

POLICY ESSAY

A BLANKET FOR A TIRED STATUTE: CONGRESS MUST REPAIR THE MECHANICAL LICENSE IN SECTION 115 OF THE COPYRIGHT ACT

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Abstract: Over the last century, music distribution models saw multiple paradigm shifts and a relentless onslaught of disruptive forces straining the ability of copyright law to keep pace. The legal status of mechanical rights, governed by § 115 of Title 17 of the United States Code barely changed since the statute's inception in 1909. While seldom used for much of its 108-year existence, the § 115 license is now a pivotal issue creating complexities and inefficiencies in the modern music ecosystem. We argue that converting § 115 to a blanket license will resolve these issues and equip the digital frontier to better serve distributors, creators, and consumers of musical works.

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I. INTRODUCTION: A CENTURY OF MECHANICAL MACHINATIONS

Two years before Napster's epochal disruption of the music marketplace, the music industry found hope, not fear, in the internet. In September 1997, when Capitol Records offered the first-ever digital sale of a song, company executives saw unlimited potential in cyberspace.¹ It would be "open 24/7 and it's global. . . . [A] product never goes out of stock. We're shipping 'bytes, not atoms.'"² Two decades and countless lawsuits and legislative fights later, the digital revolution is finally beginning to live up to its promise with an evolved system that is bearing fruit for consumers, distributors, and creators of music. The market evolved from listeners paying to download albums and individual songs to streaming, which now represents sixty-two percent of music industry revenues.³ Yet, some areas of copyright law remain inadequate and must be adapted to this new frontier.

Issues related to the rights and royalties associated with the reproduction of musical compositions date back more than a century. In a 1905 address to Congress, President Theodore Roosevelt lamented the state of copyright law as "inconsistent" and "confused"⁴ insofar as it lacked "provision[s] for many articles which, under modern reproductive processes, are entitled to protection."⁵ While copyright law has come a long way since the Roosevelt Administration, the former President's statement remains applicable to the licensing laws associated with the so-called "mechanical" rights of musical compositions first codified just four years after those remarks.

The genesis of copyright law as it relates to physical (and now digital) reproductions harkens back to the first technological attempts to capture music in a tangible form. Over the last century, music distribution models have seen multiple paradigm shifts and a relentless onslaught of disruptive forces straining the ability of the law to keep pace. Yet the legal status of mechanical rights, governed by § 115 of Title 17 of the United States Code, barely changed since the statute's inception in 1909. While seldom used for much of its 108-year existence, the § 115 license is now a pivotal issue creating problems in the digital age for which a consensus is emerging around reforms.

¹ Bret Attwood, *The History of the Music Industry's First-Ever Digital Single For Sale, 20 Years After Its Release*, BILLBOARD (Sept. 13, 2017), <http://www.billboard.com/articles/business/7964771/history-music-industry-first-ever-digital-single-20-years-later> [<https://perma.cc/KR4P-QKZR>].

² *Id.*

³ JOSHUA P. FRIEDLANDER, NEWS AND NOTES ON 2017 MID-YEAR RIAA REVENUE STATISTICS 1 (2017), <http://www.riaa.com/wp-content/uploads/2017/09/RIAA-Mid-Year-2017-News-and-Notes2.pdf> [<https://perma.cc/4GVZ-586B>].

⁴ H.R. REP. NO. 60-2222, at 1 (1909).

⁵ Brian A. Carlson, *Balancing the Digital Scales of Copyright Law*, 50 SMU L. REV. 825, 831 (1997) (quoting H.R. REP. NO. 60-2222, at 1).

The rates paid for reproductions of musical works, which are prescribed in statute,⁶ have been a consistent point of contention. More recently, however, fundamental questions have emerged about the overall structure of the mechanical license, the alleged loopholes it contains, and the ways to alter it to better conform to the way music is now consumed. Despite progress in the law, the mechanical license in § 115 remains largely unchanged and woefully inadequate for the digital frontier. Modernizing this system through new legislation would greatly improve its functionality for all participants in the music ecosystem. This article addresses present challenges facing the handling of royalties pursuant to the compulsory license created in § 115 and attempts to reform it.

