

**BEFORE THE
U.S. PATENT AND TRADEMARK OFFICE
NATIONAL TELECOMMUNICATIONS AND INFORMATION ADMINISTRATION**

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Request for Comments on Department of)
Commerce Green Paper, Copyright Policy,)
Creativity, and Innovation in the Digital)
Economy)
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Docket No. 130927852-3852-01

Submitted to: CopyrightComments2013@uspto.gov

**COMMENTS OF BROADCAST MUSIC, INC. ON
DEPARTMENT OF COMMERCE COPYRIGHT GREEN PAPER**

Broadcast Music, Inc. (“BMI”) respectfully submits these comments in response to the Request for Comments and Notice of Hearing issued on September 30, 2013 by a task force (the “Task Force”) of the U.S. Patent and Trademark Office (“USPTO”) and the National Telecommunications and Information Administration (“NTIA”) concerning certain issues presented in the Department of Commerce’s recent Green Paper on Copyright Policy, Creativity, and Innovation in the Digital Economy (the “Green Paper”). *See* 78 Fed. Reg. 61337 (October 3, 2013) (the “Notice”). Specifically, BMI will comment on the following topics identified in the Notice: (1) how the government can help facilitate the development of a robust online licensing environment; (2) the need for DMCA Safe Harbor reform; and (3) the role of statutory damages in the context of file sharing and secondary liability for large scale infringements in the enforcement of copyrights in the digital market.

I. Description of BMI

America's copyright laws provide a firm legal foundation to support a vibrant community of creative songwriters, composers and music publishers whose works fuel a robust entertainment industry. BMI's role is to license on a non-exclusive basis one of the six exclusive copyright rights identified by Congress in the U.S. Copyright Act: the right to publicly perform musical works. Public performances of musical works occur on radio, television, cable, satellite and the Internet, as well as at concerts, sports venues, restaurants, hotels, retail stores and universities, to name a few of the many categories of BMI licensees. BMI licenses its music literally wherever music is performed to the public. BMI operates on a non-profit-making basis, distributing all income (less overhead and reasonable reserves) to its affiliated songwriters and publishers.

BMI is a performing rights organization ("PRO") that offers an easy and friction-free solution for clearing the public performing rights to more than 8.5 million musical works: the mechanism of a traditional blanket license (and in some cases, other forms of the blanket license that provide crediting of otherwise directly-licensed BMI music) for one modest annual license fee.¹ BMI is proud to represent the public performing rights of over 600,000 songwriters, composers and publishers, more than any other performing rights licensing organization. BMI's repertoire includes outstanding creators in every style and genre of music.

This business model of blanket licensing has been endorsed by virtually all parties across the copyright licensing spectrum and, over the past three decades, has been adopted by Congress

¹ Significantly, the PROs enjoy statutory recognition in the Copyright Act. A "performing rights society" is defined as "an association, corporation, or other entity that licenses the public performance of non-dramatic musical works on behalf of copyright owners of such works, such as the American Society of Composers, Authors, and Publishers (ASCAP), Broadcast Music, Inc. (BMI), and SESAC, Inc." 17 U.S.C. § 101.

as a model for statutory licensing and applauded by the Registers of Copyright in several studies presented to Congress and the House of Representatives Committee on the Judiciary. BMI also represents the works of thousands of foreign composers and songwriters from over 90 foreign performing rights societies when their works are publicly performed in the United States.

BMI's core competency is serving songwriters, their publishers and the businesses that use music. BMI is a trusted third party in licensing the public performing right of these musical creators to a broad range of businesses that incorporate music into their products or services. To be successful in this mission, we have developed an understanding of and appreciation for the business models and programming needs of more than 650,000 businesses across the nation that provide our creators' music to the public. This has been a win-win success story for all interested parties.

BMI was created in 1939 to provide viable competition and choice for America's songwriters and businesses in the licensing of the public performing right in musical works. The company has been widely credited as being the spark that ignited the explosion of uniquely American forms of music ranging from what was then known as Race music to jazz, rhythm and blues, country and more. Competition among the American performing right organizations and others who license public performing rights provides benefits to creators and music users alike. BMI also plays an extremely active role in the international copyright arena, serving on many committees and in leadership capacities in CISAC, the International Confederation of Societies of Authors and Composers. In a global economy fueled by borderless media such as the Internet, BMI operates internationally.

