

THE INADVISABILITY OF NONUNIFORMITY IN THE LICENSING OF COVER SONGS

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ABSTRACT

In February 2015, the U.S. Copyright Office released a report entitled *Copyright and the Music Marketplace*, which summarizes its study of the music industry and recommends significant revisions to copyright law in response to the rapidly changing demands of the industry. Among its recommendations, the Copyright Office proposes an amendment to section 115(a)(2) of the Copyright Act. Currently, section 115(a)(2), referred to as the compulsory licensing provision of copyright law, permits someone to record a new version of a previously recorded and publicly distributed song, regardless of the format of the newly recorded version. The revised section 115(a)(2) would require someone who wishes to distribute a cover recording of a song to seek a license from the copyright owner for dissemination via interactive new media and digital downloads. However, distribution of cover songs in physical formats still would be subject to compulsory licensing.

The Copyright Office's suggested amendment to section 115(a)(2) would create nonuniformity for creators of cover recordings based on the intended format of the newly recorded song. This approach seems contrary to the Copyright Office's guiding principles and reasoning behind its recommendations for other changes to copyright law in the *Music Marketplace* report that emphasize the importance of harmonization of the rules for music licensing. For example, the Copyright Office supports

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harmonizing the rules that govern terrestrial radio with the rules concerning digital and satellite radio by broadening the sound recording performance right to include terrestrial broadcasts and including terrestrial uses under sections 112 and 114 licenses. According to the report, the creation of a terrestrial radio performance right would adhere to the Office's principle that "analogous uses should be treated alike." Yet, the recommendation for section 115(a)(2) would produce different treatments of digital and physical formats of works. A potential licensee who is the digital distributor of a cover song would no longer have the option of a compulsory license if the licensee does not want to contact the copyright owner or the copyright owner does not wish to license the song, but the potential licensee could distribute the same cover song in a physical format, such as a compact disc (CD), under the current compulsory licensing system. This Article concludes this recommendation is inadvisable because it creates inconsistencies in licensing musical works when harmonization is critical for the music industry, and it places an unjustifiable burden on musicians and distributors seeking to rerecord songs in digital formats. The U.S. Copyright Office should either recommend the elimination of the compulsory licensing system for music or suggest format-neutral changes to the current system. Because of the lack of need and purpose for a compulsory licensing system for musical works today, the Article suggests that the Office develop a recommendation that includes the repeal of section 115.

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INTRODUCTION

“I’m a musician. That’s what I do. And I also am music.”
—Prince¹

Prince. The single word moniker identifies the name of a famous artist and describes his status in the music industry. He was talented, unique, and iconic. He was also outspoken in his criticism of the industry—one of the most forthright of those music artists who object to the compulsory licensing of cover songs, or “covers.”² If the U.S. Congress ends up being as receptive to music artists’ concerns about compulsory licensing as the U.S. Copyright Office has been, then, ironically, those artists will be able to stifle the creativity of other artists, the creators of cover songs.

On April 15, 2011, Prince appeared as a guest on the Lopez Tonight television show. He made these comments regarding the compulsory licensing of cover songs:

1. Dorian Lynskey, *Prince: ‘I’m a musician. And I am music,’* THE GUARDIAN, June 23, 2011, <http://www.theguardian.com/music/2011/jun/23/prince-interview-adele-internet> [<https://perma.cc/KDF6-SA53>].