II. ROLL RULINGS AND THE CREATION OF § 115

With Congress building on the United States Constitution's grant of "securing for limited Times to Authors . . . the exclusive Right to their . . . Writings,"⁷ an established and mostly settled American copyright system existed by the end of the nineteenth century.⁸ The music business grew to be responsible for more than two million dollars of the domestic economy by 1900.⁹ At the time, legal issues related to copyright in music existed almost solely in the publishing domain, which consisted of enterprises that bought and sold musical compositions. As the cornerstone of the commodification of music, the publishing industry saw the rise of standards, patterns, and structures, many of which are still in place today.¹⁰

Lurking in the background, however, were complexities created by compositions manifested not just as sheet music to be sold or licensed for public performances by live bands, but also as a trade in reproducible physical copies of sound recordings. The emergence of the player piano—a more popular follow-on to "organettes"—involved a "roll" that mechanically reproduced songs on a piano for live audiences and became a technological means of creating music without human performers.¹¹

As the manufacturing of these rolls began to increase in popularity, copyright owners naturally sought royalties for the use of their works. These attempts were short-circuited by the United States Supreme Court's ruling that the rolls were not copies (i.e., sheet music) but instead were one with the workings of the instrument.¹² In 1909, Congress stepped in and created a

⁶ See H.R. REP. NO. 94-1476, at 111 (1976).

⁷ U.S. CONST. art. I, § 8, cl. 8.

⁸ See KEVIN PARKS, MUSIC & COPYRIGHT IN AMERICA: TOWARDS A CELESTIAL JUKEBOX 32 (2012).

⁹ See *id.* at 43.

¹⁰ See *id.* at 32.

¹¹ See EDWARD SAMUELS, THE ILLUSTRATED STORY OF COPYRIGHT 33–38 (2000), <http://www.edwardsamuels.com/illustratedstory/fisc2.htm> [<https://perma.cc/D8D8-ABV8>].

¹² See *White-Smith Music Publ'g Co. v. Apollo Co.*, 209 U.S. 1, 12 (1908).

“mechanical royalty” in § 115 to grant the owners of copyrights the right to collect on these mechanical reproductions of their compositions.¹³

To prevent this new right from being monopolized by a sole owner, it was authorized in a compulsory fashion. Thus, anyone wishing to reproduce the music after generating the initial copy need only pay the statutorily prescribed amount to the copyright holder.¹⁴ After the 1909 Act became law, in order to copy a work mechanically, one need only pay the two-cent rate, file a “notice of use” with the Copyright Office, and send a similar notice to the copyright owner indicating that one would be using the work.¹⁵ Within twenty years, the National Association of Music Publishers created the Harry Fox Agency to handle mechanical licensure arrangements outside the guise of the statutorily prescribed license.¹⁶ As such, the normal processes—noticing the Copyright Office and the rightsholder—became largely unused for the following four decades.¹⁷ In fact, despite inflationary changes, the rate of two cents per song set in 1909 did not change until 1978.¹⁸

Former Register of Copyrights Maria Pallante has written that when Congress was considering its major revisions of copyright law in the early 1970s, it was suggested that the “monopoly was no longer much of a concern and the license should perhaps be repealed.”¹⁹ The proposed elimination of § 115 was at the behest of publishers, who felt it had restrained their contracting abilities and market potential.²⁰ Ultimately, the publishers did not win this fight and instead settled for the “adjustment [of] the two-cent rate to two and three-quarters, and the license remains in effect today,”²¹ currently set at 9.1 cents.²²

III. THE MECHANICAL LICENSE IN A DIGITAL WORLD

In the commodification of music, there exists an inherent tension between those who seek to profit from the production and ownership of music and those who wish to profit from its distribution. Naturally, both seek to

¹³ See SAMUELS, *supra* note 11, at 38.