II. Ways to Facilitate a Robust Online Music Licensing Environment

A. The PROs Should Be Able to Offer Bundled Rights to Digital Music Services

The Green Paper examines the music licensing market and concludes that “collective licensing, implemented in a manner that respects competition, can spur rather than impede the development of new business models for the enjoyment of music online.” Green Paper at 85. We agree. In order to accomplish this, however, it is time to loosen the antiquated restrictions on PROs and help digital music services license music in the online market more efficiently.

The Task Force observes that many new digital services require clearance of mechanical and synchronization rights, in addition to the traditional public performing rights licenses offered by collective music licensing organizations like BMI. *See* Green Paper at 82-85. One obstacle to efficient digital music licensing is that ASCAP is not authorized under its consent decree to license other complementary mechanical rights (such as the reproduction and distribution rights) that are implicated by certain new media transmission services. A strict reading of BMI’s consent decree does not bar the offering of such bundled licenses by BMI.

The Green Paper reviews in detail the types of services that require clearance of the different rights. It notes some instances where multiple rights requirements have been eliminated as a result of either court decisions or voluntary marketplace agreements. Nevertheless, certain digital uses such as interactive streams, which are expected to be an ever-increasing component of digital music services, require performance, reproduction and distribution rights. The same is true of massive online audiovisual services such as YouTube.com, which require clearances of synchronization rights in addition to performing rights. *See, e.g.,* <http://www.youtubelicenseoffer.com/index>.

In Europe, where collective music rights organizations handle both performance and mechanical rights, it is a common practice for PROs to offer “one-stop shop” licensing for

multiple copyright rights. Despite the demands of the marketplace for bundled rights solutions, however, U.S. PROs do not currently license mechanical rights or synchronization rights, either separately or as a complement to their blanket licensing of public performing rights for digital music services. This is largely due to antiquated provisions in the ASCAP and BMI consent decrees.²

For over 10 years, digital music services have complained about the difficulty of licensing mechanical rights under Section 115. The Section 115 compulsory license is a work-specific license, whereas digital music services need access to a large volume of works in order to provide competitive music offerings online. These services have called for a blanket license under Section 115 as well as the ability to bundle the various music publishing rights they need through “one-stop shops.”

A few years ago, legislation was introduced in Congress that would have provided for a bundled “uni-license.” The “uni-license” proposal involved an amendment to the Section 115 compulsory license, which set the backdrop for licensing mechanical rights in physical CDs (and LPs and cassettes) for decades. This proposal would have permitted digital music services to avail themselves of a “one-stop shop” to obtain a license for the reproduction, distribution and performing rights for subscription interactive digital music services. PROs were permitted under the proposal to participate in this licensing scheme via an antitrust exemption.³

² BMI does receive from its affiliates the right to license synchronization rights attendant to public performing rights in certain limited cases. In contrast, ASCAP is prohibited from licensing any rights except for the public performing right in non-dramatic musical works.

³ See Hearing on Copyright Office Views on Music Licensing Reform before the House Subcommittee on Courts, the Internet, and Intellectual Property, Committee on the Judiciary, 109th Cong., 1st Sess. (2005); Hearing on Music Licensing Reform before the Senate Subcommittee on Intellectual Property, Committee on the Judiciary, 109th Cong., 1st Sess. (2005).

BMI believes that PROs ought to be able to meet the marketplace needs with efficient, cost-effective licensing solutions. We do not believe that a major overhaul of the mechanical compulsory license is required to make collective licenses more readily available. Rather, we believe that any music licensing reform legislation contemplated by Congress should permit PROs to collect mechanical license royalties from digital music services, on behalf of any music publisher who wishes to designate a PRO as its agent.⁴

Maintaining PROs as viable marketplace solutions for independent music publishers would ensure the continued diversity and competition in the music publishing sector, which has seen enormous consolidation in recent years. PROs should be explicitly authorized to handle bundled rights. Such capabilities will also bring the United States into greater consistency with global performing rights societies, reducing the potential for royalties earned by U.S. composers to be withheld on lack of reciprocity grounds.

BMI supports changes to the copyright law which would facilitate a fair, market-based standard for performing and mechanical rights. Specifically, Section 115 requires songwriters to accept fees for mechanical licenses determined by the Copyright Royalty Board, pursuant to a standard found in Section 801(b)(1), which are widely acknowledged to produce below-market rates. As a result, record labels have been able to negotiate and collect mechanical fees for their sound recordings that are as much as nine times the amount songwriters collect under 115 for the same musical composition. Congress should replace the 801(b)(1) standard with a

⁴ Recently, major music publishers have withdrawn from ASCAP and BMI the rights to license public performances to certain digital uses, in an effort to directly license their works for such digital uses in a single transaction (*i.e.*, as a one-stop shop). BMI believes that mid-size and smaller publishers who lack the majors' resources and remain with the PROs should have the benefit of a level playing field. It should be noted that the legal ability of publishers to withdraw digital rights is currently subject to litigation in both the BMI and ASCAP rate courts.

