction, But Not Far Enough, by Future of Music's Casey Rae." Billboard. N.p., 26 June 2012. Web. 08 May 2014.
[6] *United States v. ASCAP*, United States District Court, Southern District of New York. 11 Jun. 2001. United States Department of Justice, n.d. Web. 6 May 2014.
[7] *United States v. ASCAP*, 1950-51 Trade Cas. ¶62,595 at 63,754 (SDNY 1950).

songwriters' leverage and compensation, with a common goal of expanding the legitimate marketplace for the performance of musical works.

## III. Sound Recordings

### *A. Section 112 and 114 Statutory License*

The ability to make ephemeral recordings to facilitate lawful digital transmissions should not be a point of contention, though we recognize the need for case-by-case consideration of whether this activity falls within the parameters of Section 112. Resolution of disagreements regarding the applicability of Section 112 as pertains to ephemeral copies may at certain points require adjudication, and negotiations over rates may not always be smooth. However, it is clear that the ability to perform music digitally requires a standardized means through which to obtain the requisite permissions, which is what this section provides. Having not encountered workable alternatives, we suggest that the Section 112 license remains sufficient.

Future of Music Coalition supports the Section 114 statutory license because of the mechanisms through which it compensates performers. Under current provisions, royalties generated from the performance of sound recordings on non-interactive services are paid out via the nonprofit SoundExchange, which provides direct and simultaneous delivery of monies to performing artists and rightsholders. There has been some disagreement about whether the splits are equitable, but we feel that they accurately reflect the value of those who perform and record the music as well as those who distribute and promote it. Also significant is the fact that the artists' share is paid directly and not held against an artists' debt to a label for costs incurred in the manufacturing, distribution and marketing of a recording. Furthermore, we appreciate that a percentage of the money collected for digital transmissions of sound recordings (5 percent tabulated from SoundExchange performance data) is apportioned for background musicians and singers for distribution through the AFM/SAG-AFTRA Intellectual Property Rights Distribution Fund.

The 114 statutory license has come under scrutiny not so much due to its compulsory nature but rather the variances in how rates are set for different platforms. These differing standards amount to considerable disparities in how much a service pays to rightsholders. Whereas satellite radio pays under the 801(b) standard, commercial pureplay webcasters such as Pandora pay under a "willing seller, willing buyer" framework. Meanwhile, terrestrial radio broadcasters are not legally obligated to pay anything at all. As Future of Music Coalition is not party to rate-setting negotiations before the Copyright Royalty Board, we have limited observations regarding the current arrangement. However, it has become apparent that the original rationale for satellite and Internet radio falling under different rate standards may no longer be appropriate. There are some benefits to each approach, however. For example, the 801(b) standard provides for a percentage of revenue calculation that is likely easier to negotiate and administer than the per-stream rate for Internet radio. On the other hand, the current 9 percent of gross revenue calculation that applies to Sirius/XM seems woefully low, especially compared to the amount paid by Pandora (up to half its revenue under the per-stream standard, according to reports).[8] Congress certainly has its work cut out for it in any resolution of these issues.

*B. Pre-1972 Sound Recordings*

Further controversies regarding digital radio services have emerged from recent, separate lawsuits brought by major labels, SoundExchange and select recording artists against Sirius/XM and Pandora for performing music recorded before February 15, 1972 without compensation. Future of Music Coalition believes that performing artists and sound copyright owners should be paid fairly for the use of their work on any broadcast platform, including AM/FM radio. However, we have

[8] Cassondra C. Anderson, *"We Can Work it out:" A Chance to Level the Playing Field for Radio Broadcasters*, 11 N.C.J.L. & Tech. On. 72, 88 n.90 (2009), *citing* "Music in the 21st Century: Hearing on S. 256 Before the S. Comm. on the Judiciary," 109th Cong. (2008) (statement of Joe Kennedy, President and Chief Executive Officer, Pandora Media, Inc.)(arguing that under the current rate-setting mechanisms for sound recording performance royalties, if both Internet and satellite broadcasters made $25 million in annual gross revenue, the satellite broadcaster would pay $1.6 million in royalties, or about 6.5% of its revenue, while the Internet broadcaster would pay about $18 million in royalties, or about 70% of its revenue).

serious doubts as to the major labels' rectitude with regard to their lawsuits against the services.