¹⁴ See Skyla Mitchell, *Reforming Section 115: Escape from the Byzantine World of Mechanical Licensing*, 24 CARDOZO ARTS & ENT. L.J. 1239, 1242 (2007).

¹⁵ See H.R. REP. NO. 60-2222, at 6 (1909).

¹⁶ See Mitchell, *supra* note 14, at 1243.

¹⁷ See *id.* at 1244.

¹⁸ See *Section 115 of the Copyright Act: In Need of an Update?: Hearing Before the Subcomm. on Courts, the Internet, and Intellectual Prop. of the H. Comm. on the Judiciary*, 108th Cong. 6 (2004) [hereinafter *Section 115 of the Copyright Act Hearing*].

¹⁹ Maria A. Pallante, *The Next Great Copyright Act*, 36 COLUM. J.L. & ARTS 315, 334 (2013).

²⁰ See U.S. COPYRIGHT OFFICE, REPORT OF THE REGISTER OF COPYRIGHTS ON THE GENERAL REVISION OF THE U.S. COPYRIGHT LAW 33 (1961), https://www.copyright.gov/docs/next_great_copyright_act.pdf [https://perma.cc/GG24-GHPT].

²¹ See Pallante, *supra* note 19, at 334.

²² *What Are Mechanical Royalty Rates?*, HARRY FOX AGENCY, https://www.harryfox.com/license_music/what_mechanical_royalty_rates.html [https://perma.cc/892V-VD4G].

maximize their financial gains, often times at the expense of the other. In the context of the mechanical license, these disputes have become especially pronounced in the last two decades.

Historically, fights over compensation in the context of the § 115 license have been about the rates paid to composers per the statutory license. To mollify this concern, the 1976 Copyright Act created the Copyright Royalty Tribunal as an independent body charged with setting rates to relieve Congress of this cumbersome task.²³ In 2004, the Copyright Royalty Judges, a panel of three full-time judges, replaced the tribunal.²⁴ When private negotiations failed, the judges would set rates based upon a statutory set of criteria.²⁵ Effectively, the rates set by the judges also function as a ceiling for how much can be charged for reproduction rights, since anyone wishing to reproduce the work can avail themselves of the statutory rate.²⁶

In addition to the rate-setting procedures, the rise of digital transmission as a primary means by which the public consumes music opened an additional major front in the battle over the structure of the mechanical license. The ease of manufacturing high fidelity digital reproductions—such as burning MP3s onto compact discs, and later services like Napster and LimeWire—resulted in unanticipated and novel complexities related to the distribution of royalties to rightsholders under § 115.²⁷ Updates to some areas of the law in recent decades have not only enabled this new frontier in music but have also created new challenges.

Despite the multitude of changes to the composition of music in the twentieth century, “the mechanical license has remained unchanged for over one hundred years.”²⁸ The one substantial exception is the Digital Performance Right in Sound Recordings Act of 1995²⁹ (“the DPRA”), which added § 115(c)(3)(E), creating a “mandatory mechanical royalty rate” for digital music.³⁰ It did so by adding a provision to deal with “digital phonorecord delivery,” which is defined in law as:

each individual delivery of a phonorecord by digital transmission of a sound recording which results in a specifically identifiable reproduction by or for any transmission recipient of a phonorecord

²³ See H.R. REP. NO. 94-1733, at 60 (1976) (Conf. Rep.).

²⁴ 17 U.S.C. § 115(c)(3)(C) (2012).

²⁵ See *id.*

²⁶ These fights continue today, with legislation pending before Congress that seeks to change the criteria by which rates are calculated, ostensibly to the advantage of songwriters. See Songwriter Equity Act of 2015, H.R. 1283, 114th Cong. (2015).

²⁷ See Mitchell, *supra* note 14, at 1246.

²⁸ Pallante, *supra* note 19, at 334.