“willing-buyer/willing-seller” standard, which would help to ensure that songwriters receive fairer compensation by attempting to replicate free market conditions as much as possible.

BMI also notes the gross disparity in fees paid by Internet music webcasters to songwriters and publishers for the performance of musical works, as compared to fees paid to record labels and recording artists for the performance of sound recordings under Section 114. This disparity is due in part to the language of 114(i) that currently prevents BMI and ASCAP rate courts from considering the fair market value rates paid for sound recording fees as a benchmark when setting rates for musical work fees. Although section 114(i) was enacted with the intent to protect songwriter royalties from being adversely impacted by the then-newly-adopted performance right in sound recording, it has unintentionally served to prevent rate courts from considering the roughly twelve-to-one disparity in royalties paid to recording artists versus songwriters.

B. The “Communication to the Public” Right and “Making Available” Right

The right of “communication to the public” recognized in the WIPO Copyright Treaty (“WCT”) is analogous to the right of public performance in the U.S. Copyright Act. The communication to the public right specifically corresponds to the second section of the Copyright Act’s definition of what it means to perform or display a work “publicly” insofar as it broadly includes transmissions to the public by wire or wireless means. The “making available” right is a subset of the WCT’s right of communication to the public and includes interactive, one-to-one transmissions commonly made by Internet and mobile services within its scope. The

making available right also includes the “mere offering” to transmit, without the need to demonstrate that a transmission took place.⁵

BMI believes that the current U.S. public performing right includes the full scope of wired and wireless transmissions, as well as the full scope of interactivity. In this regard, it is worth underscoring the fact that no amendments to the U.S. public performing right were deemed necessary by Congress following ratification of the WCT.

There are several recent developments that compel Congress to consider explicitly clarifying that the concepts embodied in the “making available” right are applicable to public performances.

Development # 1: The Argument that Making Available applies only to the distribution right. The Green Paper discusses the making available right (*see* Green Paper at 14-15) and what it terms to be “challenges to the meaning of the public performing right.” *Id.* at 19-20. In particular, the Green Paper addresses the making available right as if it were separate and apart from the public performing right. *See id.* at 14-15. The Task Force observes that some courts have considered the mere offering of works to be related to the publication right, which is subsumed within the U.S. distribution to the public right. A number of commentators in recent

⁵ The making available right inheres in both the right of distribution and the right of communication to the public. *See* WIPO Copyright Treaty, Articles 6 and 8 (1996). The text of Article 8, Right of Communication to the Public, states as follows:

Without prejudice to the provisions of Articles 11(1)(ii), 11*bis*(1)(i) and (ii), 11*ter*(1)(ii), 14(1)(ii) and 14*bis*(1) of the Berne Convention, authors of literary and artistic works shall enjoy the exclusive right of authorizing any communication to the public of their works, by wire or wireless means, including *the making available to the public* of their works in such a way that members of the public may access these works from a place and at a time individually chosen by them.

WIPO Copyright Treaty, Article 8 (1996) (emphasis supplied).

years have also claimed that the making available right inheres only in the right of distribution in the U.S., and is not part of the right of public performance.⁶

We disagree. BMI believes that Congress should confirm that the mere offering of performances for transmission is covered by the public performing right. Failing to recognize this right would unduly limit the public performing right in the digital environment in a manner that violates the WCT.

Development # 2: The Cartoon Network and Aereo decisions. Two recent cases have called into question the scope of the public performing right as it applies to certain kinds of interactive transmissions: the Second Circuit's *Cartoon Network*⁷ and *Aereo*⁸ decisions. These decisions have opened up a large loophole in the U.S. public performing right. Together, these decisions have dramatically curtailed the public performing right by declaring that one-to-one transmissions of a copyrighted work from purportedly "personal copies" are to be considered private transmissions that are not covered by the public performing right, notwithstanding that they are made by commercial services to members of the public. The technology-based loophole is at odds with the 1976 Copyright Act's philosophy of a broad performing right covering transmissions "by any device or process." This would not be the result in Europe (as confirmed

⁶ As an example of this, a bill recently introduced in the U.S. House of Representatives by Representative Mel Watt directs the Copyright Office to study separately how the "making available" right applies to the distribution right under 106(3) and how the "communication to the public" right applies to the public performing right under 106(4). See H.R. 3219, 113th Cong., 1st Sess. (2013).