The lack of federal copyright protections for pre-'72 sound recordings has created a situation where so-called "legacy" artists (or their heirs) are not guaranteed compensation for the use of their music on non-interactive services. A loophole in existing statute puts these older recordings in a kind of legal limbo where services risk liability and labels are tempted to litigation. We do not know why Congress, when enacting laws in 1972 to protect sound recordings, chose not to apply retroactive protections. While it's true that the 1972 federalization was a stopgap measure with a sunset provision—Congress was in the midst of hammering out the numerous stipulations that would become the 1976 Copyright Act—it would have been logical to address this exception when they hammered out the full Act. Alas, it did not.

We agree with the Copyright Office that the smartest way for labels and performers to be paid for plays of these older records would be to place them under federal protection. Your report on the subject offers useful guidelines on how Congress might approach federalization. Yet the big labels seem more interested in seeking huge damages than making the system more functional and simplifying how artists are compensated. Otherwise, they'd join Future of Music Coalition and our artist allies in supporting the federalization of pre-'72s.

We also wonder whether the labels will share any potential awards from damages with performers or heirs. We haven't seen any evidence that prior successes against numerous illicit file-sharing sites resulted in any payouts to creators.[9]

Another reason the labels are likely keen to litigate on pre-'72s is because a favorable ruling establishing liability could set precedent that might impact the "safe

[9] Barrett, Brian. "Money Won in Pirate Bay Convictions Won't Go Back to Artists Because Ugh (Updated)." Gizmodo. N.p., 29 July 2012. Web. 20 May. 2014.

harbors" available to internet service providers, such as search engines and user-upload sites. Future of Music Coalition does not believe that certain services are automatically eligible for safe harbors for either pre-or-post-1972 sound recordings. However, we feel that liability should be determined by a court's review of evidence presented within the context of a Section 512 argument rather than a too-clever-by-half attempt to seek damages across a wide range of otherwise DMCA-compliant sites and services. Furthermore, if the major labels are serious about achieving reliable compensation, they should embrace the federalization of pre-'72s, as this would provide them with more uniform enforcement tools as well as established licensing protocols. That is, unless they prefer to not pay older artists still under contract, or to pay them under ambiguous terms that likely did not include newer platforms such as internet and satellite radio at the time of copyright transfer.

To reiterate, FMC believes there is a better solution, and one that would result in services knowing what to pay to whom, when and under what conditions, and where performers are directly compensated their fair share.

C. *Non-interactive and Interactive Services*

Certainly, technological distinctions are less fixed than many realize. We've heard it said that "a stream is really just a download set to self-destruct." In the realm of streaming, distinctions between interactive and non-interactive services may seem arbitrary, especially to end users. From a legal perspective, the dividing line between interactive and non-interactive rests on the concept of "volition"—whether a user can choose a track or album or whether an algorithm or human curator serves up the music a listener hears. This difference impacts what is permissible in rate-setting proceedings, as evidenced by the recent ruling by Judge Denise Cote in the Southern District Court of New York in a lawsuit brought by Pandora against ASCAP. In her determination, Judge Cote pointed to the royalty for works performed on interactive services as a reason why she chose to retain the current rate of 1.85 percent paid by

Pandora rather than increase the amount to 3 percent sought by ASCAP[10] (which is the approximate amount paid by interactive services such as Spotify).