²⁹ See Pub. L. No. 104-39, 109 Stat. 336 (1995) (codified as amended in scattered sections of 17 U.S.C.).

³⁰ See Brian S. Mencher & Vidal C. Maurrasse, *Revisiting the Convergence of Technology, Legislation, and Industry: The Effect of 17 U.S.C. § 115(c)(3)(e) of the Copyright Act on Mechanical Royalties and the Controlled Composition Clause*, 39 OHIO N.U. L. REV. 723, 723 (2013).

of that sound recording, regardless of whether the digital transmission is also a public performance of the sound recording or any nondramatic musical work embodied therein. A digital phonorecord delivery does not result from a real-time, non-interactive subscription transmission of a sound recording where no reproduction of the sound recording or the musical work embodied therein is made from the inception of the transmission through to its receipt by the transmission recipient in order to make the sound recording audible.³¹

Prior to the DPRA, the users of the mechanical license were almost exclusively record labels. This legislative change paved the way for a new universe consisting of digital platforms.³² While the 1995 Act squarely integrated digital music into the § 115 ecosystem, it also generated some lingering problems as online distribution platforms proliferated at a rapid clip.

By 2004, the digital disruption of the music industry had reached almost a fever pitch. The internet enabled users to easily download music, legally and illegally, through Napster and its successors. Then, the advent of the iPod gave rise to the beginning of the end for physical reproductions of musical works. Congress took notice. In testimony before the House Judiciary Committee in 2004, Jonathan Potter, the Executive Director of the Digital Media Association, characterized § 115 as outdated and unworkable in the twenty-first century:

The mechanical compulsory license is provided only on a per work basis because in 1909 when the license was developed, and in 1976 when it was modified, licensees typically licensed only a handful of compositions at one time in order to produce a piano roll or composition book or a record album.

Today, however, online services require hundreds of thousands or even a million licenses simultaneously, as they compete—against each other and against online black markets—to offer consumers the most comprehensive music selection possible.³³

The Register of Copyrights agreed with the newfound complexities of the mechanical royalty, especially when compared with the blanket licensing of performance rights, testifying:

[w]hile it was widely recognized that the performance right could be cleared easily with blanket performance licenses from the three performing rights societies, it became apparent that no similar

³¹ 17 U.S.C. § 115(d) (2012).

³² See Mencher & Maurrasse, *supra* note 30, at 734, 734 n.54.

³³ *Section 115 of the Copyright Act Hearing*, *supra* note 18, at 29 (statement of Jonathan Potter, Executive Director, Digital Media Association).

mechanism existed to clear the reproduction and distribution rights with equal ease.³⁴

The Performing Rights Organizations (“PROs,”³⁵ the four largest of which being ASCAP,³⁶ BMI,³⁷ SESAC,³⁸ and GMR³⁹) have been looked upon as a potential solution for § 115 issues. In the United Kingdom, for example, a single PRO collects the royalties for both the mechanical rights and the performance rights.⁴⁰ However, this is not possible in the United States because of consent decrees enforced by the Department of Justice since 1941. This regulation of ASCAP and BMI “do[es] not allow composers and publisher[s] to grant these PROs rights other than the rights of public performance.”⁴¹

IV. A SOLUTION EMERGES

By 2006, some in Congress sought a legislative fix to the problem. Representatives Lamar Smith (R-Tex.), then-Chairman of the House Judiciary Subcommittee on Courts, Intellectual Property, and the Internet, and Howard Berman (D-Cal.), the ranking Democrat on the Subcommittee, introduced the Section 115 Reform Act⁴² (“SIRA” or “SIRA”). The bill aimed to simplify the burdensome and complex process of clearing rights associated with the administration of mechanical licenses.⁴³ To do this, it would have changed “the section 115 licensing structure to a blanket-style system for digital uses” through a series of new mechanisms.⁴⁴

SIRA would have required the Register of Copyrights to designate an agent responsible for licensing and collection.⁴⁵ This agent would represent the “greatest share of the music publishing market” and be empowered to “grant and administer all licenses for musical works licensed under this regime; collect and distribute the royalties; engage on the behalf of music publishers and songwriters in industry negotiations, rate setting proceedings,

³⁴ *Reforming Section 115 of the Copyright Act for the Digital Age: Hearing Before the Subcomm. on Courts, the Internet, and Intellectual Prop. of the H. Comm. on the Judiciary*, 110th Cong. 24–25 (2007) [hereinafter *Music Licensing Hearing*] (statement of Marybeth Peters, Register of Copyrights).