⁷ *Cartoon Network LP, LLLP v. CSC Holdings, Inc.*, 536 F.3d 121 (2d Cir. 2008) ("*Cartoon Network*").

⁸ See *WNET, Thirteen v. Aereo, Inc.*, 712 F.3d 676 (2d Cir. 2013), *reh'g denied*; *WNET, Thirteen v. Aereo, Inc.*, 722 F.3d 500 (2d Cir. 2013), *petition for writ of certiorari pending* (collectively, "*Aereo*").

By contrast, two other district court decisions have also addressed the same technology and found that the service was obliged to compensate creators for the public performing right. See *Fox Television Stations, Inc. v. BarryDriller Content System, PLC*, 915 F. Supp.2d 1138 (C.D. Cal. 2012), *appeal docketed sub nom, Fox Television Stations, Inc. v. Aereokiller, LLC*, Nos. 13-55156, 13-55157 (9th Cir. 2013); *Fox Television Stations, Inc. v. FilmOn X LLC*, No. CV 13-758 (D.D.C. Sept. 5, 2013), *appeal docketed*, No. 13-7146 (D.C. Cir. 2013).

by the recent *TVCatchup* decision by the European Court of Justice),⁹ and is squarely in conflict with the “making available” aspect of the “communication to the public” right in the WCT.

The current right of public performance has been widely recognized since the 1976 Act became effective on January 1, 1978, to apply to one-to-one “on demand” or interactive transmissions. Section 114 of the Copyright Act expressly states that interactive transmissions are subject to the exclusive public performance right of sound recording copyright owners. Additionally, PROs have long provided blanket licenses to publicly perform musical works to both “video on demand” services and interactive Internet services. It was only recently in the *Cartoon Network* case that a loophole in the public performing right was created for certain interactive transmissions.

In *Cartoon Network*, the Second Circuit panel debated whether Cablevision’s remote DVR service was more like video “on demand” or more like a set top DVR, which is similar to the VCR tape recorders considered by the U.S. Supreme Court years ago in the *Sony-Betamax* time-shifting case. Because fair use was not at issue in the *Cartoon Network* case by stipulation of the parties, the court based its finding of no public performance on a novel, unsupported concept of “private” transmissions made from supposedly personal, unique copies to members of the public. And in the more recent *Aereo* decision involving retransmissions of TV broadcasts, the Second Circuit panel concluded that it was constrained to follow the precedent established in *Cartoon Network*.

We disagree with the Court’s holdings in these cases, which have the effect of eroding the public performing right and the corresponding income of content creators, while concurrently undermining the robust licensing environment for digital transmissions of public performances.

⁹ *ITV Broadcasting, Ltd. v. TVCatchup Ltd.*, Case C 607/11 at par. 40 (ECJ Mar. 7, 2013).

The *Aereo* decision underscores the concern raised by many commentators after *Cartoon Network* was handed down – namely, that the decision could be misapplied by district courts to gut the Copyright Act and, in particular, the public performance right that is so crucial to authors and copyright owners alike. *See, e.g.*, 2 GOLDSTEIN ON COPYRIGHT § 7.7.2 (3rd ed. 2012). These decisions essentially place the application of the Copyright Act’s exclusive public performing right squarely in the hands of clever software engineers to configure or not configure a performance as “public.” See Judge Chin’s dissent in *Aereo*, describing the Aereo system of retransmission of broadcasts by thousands of tiny antennas as a “sham” with no technologically sound reason for existing besides skirting the copyright law. These decisions are especially troubling as the future of commercial music content delivery lies with highly customized and individualized content streaming offered by cloud music services.

Many of these commercial services are already claiming to make “private” performances, in reliance on *Cartoon Network*. If these court decisions remain the law of the land, or are not cured by legislation, we face the potential for a growing range of uses of copyrighted content without compensation for its creators.¹⁰

In summary, the holdings in *Cartoon Network* and *Aereo* conflict with the “making available” aspect of the “communication to the public” right in the WCT. That is, these decisions effectively fail to afford the U.S. public performing right the full scope of wired and wireless transmissions and interactivity, which is inconsistent with the WCT “making available” right.