The value of interactivity is an issue that will surely be debated as the marketplace for physical media and downloads continues to decline and as streaming services become the main point of access for music consumers. The policy question is whether the "lean back" listening experience has more or less value than volition, and how that value might be approximated in terms of rate-setting or reflected in a statutory distinction. This question would be less fraught if interactive streaming did not establish a potential substitute for downloadable, permanent files. However, evidence now suggests that the negative impact on unit sales by interactive services is real.[11] This changes the economics for recording artists considerably, especially those who do not possess mass-market ambitions and who are unlikely to achieve the scale necessary to make streaming a viable revenue proposition. FMC has spent a good deal of time thinking through these developments, and, while we appreciate the convenience of on-demand streaming, we have questions about whether the growth of such services will translate to meaningful payouts to a majority of performers and composers.[12] Furthermore, prominent independent labels such as the Beggars Group are modifying the 50-50 percentage shares with their artists due to these new economics.[13] While it is possible that this will allow for greater up-front investment in other areas that could result in revenue opportunities for the artist, it could also exacerbate the problems around artist compensation that make it more difficult for musicians to sustain long-term careers.

Some independent artists and labels may welcome the elimination of the statutory distinction between interactive and non-interactive—or the expansion of the 114

[10] Sisario, Ben. "Pandora Wins a Battle, but the War Over Royalties Continues." *The New York Times*, 20 Mar. 2014. Web. 09 May 2014.
[11] Peoples, Glenn. "Business Matters: Download Sales Off to Terrible Start in 2014." *Billboard*. N.p., 23 Jan. 2014. Web. 09 May 2014.
[12] Erickson, Kevin. "Does Spotify Make Sense For Non-Superstars?" Future of Music Coalition, 17 July 2013. Web. 09 May 2014.
[13] Erickson, Kevin. "Is On-Demand Streaming Forcing Indies To Behave More Like Major Labels?" Future of Music Coalition, 7 May 2014. Web. 09 May 2014.

compulsory—for reasons of equity in the licensing marketplace. As the independent label trade association, the American Association for Independent Music (A2iM), points out in its filing in the NTIA/USPTO "green paper" proceeding:[14]

> "This copyright valuation issue cuts directly to the core of A2IM's mission: insuring a fair marketplace for Independents where the value of a song or performance must not be determined by which music label creates or owns the song. If that differential is allowed to stand then Independent labels and artists will always be treated unfairly, as lesser, when there is ample proof that music fans want our music. This is witnessed by the Independent music label community overall market share and the Grammy awards won by our community, including the last five Album of the Year award winners being signed to Independent music labels. CRB rate-setting decisions and the resulting statutory rates ensure that the value of every creator's sound recording is equal, that our members' copyrights are worth as much as any other copyright!
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> "Under an expanded compulsory statutory licensing regime, combined with the music industry development of a robust international rights database, online services will have access to use musical copyrights and be able to have access to a broad array of music and innovate without having to pay higher direct licensing fees, which will result in greater consumer access to music to the fans of our musical copyrights."

FMC would also consider supporting the expansion of a statutory license for sound recordings on interactive music services for the reasons of clear and transparent creator splits and direct payments. We do, however, recognize that in an environment where on-demand listening continues to supplant higher-margin transactions such as downloads, that there are many questions regarding the return on investment in the creation, distribution and promotion of recorded music. We believe that some of these questions can be addressed by integrating higher-margin commerce—scarce goods and other unique opportunities—within existing and future access platforms. Likewise, we see promise in partnerships in which creators are not obligated to transfer their copyrights, but rather enter into shorter-term, targeted licensing agreements.

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[14] Bengloff, Rich, and A2IM. "Request for Comments on the Department of Commerce Green Paper on Copyright Policy, Creativity, and Innovation in the Digital Economy-Comments by The American Association of Independent Music." Letter to National Telecommunications and Information Administration. 13 Nov. 2013.