2. OFFICE OF THE GENERAL COUNSEL, U.S. COPYRIGHT OFFICE, COPYRIGHT AND THE MUSIC MARKETPLACE: A REPORT OF THE REGISTER OF COPYRIGHTS at 175 (Feb. 2015) [hereinafter *Music Marketplace*], <http://copyright.gov/policy/musiclicensingstudy/copyright-and-the-music-marketplace.pdf> [<https://perma.cc/3WLC-9SMQ>] (“While the ability to make a cover recording has long been a feature of the law, it is not without controversy, especially among artists who write their own works. While some artist songwriters may view imitation as flattery, others do not appreciate that they are unable to prevent the re-recording of their songs by others.”); see also Eriq Gardner, *Why Taylor Swift May Soon Be Able to Stop Cover Songs on Spotify Too*, THE HOLLYWOOD REPORTER, February 5, 2015, <http://www.hollywoodreporter.com/thr-esq/why-taylor-swift-may-soon-770698> [<https://perma.cc/NH42-P395>] (“Many artists are quite fine with cover versions of their songs, but not all. Some might want more money, while others are just philosophical.”); e.g. Joshua Brustein, *Here’s How Taylor Swift’s Songs Could End Up Back on Spotify*, Bloomberg Business, Aug. 6, 2015, <http://www.bloomberg.com/news/articles/2015-08-06/here-s-how-taylor-swift-s-songs-could-end-up-back-on-spotify> [<https://perma.cc/4T77-TFJD>]. However, some artists do not object to compulsory licensing of songs recorded by them, or they have not given it much consideration. Shirley Halperin, *Should Covering Songs Be Illegal? Dr. Luke, Ke\$ha, Adam Lambert Weigh In*, HOLLYWOOD REPORTER, April 29, 2011, <http://www.hollywoodreporter.com/thr-esq/should-covering-songs-be-illegal-183759> [<https://perma.cc/CCC5-E9K7>] (During the 2010 ASCAP Pop Awards, The Hollywood Reporter interviewed several artists about their views of Prince’s criticism of compulsory licensing. Dr. Luke said, “I have the most respect in the world for Prince, but I think there are more important things to be worrying about. I think people should be able to record songs that they want to record.” Ke\$ha opined, “There is some truth to that, because people can obviously massacre something you hold very sacred. But one of the reasons why the American flag is so evident in my live show is because I really stand for freedom of speech.” Rod Stewart acknowledged the validity of Prince’s point, but he said he would need to give it “great consideration.”).

[C]overing music means that your version doesn't exist anymore. A lot of times, people think I'm doing Sinead O'Connor's song and Chaka Khan's song when in fact I wrote those songs [Compulsory licensing] allows artists through the record companies to take your music at will without your permission, and that doesn't exist in any other art form, be it books, movies. There's only one version of Law & Order. There's several versions of "Kiss" and "Purple Rain".³

On February 5, 2015, the U.S. Copyright Office released a report that appears to support the position of music artists like Prince. The report, entitled *Copyright and the Music Marketplace (Music Marketplace)*, summarizes the Copyright Office's study of the music industry and recommends significant revisions to copyright law in response to the rapidly changing demands of the industry.⁴ Among its recommendations, the Copyright Office proposes an amendment to section 115(a)(2) of the Copyright Act.⁵ Currently, section 115(a)(2), referred to as the compulsory licensing provision of copyright law, permits someone to record a new version of a previously recorded and publicly distributed song, regardless of the format of the newly recorded version.⁶ The revised section 115(a)(2) would require someone who wishes to distribute a cover recording of a song to seek a license from the copyright owner for dissemination via interactive new media and digital downloads.⁷ However, distribution of physical formats still would be subject to compulsory licensing.⁸

3. *Lopez Tonight* (TBS television broadcast Apr. 15, 2011), available at https://www.youtube.com/watch?v=rQbqNl_lacg [<https://perma.cc/9JRX-H26U>].

4. See *Music Marketplace*, *supra* note 2, at 166–67.

5. *Id.*

6. 17 U.S.C. § 115(a) (2) (2012) (“A compulsory license includes the privilege of making a musical arrangement of the work to the extent necessary to conform it to the style or manner of interpretation of the performance involved, but the arrangement shall not change the basic melody or fundamental character of the work, and shall not be subject to protection as a derivative work under this title, except with the express consent of the copyright owner.”); see also 17 U.S.C. § 115(a)(1) (“When phonorecords of a nondramatic musical work have been distributed to the public in the United States under the authority of the copyright owner, any other person, including those who make phonorecords or digital phonorecord deliveries, may, by complying with the provisions of this section, obtain a compulsory license to make and distribute phonorecords of the work.”).

7. See *Music Marketplace*, *supra* note 2, at 166–67. (“[A] publisher’s choice to negotiate interactive streaming and DPD rights for its catalog of songs would include the ability to authorize the dissemination of cover recordings by those means. Or, put another way, where the publisher had opted out [of the compulsory licensing provision], someone who produced a cover recording would need to obtain a voluntary license to post the song on an interactive streaming or download service (just as would someone who wished to offer streams or downloads of the original recording of that work).”).