³⁵ Performance Rights Organizations are copyright collectives that serve as intermediaries between rightsholders (songwriters and publishers) and licensees for the purposes of collecting royalties associated with the public performance of a sound recording.

³⁶ The American Society of Composers, Authors and Publishers.

³⁷ Broadcast Music, Inc.

³⁸ Originally the “Society of European Stage Authors and Composers.”

³⁹ Global Music Rights.

⁴⁰ Bruce H. Kobayashi, *Opening Pandora’s Black Box: A Coasian 1937 View of Performance Rights Organizations in 2014*, 22 GEO. MASON L. REV. 925, 930 n.38 (2015).

⁴¹ *Id.*

⁴² Section 115 Reform Act of 2006, H.R. 5553, 109th Cong. (2006).

⁴³ *See id.*

⁴⁴ Pallante, *supra* note 19, at 334.

⁴⁵ H.R. 5553 § 2(e)(9)(b)(i)(I).

litigation, and legislative efforts.”⁴⁶ The Register would further certify “additional designated agents (ADAs) . . . who represent music publishers representing at least a 15% share of the music publishing market.”⁴⁷

These agents would also represent copyright owners and would be responsible for the distribution of royalties collected. Furthermore, the bill required “[t]he GDA [(General Designated Agent)] and ADAs are to maintain and make available free of charge to digital music providers a searchable electronic database from which the providers can determine which musical works are available for licensing through that designated agent.”⁴⁸ The agents were also empowered to conduct “royalty compliance examination as a quality control.”⁴⁹ In its totality, the bill was an earnest attempt to streamline the process by which digital users obtained permissions.

The bill received broad support from industry stakeholders, including the National Music Publishers Association, the Digital Music Association, all four major PROs, and the National Academy of Recording Arts and Sciences.⁵⁰ The internet community, however, was less than thrilled about the prospect of SIRA. The Electronic Frontier Foundation (EFF), an organization that champions internet freedom, described the bill as “an unholy alliance between the major music service providers and music publishing industry.”⁵¹ EFF and its allies’ major concern was that the bill threatened fair use protections. While the organization supported updating § 115, it argued that in SIRA “the copyright industries are stacking the deck for future fights against other digital technologies that depend on making incidental copies [protected by fair use].”⁵² However, SIRA was not designed to implicate fair use and contained a clause to make that clear.⁵³ Ultimately, SIRA never received a vote in the House of Representatives.⁵⁴ Instead, it left open the possibility for a future deal to better adapt mechanical licensing to the twenty-first century.

⁴⁶ BRIAN T. YEH, CONG. RESEARCH SERV., RL33538, SATELLITE DIGITAL AUDIO RADIO SERVICES AND COPYRIGHT LAW ISSUES 13 (2006).

⁴⁷ *Id.*

⁴⁸ *Id.*

⁴⁹ *Id.*

⁵⁰ See Letter from Am. Fed’n of Musicians et al. to F. James Sensenbrenner, Chairman, Comm. on the Judiciary and John Conyers, Ranking Member, Comm. on the Judiciary (Sept. 21, 2006), <https://www.publicknowledge.org/pdf/sira-letter-20060921.pdf> [perma.cc/7VGS-4QWU].

⁵¹ Fred von Lohmann, *Season of Bad Laws, Part 4: Music Services Sell Out Fair Use*, ELEC. FRONTIER FOUND. (June 4, 2006), <https://www.eff.org/deeplinks/2006/06/season-bad-laws-part-4-music-services-sell-out-fair-use> [perma.cc/Q46M-275N].