Some of these experiments are already underway, but it remains to be seen whether services such as Spotify will allow for the flexibility—including pricing and data management—made possible by direct-to-fan platforms prized by independent artists and labels.[15] More worrisome is that in a profit-driven, capital-scarce digital music space, today's useful tools may be sold for spare parts or even shut down altogether.[16]

We believe that any changes to the interactive/non-interactive designation within statute should not limit the ability for musicians to have a stake in information management and commerce opportunities within platforms operating under any legal distinction. On the surface, this may not seem to be a policy concern, but the current environment for music licensing impacts what innovations can come to market and for whose benefit they are designed. The lack of a statutory license for interactive services, for example, creates tremendous barriers to entry to the marketplace due to the need for a prospective service to enter into protracted licensing negotiations with the three major labels, as well as the high likelihood of having to deliver large up-front payments and equity shares to rightsholders. Negotiations can take an average of 18 months, with no guarantee of a deal. By contrast, obtaining a public performance license can take around 45 days or even less than a few weeks.[17]

These issues are exacerbated by increased concentration among both major labels and major publishers. We are encouraged that both groups seem to understand that the core components of their businesses will be digital—or at least those portions of the business with which consumers interact. Still, it is incumbent upon policymakers who would uphold the compact outlined in Article I, Section 8 of the United States Constitution to devise laws that work for creators and not just corporate

[15] "Bandcamp Empowers Artists." Artists. N.p., n.d. Web. 09 May 2014.
[16] Rae, Casey. "Built to Last: The Importance of Sustainable Digital Tools for Musicians." Future of Music Coalition, 17 Apr. 2014. Web. 09 May 2014.
[17] Touve, David. "Innovation at the Edge: An Investigation of Music Licensing Efforts and the Process of Opportunity Development." Davidtouve.com. Washington and Lee University, 22 July 2012. Web. 09 May 2014.

intermediaries. Nowhere in the copyright clause are intermediaries mentioned. Therefore, the task of Congress and the federal agencies when contemplating licensing is to ensure that the incentive for creators to create (and for the public to benefit from these creations) is honored above secondary concerns, such as the ability of corporations to build or sustain massive businesses on the direct or indirect exploitation of expressive works.

## IV. Platform Parity

Most of what we feel equipped to remark upon with regard to platform parity has been addressed in previous sections. What follows are some additional comments in response to specific questions put forth in this NOI.

### *A. Asymmetry in Performance Rights Obligations*

Perhaps the most glaring disparity in the current licensing environment for music is the lack of a public performance right for terrestrial radio. FMC has gone on record in countless venues in support of closing this loophole, which perpetuates a lopsided marketplace and disadvantages American performers. Due to this unfair exemption, broadcasters in the US are not obligated to pay performers a single penny for the use of their work. This is in contrast to nearly every developed nation on the planet (notable exceptions include Iran and North Korea). Though it is true that consolidated corporate AM/FM radio in the US is not known for its playlist diversity,[18] this is not necessarily the case with broadcasters abroad, who value American recordings and include a broader range of music in rotation.

The lack of a terrestrial performance right means that not only are American artists not getting paid when their music is broadcast in America, but also that they can't collect what's owed to them for overseas plays. We are unable to think of another valuable export that the US would give away on the global stage with

[18] "Same Old Song: An Analysis of Radio Playlists in a Post FCC-Consent Decree World." Future of Music Coalition, 29 Apr. 2009. Web. 10 May 2014.

no expectation of remuneration. This injustice has historically and notably impacted artists in genres such as jazz and r&b, in which highly sought-after performances by artists who are not the composer or songwriter generate no income for the performers—many of whom are past the age where touring is a possibility.

This disparity also disadvantages newer forms of radio that do play a role in exposing artists to new audiences, and which already pay performers, sound copyright owners, labels and publishers. Before the many questions about royalty rate standards can be resolved, policymakers must first address the fundamental disparity that creates a lopsided market and prevents recording artists from participating in the value generated from their creative work.