8. *Id.* at 166. (“With respect to cover recordings, the Office recommends an approach whereby those who seek to re-record songs could still obtain a license to do so, including in

The Copyright Office's suggested amendment to section 115(a)(2) would create nonuniformity for creators of cover recordings based on the intended distribution format of the newly recorded song. This approach seems contrary to the Office's guiding principles and reasoning behind its recommendations for other changes to copyright law in the Music Marketplace report, which emphasize the importance of harmonization of the rules for music licensing.⁹ For example, the Copyright Office supports harmonizing the rules that govern terrestrial radio with the rules concerning digital and satellite radio by broadening the sound recording performance right to include terrestrial broadcasts and including terrestrial uses under sections 112 and 114 licenses.¹⁰ According to the report, the creation of a terrestrial radio performance right comports with "the principle that analogous uses should be treated alike."¹¹ Yet, the recommendation for section 115(a)(2) would create different treatments for distributing digital and physical formats of musical works.¹² A potential licensee who is the digital distributor of a cover song would no longer have the option of a compulsory license if the licensee does not want to contact the copyright owner or the copyright owner does not wish to license the song. However, the potential licensee who distributes the same cover song in a physical

physical formats. But the dissemination of such recordings for interactive new media uses, as well as in the form of downloads, would be subject to the publisher's ability to opt out of the compulsory regime."

9. One of the four guiding principles of the report is that the "licensing process should be more efficient." See *Music Marketplace*, *supra* note 2, at 1. The Copyright Office identifies additional principles that should guide any process of reform of the licensing system, notably "[g]overnment licensing processes should aspire to treat like uses of music alike." *Id.* It seems inefficient to encourage the option of private negotiation for the licensing of cover songs in digital format but continue compulsory licensing for the licensing of cover songs in physical format. Further, this recommendation would result in treating highly similar, one might even posit identical, uses of music (for the purpose of "remakes" or "covers") unlike.

10. Marybeth Peters, *Ensuring Artists Fair Compensation: Updating the Performance Right and Platform Parity for the 21st Century*, Statement of Marybeth Peters, The Register of Copyright before the Subcommittee on Courts, the Internet, and Intellectual Property, Committee on the Judiciary (July 31, 2007), <http://www.copyright.gov/docs/regstat073107.html> [<https://perma.cc/LF9A-R99P>], ("I strongly urge Congress to expand the scope of the performance right for sound recordings to cover all analog and digital by broadcasters as a way to enable creators of the sound recordings to adapt to the precipitous decline in revenue due to falling record sales.").

11. See *Music Marketplace*, *supra* note 2, at 177 ("[A]ssuming Congress broadens the sound recording performance right to include terrestrial broadcasts, in keeping with the principle that analogous uses should be treated alike, it would seem only logical that terrestrial uses should be included under section 112 and 114 licenses"). See also *id.* at 2 ("The Copyright Office believes that any overhaul of our music licensing system should strive to achieve greater consistency in the way it regulates (or does not regulate) analogous platforms and uses.").

12. *Id.* at 166–67.

format could license the song under the current compulsory licensing system.¹³

Part I of this Article analyzes section 115, the compulsory licensing provision of the federal copyright statute. This Part explains the evolution of this provision of copyright law from the 1909 Act to the 1976 Act. It also highlights the challenges posed by digital technology and its effect on the delivery of music to the public.

Part II reviews the Copyright Office's Music Marketplace report. It critiques the pitfalls of the recommendation concerning cover song licensing. In addition, it compares this recommendation to other recommendations in the report, which are more consistent with the guiding principles of the Copyright Office's report.

This Article concludes that the "Cover Recordings" recommendation of the Music Marketplace report is inadvisable because it creates inconsistencies and inefficiencies in licensing musical works when harmonization is critical for the industry, and it places an unjustifiable burden on musicians and distributors seeking to rerecord and distribute songs in digital formats. The Copyright Office should take a harmonious position regarding the compulsory licensing system for music—either set forth a recommendation that abolishes compulsory licensing or suggest format-neutral changes to the current compulsory licensing system. Despite the arguments of some music industry participants,¹⁴ there is not a demonstrable need for a compulsory licensing system for music in today's industry. Therefore, this Article asserts that the Copyright Office should recommend the repeal of section 115 and propose a phasing out process for eliminating the compulsory licensing regime for musical works.