Development # 3: The Download/Performing Right issue. Corrections to the public performing right in the context of the making available right should also address the Second

¹⁰ For example the word “public” could similarly be read out of the public display right, injuring photographers and graphic artists, as well as the public distribution right.

Circuit's recent decision to exempt downloaded transmissions from the public performing right.¹¹ This decision was based on a hyper-technical reading of the transmission clause of the public performing right definition that has the effect of narrowing the scope of the public performing right in a way that arguably conflicts with the WCT concept of making available musical works by all wire and wireless means. As stated above, the public performing right is applicable to all transmissions of performances of works. This includes transmissions to members of the public by any device or process, regardless of the time or place chosen by them for the transmission.

As a policy matter, one may contend that sales of music by pure downloads such as purchases of sound recordings on iTunes are economic transactions that most resemble the type of sales and transfers of ownership traditionally covered by the distribution right, and that, as such, they should be exempt from the public performing right. Any exemption of this nature should be something for Congress to determine after careful consideration of all the relevant facts, and it is inappropriate to curtail the public performing right for all downloaded transmissions through a technical truncation of the definition of publicly perform. There are at least ten billion plays of conditionally downloaded music each year, likely resulting from tens of millions of conditional download transmissions, which are commonly packaged on a subscription basis by digital music services together with "on demand" streams. At a minimum these must be recognized to be what they are – public performance transmissions that compete with all manner of other digital music delivery services.¹² A number of other types of digital transmissions of audio and television programming may involve the making of intermediate

¹¹ *U.S. v. ASCAP, et al.*, No. 09-0539, 2010 WL 3749292 (2nd Cir. 2010).

¹² The regulations under Section 115 of the Copyright Act refer to these as Limited Downloads. *See* 37 CFR Section 385.11 (2012).

copies – this is the nature of what computers do, after all.¹³ Any hyper-technical rule that makes the public performing right hinge on whether or not a technical copying takes place before the performance of the work reaches the consumer is nothing but an open invitation for the development of more *Aereo*-style shams.

III. Fixing the Broken DMCA Safe Harbors

In the Notice, the Task Force announced its intention to establish a multi-stakeholder dialogue on improving the notice-and-takedown system for removing infringing content from the Internet under the DMCA. *See* Notice at 61337. BMI applauds the Task Force’s interest in examining the notice-and-takedown process and would like to participate in the dialogue on ways to improve it. More importantly, however, BMI believes that the DMCA safe harbors are fundamentally broken as a result of various judicial determinations that do not comport with the balanced approach to online copyright enforcement envisioned by the WCT and by Congress when the DMCA was enacted in 1998.

It must be stressed that the notice-and-takedown provision in the DMCA is not a “system” for remedying infringements online at all. Rather, it was intended to be the minimum obligation of Internet service providers (“ISPs”) who otherwise had met the three important thresholds for safe harbor protection. In other words, even a disinterested ISP with no knowledge and no complicit role in infringements must, at a minimum, respond to a notice letter from a copyright owner. Unfortunately, the case law to date has morphed this safety valve into the one and only requirement that ISPs must observe. This is all the more problematic because

¹³ Limited downloads are also covered by bundled rates under Section 115 and should be included in PRO licenses. However, because of the incorrect Second Circuit decision about the scope of the public performing right in downloads (*see U.S. v. ASCAP, et al.*, No. 09-0539, 2010 WL 3749292 (2nd Cir. 2010)), conditional downloads are considered not to constitute “public” performances. Recognizing the PROs’ ability to license mechanical rights would mitigate some of the ill effects of this incorrect decision.

the concept of what an ISP is has itself morphed to include major media entertainment providers. It is clear that merely requiring an ISP to take down an infringing work from which it profits with: (a) no obligation on the part of the ISP to insure against a repeat posting, (b) no liability for prior infringements, and (c) no incentive to license the work to begin with, does not constitute a copyright infringement “remedy” by any stretch of the imagination. Congress surely did not envision 7 million takedown letters being sent to Google alone by beleaguered copyright owners each week, especially ones to ISPs that have no obligation to prevent the instant and rampant reposting of the self same works on the services of the self same IPSs.¹⁴ This “system” is broken and balance must be restored.