*B. The Pitfalls of Direct Licensing*

Direct licensing has been put forward as a "solution" by broadcasters who wish to avoid paying performers and sound copyright owners under statutory obligation. Currently, there are a handful of deals between major labels, mega-indie labels and even a superstar band to be compensated for terrestrial plays on a percentage of revenue calculation. However, this is not a panacea for the lack of a public performance right. It important to understand that these deals will not make a difference to the vast majority of performers who lack the leverage to be at the negotiation table. Furthermore, these deals are not transparent. We have heard that as part of these deals, the major broadcasters and rightsholder parties have agreed to trade *some* compensation for terrestrial plays for reduced per-digital-play rates. This means that compensation for musicians and labels could actually be lower if such deals become commonplace, or if digital radio achieves greater market share than its terrestrial counterpart.

Furthermore, direct licensing deals leave musicians without a voice. Under the statutory, splits are equitable, easy to understand and paid out directly to performers by the nonprofit SoundExchange. The SoundExchange board is evenly

split between labels and artist representatives, which gives artists legitimate power and collective leverage in future rate-setting proceedings. By abandoning this structure and going to direct licensing for digital performances, artists cede all of that power, and record labels and broadcasters hold all the cards.

Major publishers also seek to license directly to services rather than negotiate rates through ASCAP before a rate court. Such arrangements raise a similar set of concerns. It's easy to see why publishers want to go direct, especially when one considers what the major labels have been able to negotiate for other digital uses. However, any short-term gain may end up creating fissures that will be difficult to repair. Balkanization means that the marketplace would once again favor the biggest players over the smaller players—the very dynamic the consent decrees were put into place to correct. Direct deals on the publishing side also raise concerns about transparency. Outside of the framework made possible by oversight, what guarantees do songwriters and composers have that that their share will be fairly apportioned? The consent decrees, while hardly perfect, also offer benefits to smaller publishers who may not have the capital or clout to be represented in direct negotiations. Under the current system, independent outfits can just as easily make catalog available as their multinational peers. That kind of leverage is crucial, especially as market share for independent songs continues to grow.

Statutory or *de facto* compulsory licensing also keeps the doors open for new entrants. Legal, licensed music services mean more ways for music to be heard and more revenue streams available to creators. Fewer licensed services means less opportunity for fans to encounter digital music legitimately, as well the perpetuation of gatekeepers that have, in the past, prevented a tremendous amount of worthwhile music from reaching audiences. There are valid reasons to reexamine the consent decrees that govern the public performance of musical works, but it is crucial that any amendments to these rules do not disadvantage composers, songwriters and independent publishers while giving even greater

market control to a handful of consolidated rightsholders.

C. *Microlicensing*

At FMC we feel that all licensing options should be under consideration, including solutions that may have been impractical at other points in the history of recorded music. However, there is a great deal of groundwork to be done before such systems can reach their maximum utility. Some of this groundwork will come from private market experimentation; other solutions may require a government nudge. Currently, there are any number of boutique licensing services that have emerged to facilitate reasonably frictionless transactions across an array of use environments. Synch licensing is an area that is especially prime for efficiencies enabled by technology, given the growth in demand and the opportunity to build systems that are tailored to specific transactions. In addition to proprietary licensing systems operated by publishers and labels, there are also business-to-business platforms emerging, such as MusicSynk[19] and Rumblefish,[20] which enable artists and rightsholders to make music available for film, television, video game and new media uses within a relatively simplified framework. Similar solutions now exist to facilitate the acquiring of mechanical compulsory covers licenses, including Limelight.[21]

We notice that "microlicensing" has become something of a buzzword in the copyright policymaking community, but for us to offer meaningful observations about new licensing approaches, a common working definition would be useful. There is also something of a "cart-before-the-horse" dynamic at work here, as any discussion of potential models necessitates a substantive investigation into data standards and comprehensive rights registries. We will reflect on this matter in a

[19] "MusicSynk - Sync Rights Organization - Site." MusicSynk - Sync Rights Organization - Site. N.p., n.d. Web. 10 May 2014.
[20] Music Licensing Store. Rumblefish, n.d. Web. 10 May 2014.
[21] "Limelight - Designed by Musicians For Musicians." Mechanical License Clearance by Limelight. Rightsflow. Web. 20 May 2014.

subsequent section.