⁵² *Id.*

⁵³ See H.R. 5553, 109th Cong. § 7(b) (2006).

⁵⁴ H.R. 5553 – *Section 115 Reform Act of 2006*, CONGRESS.GOV, <https://www.congress.gov/bill/109th-congress/house-bill/5553/all-actions?overview=closed#tabs> [https://perma.cc/63R3-YZAJ].

V. THE DUBIOUS ROLE OF NOTICES OF INTENTION (“NOIs”) IN THE
§ 115 DIGITAL LANDSCAPE

With Congress making no changes to the mechanical license to enable it to systemically comport to the digital age, new problems emerged related to the parameters set forth over forty years ago. As noted above, to avail themselves of the compulsory license offered by § 115, music users or distributors must notify the music’s owner of their intent to license the work. However, oftentimes records identifying the owner of a work are not readily available, which frustrates the noticing requirement. In re-crafting § 115 in 1976, Congress allowed a music distributor to use the work even when the distributor could not identify the rightsholder. In such a case, the law requires that the user or distributor send an “address unknown” NOI to the Copyright Office.

Section 115(b)(1) stipulates: “[i]f the registration or other public records of the Copyright Office do not identify the copyright owner and include an address at which notice can be served, it shall be sufficient to file the notice of intention in the Copyright Office.”⁵⁵ Furthermore, royalties are not payable to “unknown addresses” until the rightsholder is identifiable via public records held by the Copyright Office. Afterwards, the owner is “not entitled to recover for any phonorecords previously made and distributed.”⁵⁶

The 1976 Act’s NOIs replaced the original obligation of a “notice of use.” As copyright lawyer Chris Castle has observed, § 115(c)(1) reflects a compromise to take into account the already-known ownership of a song at the time of its use:

The “notice of use” was an obligation on the song copyright owner to file a notice in the Copyright Office when the song has had a “first use.” (“[I]t shall be the duty of the copyright owner, if he uses the musical composition himself for the manufacture of parts of instruments serving to reproduce mechanically the musical work, or licenses others to do so, to file notice thereof in the copyright office, and failure to file such notice shall be a complete defense to any suit, action, or proceeding for any infringement of such copyright.”). As noted in the House Report for the 1976 revision of the Copyright Act, “[t]his requirement has resulted in a technical loss of rights in some cases, and serves little or no purpose where the registration and assignment records of the Copyright Office already show the facts of ownership. Section 115(c)(1) therefore drops any formal ‘notice of use’ requirements and merely provides that ‘[the copyright owner must be identified

⁵⁵ 17 U.S.C. § 115(b)(1) (2012).

⁵⁶ *Id.* § 115(c)(1).

in the records of the Copyright Office] in order to be entitled to receive royalties under a compulsory license'"⁵⁷

In the last decade, the change from “notice of use” to “notice of intent” drastically complicated matters related to the mechanical license by digital services. In fact, it appears that administrative changes at the Copyright Office spurred a sharp increase in the filings of NOIs for which the address was unknown.

Just two years ago, filing an NOI for an address unknown with the Copyright Office was burdensome and quite expensive for the music user. The Copyright Office required NOIs to be filed by paper.⁵⁸ Each NOI required paying a seventy-five dollar filing fee plus two dollars per song.⁵⁹ As *Billboard* summarized the situation,

[s]o if you started a service and had the publishing data for say, five million songs, but did not have the information for another 500,000 songs, the service would need to file NOIs, saying it is licensing and using those songs with the Copyright Office. That process would cost . . . about \$1 million.⁶⁰

In early 2016, however, the Office began accepting NOIs filed electronically at only ten cents per track.⁶¹ Thus, “filing NOIs for 500,000 songs will only cost \$50,075, instead of \$1.000075 million.”⁶² Digital music providers, naturally, began to file in bulk.⁶³ Between April 2016 and January 2017, an average of three million NOIs pertaining to unknown addresses were served on the Copyright Office.⁶⁴

A further complication is that the law is silent with respect to what happens if the music user is, or has the means to identify, the person to whom payment should be rendered. Why not file a tremendous number of NOIs when the upside is putting the burden on songwriters while getting to play music without payment? In response to the question of why there are so many “address unknown” NOIs, one could as easily ask, why are there not more?