One possible fix for the current predicament would be for Congress to amend the safe harbors to clarify that the vicarious liability threshold test for safe harbor protection does not require specific knowledge of the infringement. The common law concept of vicarious liability rests on two prongs: control and direct financial benefit. Knowledge is not required under common law vicarious liability. The concept of contributory infringement, on the other hand, rests on knowledge and making a material contribution. By importing a *specific* knowledge requirement into the safe harbor threshold test for vicarious liability, the courts have essentially read out of the statute the “red flag” (or “constructive”) knowledge component of the thresholds for protection. True red flag knowledge should include instances where the ISP is knowingly

¹⁴ See www.google.com/transparencyreport/removals/copyright. This web site reports that during the past month over 26.6 million requests were made for Google to remove search results that link to materials that allegedly infringe copyrights. Each request names specific URLs to be removed. Google’s transparency report also lists the top copyright owner entities that made take-down requests during the past month: the RIAA member companies made almost 3 million, and Fox more than 1 million. These numbers are staggering. By May 2013, the number of music files removed by Google alone reached 20 million. That number may seem impressive. However, it must be noted that copyright infringements and copyright infringing activities on the Internet are infinitely larger. See http://www.riaa.com/blog.php?content_selector=riaa-news-blog&blog_selector=One-Year-&news_month_filter=5&news_year_filter=2013&searchterms=DMCA.

harboring and indeed encouraging third parties to infringe works, even if the ISP does not know the specific location of the specific files without further investigation. The test should require such knowledge to promote investigation and indeed proactive monitoring. The courts have also all but ignored the statute's provision permitting a copyright owner to provide a representative list of works, which should put the onus back on the ISP to protect against infringements of other works. The end result is the rise of lucrative entertainment-oriented web sites that are hiding behind the safe harbors.

In short, for entertainment-oriented web sites that openly encourage the upload of infringing content, the safe harbors should make immunity contingent upon the adoption and implementation of reasonably available screening and filtering technologies. Such technologies exist and are affordable. There is no reason that ISPs should be allowed to claim safe harbor protection when they do not take the bare minimum, reasonable steps to protect copyright owners' property rights from rampant infringement.

IV. Statutory Damages for File Sharing and Secondary Liability by Large Scale Infringers in the Digital Environment

The Notice asks for comments on changes to the statutory damages limits for file sharing and large scale secondary infringers in the digital environment. BMI does not believe that any changes are necessary or appropriate at this time. Statutory damages are the life blood of copyright enforcement for musical works, whose contributions to entertainment services are often combined with other content. It can be difficult – not to mention quite costly – to identify an infringer's profits from using music in order to assess actual damages.

File sharing on peer-to-peer networks has been recognized by the courts to involve only the distribution and reproduction rights. While there have been widely reported cases of large

damages awards against individual file sharers, we are not aware of such a tide of outsized awards as would cause a re-examination of the current levels. These levels give judges and juries wide discretion in setting per work damages, and this includes the lower threshold for innocent infringement. Instead of focusing the attention of the law on actions against individuals, the government should focus its attention on bringing the websites and ISPs that make these services possible into the licensing and enforcement mix. Judge Posner observed in the seminal *Aimster* decision that ISPs cannot turn a blind eye to infringement occurring on their sites – infringements that they are welcoming and profiting from.¹⁵

Should statutory damages levels be lowered for secondary infringers involved in large scale infringement? The answer to that question is a resounding no. The ease by which infringers can do grievous harm to content owners, particularly in the online environment, does not compel the reduction of any disincentive to infringement. Blanket licensing by collectives is likely to be a better solution than changes to the crucially important infringement remedies that exist today.

V. Conclusion

If music licensing reform is to reach fruition, protecting the economic interests of songwriters should be a paramount concern of the legislative and executive branches of government. The U.S. Constitution is rooted in a fundamental principle that authors should be incentivized to create. PROs are key players, as they present, on behalf of authors, efficient marketplace licensing solutions that deliver performing rights to users, and performing right royalties back to songwriters and publishers. Music always starts with a song, and without

¹⁵ *In re Aimster Litigation*, 334 F.3d 643, 2003 U.S. App. LEXIS 13229 (7th Cir. 2003).

songwriters there would be no music. Congress should address the barriers to efficient collective licensing of music users in the digital environment by: (1) modernizing the consent decrees to enable BMI and ASCAP to handle the licensing of mechanical and synchronization rights to digital music services; and (2) legislatively correcting the misinterpretations of the public performing right in recent court decisions by clarifying that all interactive, on demand transmissions to the public are public performances. As to statutory damages and secondary infringement by large scale infringers, the tests should be strengthened, not weakened. Any examination of the system of notice and takedown should include a re-evaluation of the broken standards under the DMCA safe harbors.

Respectfully submitted,

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