*D. Scope of Statutory Licenses*

In previous sections, we commented on the possibility of expanding existing statutory licenses to include new uses, such as interactive streaming. Provided that there is open discussion about investment, returns on investment and equitable splits for creators, we think such ideas are very much worth considering. One potential benefit of expanded collective or statutory licensing would be simplified enforcement. The ease of obtaining a license to perform or distribute recorded music may mean more opportunities to be paid for such uses. Scofflaws would be easy to identify and shut down, which is why there are no unlicensed, large-scale commercial Internet radio operators in the United States. There are tradeoffs to such structures, such as the ability to deny a licensee who complies with statutory obligations. Another concern is that not all rightsholders would want to participate in such systems, so policymakers might consider more flexible opt-in/opt-out protocols. Rather than getting hung up on whether opt-out is a true compulsory, we think it would be more beneficial to view statutory licenses as providing a baseline requirement to pay for the use of music while covering a maximum number of parties. Additionally, it should be obvious that comprehensive and interoperable ownership databases would aid both flexibility and efficiency.

*E. Innovation and New Business Models*

In broad strokes, it is obvious that licensing impacts which innovations can come to market and how music consumers access and experience recorded music. Copyright law lays out the obligations and exceptions; the private market adapts to these realities. In the interest of space, we will not itemize the many technological developments that have been either met with resistance or eliminated by rightsholders utilizing copyright law as their primary tool. Some innovations have not been neutral in terms of how artists make a living. There should be no debate that rampant, unlawful access and distribution has a negative impact on artists' livelihoods. However, there have been many instances where a

technology that is initially perceived as disruptive to incumbent industry ends up becoming a new revenue stream, or even a pillar of business. In fact, one could see the Internet itself as the ultimate example of this trend. Globally, where digital marketplaces are more mature, there is typically greater effort placed on expanding high-quality broadband. Access to high-quality, affordable Internet service is also important to American creators, as is the need to preserve a level online playing field that allows independent artists and labels to compete alongside the biggest companies.[22]

Under current licensing conditions, we do not overly fret about how major labels are doing: they have equity shares in a growing access and distribution platform; they receive large cash payments for the use of their music on any service not eligible for a statutory (and some that may be); most are multinational corporations with parent companies that have consolidated to the extent that their leverage exceeds that of previous decades; they promulgate contracts that allow them to tap into revenue streams that were once the sole province of artists; they make deals with technology companies all the while advancing the notion that they are under siege by these very companies, and so on and so forth. For their part, publishers have historically had more ways to exploit their copyrights, but the major publishing concerns now seem to want what exactly what major labels have. Where in this dynamic are the needs of artists advanced for anything other than achieving corporate ends?

On the other hand, large technology firms are typically not responsible for direct investment in creativity and culture. A good deal of the infrastructure they have established is incredibly useful to artists, though this utility may not be easily economically quantified. However, it is clear that the biggest technology companies are adept at monetizing user activity. Often, no portion of this revenue makes its way back to the artist; in fact, Facebook now charges creators, non-

[22] "Artists to FCC: We Want Real Net Neutrality." FutureofMusic.org. Future of Music Coalition, 13 May 2014. Web. 23 May 2014.

profit organizations and small businesses for the privilege of reaching users who have willingly signed up to receive information from these groups and individuals.[23] Given the increasingly *laissez-faire* attitude of government with regard to corporate consolidation, it is perhaps only a matter of time before vertical integration makes things even more difficult for independent artists. If this happens, artists may be able to utilize (aspects of) the infrastructure provided by corporations, but they will have less say in their overall economics. This is why FMC supports open technologies that allow for artists to make use of innovations and have more control over the mechanisms of access and compensation.