⁵⁷ Chris Castle, *Meet the New Boss: Tech Giants Rely on Loopholes to Avoid Paying Statutory Royalties with Mass Filings of NOIs at the Copyright Office*, 33 ENT. & SPORTS LAW. 65, 67 n.29 (2017) (citations omitted).

⁵⁸ Ed Christman, *Say You Want a Revolution? U.S. Copyright Office Modernizes Key Part of Digital Licensing*, BILLBOARD (June 24, 2016), <http://www.billboard.com/articles/news/7416438/us-copyright-office-music-reports-compulsory-licensing-digital-notice-of-intent> [<https://perma.cc/C5CZ-2UVG>].

⁵⁹ *Id.*

⁶⁰ *Id.*

⁶¹ *Id.*

⁶² *Id.*

⁶³ Ari Herstand, *Apple Music Admits Harry Fox Agency Is Incompetent*, DIGITAL MUSIC NEWS (Mar. 10, 2016), <https://www.digitalmusicnews.com/2016/03/10/apple-music-admits-harry-fox-agency-is-incompetent/> [<https://perma.cc/TN9C-7N68>].

⁶⁴ Castle, *supra* note 57, at 65.

Critics have pointed out “that music users are simultaneously accounting under blanket licenses to the U.S. performing rights organizations for the performing rights of the same uses of the same songs by the same service.”⁶⁵ In other words, they argue the information claimed to be “unknown” for the purposes of fulfilling § 115 NOI obligations is known, via PROs, for other purposes. An additional issue in this space is the time lag created by the administration of the public records. The Copyright Office itself “acknowledges on its copyright registration portal that the processing time for e-filings is six to ten months.”⁶⁶ This delay can affect new releases during the time period of their highest earning potential.⁶⁷

Solving the NOI problem is complicated because of the incentives at play on both sides of the equation. As one skeptic put it, “[n]either the services filing the mass NOIs nor their agents should be providing search functions to songwriters, as this really would be like asking the fox to file an after action report for the fox’s attack on the chicken coop.”⁶⁸ In reality, lawsuits related to mechanical royalty issues create business and legal uncertainty and threaten their relationship with music creators.⁶⁹ As evidenced by the coalescence around SIRA, digital distributors would welcome efficiency in this space. Congress can solve the NOI problem by making NOIs obsolete. To do so, Congress could turn to the distribution of digital performance royalties as a model. In that space, the non-profit SoundExchange distributes performance royalties for certain categories of digital transmissions of music.⁷⁰ This safe harbor charges royalties from the users of music and seeks to distribute them equitably to rightsholders.

VI. THE FUTURE FIGHT OVER § 115

There is little disagreement that changes to § 115 are in order. In testimony before the Senate Judiciary Committee in 2005, former Register of Copyrights Marybeth Peters stated:

There is no debate that section 115 needs to be reformed to ensure that the United States’ vibrant music industry can continue to

⁶⁵ *Id.* at 67.

⁶⁶ *Id.* at 70.

⁶⁷ *Id.*

⁶⁸ *Id.* at 69.

⁶⁹ In July 2017, Bob Gaudio of the musical group Frankie Valli and The Four Seasons, filed lawsuits against Spotify seeking copyright infringement damages that could add up to hundreds of millions of dollars related to the administration of § 115 licenses. See Eriq Gardner, *Spotify Hit with Two Lawsuits Claiming “Staggering” Copyright Infringement*, HOLLYWOOD REPORTER (July 18, 2017, 2:20 PM), <http://www.hollywoodreporter.com/thr-esq/spotify-hit-two-lawsuits-claiming-staggering-copyright-infringement-1021771> [https://perma.cc/9BZ4-2Q57].

⁷⁰ Jeff Burke, *SoundExchange vs. BMI/ASCAP/SESAC*, NPR DIGITAL SERVICES (May 23, 2016), <http://digitalservices.npr.org/post/soundexchange-vs-bmiascapesac> [https://perma.cc/ET7F-VNDX].

flourish in the digital age. . . . [T]he operative question is not whether to reform section 115, but how to do so. . . . It is now time to modernize section 115 holistically, not only to address immediate needs, but also to establish a functional licensing structure for the future.⁷¹

Some have responded to the present challenges by suggesting “phasing out the Section 115 license to enable owners to negotiate licenses directly with users at market rates, similar to how sync licenses are negotiated.”⁷² Though there was much discussion about getting rid of the mechanical license altogether in the lead up to the 1976 Copyright Act, it was retained under the guise of having streamlined access to musical works on “non-discriminatory” terms.⁷³ As noted above, publishers went along with this in exchange for an increase in the rate.⁷⁴

In the present context, Congress must re-write § 115 to maximize efficiency and certainty for distributors while ensuring due compensation to creators. In 2013, the former Register of Copyrights Maria Pallante lamented that SIRA did not become law and prescribed that, “[i]t may be time for Congress to take another look.”⁷⁵ Instead, Congress should now reconsider the fundamental tenets of the Section 115 Reform Act with the benefit of a decade’s worth of hindsight. In one fell swoop, the conversion of the current system to one that sanctions a mechanism for the efficient clearing of rights would upend the complications with the mechanical license. Much like with the handling of performance royalties for digital services, a blanket license structure for digital reproductions “would enable services to launch without litigation risk, and ensure prompt royalty payments and distributions, which benefits music publishers, composers, and songwriters.”⁷⁶

VII. CONCLUSION

As Congress seeks to reform the music-licensing ecosystem, reforming § 115 is no easy task, given the complexities at play in the 108-year-old law. However, at present, updating the mechanical license likely represents the lowest-hanging fruit relative to the most bountiful gathering. With over a decade since SIRA was first introduced, it now seems clear that its central

⁷¹ *Music Licensing Reform, Hearing before the Subcomm. on Intellectual Prop. of the S. Comm. on the Judiciary*, 109th Cong. 117–18 (2005) (statement of Marybeth Peters, Register of Copyrights).

⁷² Danica Mathes, *Music Licensing Reform May Be on the Way*, LAW360 (Sept. 9, 2014, 10:45 AM), <https://www.law360.com/articles/573481/music-licensing-reform-may-be-on-the-way> [perma.cc/9LDH-SH3K].

⁷³ See H.R. REP. 90-83, at 66 (1967).

⁷⁴ Pallante, *supra* note 19, at 334.

⁷⁵ *Id.*

⁷⁶ *Section 115 of the Copyright Act Hearing, supra* note 18, at 20.

tenant—embracing a blanket license—deserves renewed consideration with an eye toward a more flexible and efficient system.

In its 2015 report on the state of the music marketplace, the Copyright Office agreed, arguing:

[T]he Office believes that on the whole, the benefits of a blanket licensing approach clearly outweigh the conceded challenges of matching reported uses with copyright owners. Throughout this study, the Office has heard consistent praise for the efficiencies of blanket licensing by SoundExchange and the PROs, and widespread frustration with the song-by-song process required under section 115—including from publishers who find themselves burdened with deficient notices and accountings.⁷⁷

Furthermore, the political environment now seems riper than when SIRA was introduced in 2005. The ascension of digital distribution services to the main mode by which music is consumed—combined with the maturation of these business models—has fostered an environment that beckons reforms long overdue.

⁷⁷ U.S. COPYRIGHT OFFICE, COPYRIGHT AND THE MUSIC MARKETPLACE 170 (2015).