## V. Data Standards and Ownership Databases

Future of Music Coalition is on record in support of voluntary global copyright registries and/or authentication databases as a means to reduce frictions in the digital music marketplace and more efficiently compensate creators for various uses of their work. We also support metadata standardization to streamline these processes.

### A. *Potential Government Role*

As the recent Green Paper from the NTIA and USPTO recognizes, "the most basic prerequisite for obtaining licenses is reliable, up-to-date information about who owns what rights in what territories." To that end, it seems necessary to establish a comprehensive, publicly searchable informational database (or databases) of copyright information with functionality allowing for the uniform entering of relevant data about ownership.

While there are a number of such databases extant or in development, they are either lacking in accuracy or depth of information or are to one or another extent proprietary. The Copyright Office offers one example of a publicly searchable

[23] "Why Musicians Don't 'Like' Facebook Changes." Future of Music Coalition. N.p., 19 Feb. 2014. Web. 10 May 2014.

rights database, but some of its records are incomplete and not always available online.

Any comprehensive registry system or systems would benefit tremendously from metadata standardization, as would commercial platforms that sell or provide access to music. There is still much work to be done in standardizing musical metadata—the information that accompanies a sound recording file and is delivered to download stores like iTunes and streaming platforms like Spotify or Pandora. Metadata includes things like performer, composer, record label, and release date. FMC Director of Programs Jean Cook presented research on this topic at the CASH Music Summit in Portland, Oregon in August 2013, demonstrating how inconsistencies in metadata have particularly impacted artists in the classical and jazz genres:

> "Spotify, Pandora, Google Play, Rhapsody and iTunes do not make a clear or consistent distinction between composer and performer when delivering classical music to fans. Nor do they list sidemen on any jazz albums. These are infrastructure issues. These are metadata issues. These are deal-breakers for classical and jazz fans. And they make classical and jazz undiscoverable for new fans, contributing to the bigger problem of these genres' "invisibility" in the marketplace."

Better data on the input side and enhanced functionality and interoperability on the output side may alleviate some of the existing frictions in the music licensing space while pointing the way towards potential solutions for other copyright sectors.

*B. Potential Government Role*

Proprietary, private databases serve some purposes, particularly to the members or clients of the companies and organizations who operate them. Examples include YouTube's Content ID system or databases maintained by PROs and the Harry Fox Agency. Although proprietary systems may pave the way in establishing a technological framework that is efficient for input and access, it is likely that

stakeholders across the board will have more confidence in systems overseen by nonprofit entities rather than businesses with highly specific interests. An example of a nonprofit organization deeply involved in database management is SoundExchange, which was established to collect and distribute money generated by the digital public performance right for sound recordings. While SoundExchange was not designed to provide publicly searchable information on who owns what specific piece of music, the organization may have valuable insights into how to organize and maintain huge quantities of rightsholder data in a digital context.

Congress may consider authorizing the creation of a similar nonprofit to oversee the development of a global registry database (or databases) that could be overseen by government, in cooperation with international bodies. With the right investment and technological assistance, the Copyright Office may alternatively be able to enhance its current database to fulfill this role.

While FMC recognizes that copyright registration cannot be compelled, we see benefit in aligning incentives so that these structures are seen as something that a majority of stakeholders find worthwhile. Government can and must play a role in encouraging such an outcome.

## VI. Conclusion

Future of Music Coalition recognizes that optimizing music licensing for a digital environment is difficult—were it not so, it would have been accomplished by now. Although any adjustments to the law must be undertaken by Congress, the Copyright Office has an important role to play in describing the existing landscape for licensing, considering input from stakeholders and making recommendations where its expertise can inform how the legislative branch approaches these issues. We appreciate the opportunity to be a part of this important process and offer our organization as a resource

in further inquiries into music licensing and the impact of copyright and technology on musicians and composers.

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