I. COMPULSORY LICENSING PROVISION OF U.S. COPYRIGHT LAW

A. History of Compulsory Licensing System

The compulsory licensing system was established in section 1(e) of the 1909 Copyright Act, which provided:

That whenever the owner of a musical copyright has used or permitted or knowingly acquiesced in the use of the copyrighted work upon parts of instruments serving to reproduce mechanically the musical work, any other person may make similar use of the copyrighted work upon the payment to the copyright proprietor of a royalty of two

13. *Id.*

14. *See generally infra* note 31.

cents on each such part manufactured, to be paid by the manufacturer thereof . . .¹⁵

Congress created the compulsory licensing system in response to the Supreme Court's decision in *White-Smith Music Publishing Co. v. Apollo Co.*, which held that the unauthorized embodiment of a song in a player piano roll did not infringe the copyright in the song.¹⁶ The Court's rationale was that a player piano roll was not a "copy" under the 1909 Act because the mechanical reproduction could not be understood by the human eye.¹⁷

Following this decision, there was an outcry against music publishers' banding together to grant their recording rights to a single entity.¹⁸ Congress provided for a copyright owner's exclusive right to make and distribute mechanical reproductions of its musical works under the 1909 Act,¹⁹ but it also established the compulsory licensing system to address concerns that a single entity might acquire such exclusive rights from publishers, thereby creating a monopoly of the player piano roll market.²⁰

B. Current Compulsory Licensing System

Section 115 of the Copyright Act of 1976 is the compulsory license provision of copyright law.²¹ It is the basis for the current compulsory

15. An Act to Amend and Consolidate the Acts Respecting Copyright, ch. 320, § 1(e), 35 Stat. 1075 (1909).

16. Howard B. Abrams, *Copyright's First Compulsory License*, 26 SANTA CLARA COMPUTER & HIGH TECH L.J. 215, 218 (2009) (citing *White-Smith Music Publ'g Co. v. Apollo Co.*, 209 U.S. 1 (1908), aff'd 147 F. 226 (2d Cir. 1906), aff'd 139 F. 427 (C.C.S.D.N.Y. 1905)).

17. *White-Smith*, 209 U.S. at 17. The Court accepted an expert's definition of a copy of a musical composition as "a written or printed record of it in intelligible notation" and concluded a mechanical instrument that reproduces a song copies but only under a "strained and artificial meaning" of the term.

18. Abrams, *supra* note 16, at 219–20 ("Eighty-seven members of the Music Publishers Association controlling 381,598 compositions had agreed to give the Aeolian Company exclusive rights to manufacture piano rolls of their copyrighted compositions The Aeolian Company was the dominant manufacturer of player pianos.").

19. *Id.* at 215.

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

21. Abrams, *supra* note 16, at 215–16, n.1 (noting the term "compulsory license" is used in section 115 of the Copyright Act, but the Act "is not consistent in its terminology. For example, the term 'statutory license' is used in section 111(d). 17 U.S.C. § 111(d) (2006) (secondary transmissions by cable television systems). Sections 116 and 118 provide a statutory/compulsory license in the absence of a negotiated agreement without using either of those terms. 17 U.S.C. §§ 116 & 118 (2006) (116: juke box performances of copyrighted non-dramatic musical compositions; 118: noncommercial broadcasts of published nondramatic musical works and published pictorial, graphic and sculptural works)." Prior to the enactment of the 1976 Act, the then-Register of Copyrights proposed the abandonment

licensing regime in the United States and provides a compulsory license to anyone who would like to make and distribute phonorecords of a nondramatic musical work.²² In other words, upon the payment of the government-controlled licensing fee, one can reproduce or distribute musical compositions, but not sound recordings.²³

Section 115(a)(2) provides a compulsory license for anyone to make and distribute a “cover song”.²⁴

A compulsory license includes the privilege of making a musical arrangement of the work to the extent necessary to conform it to the style or manner of interpretation of the performance involved, but the arrangement shall not change the basic melody or fundamental character of the work, and shall not be subject to protection as a derivative work under this title, except with the express consent of the copyright owner.²⁵

Read together, sections 115(a)(1) and 115(a)(2) of the 1976 Act currently permit anyone to reproduce and distribute phonorecords²⁶ and

of the mechanical licensing system because, among other reasons, the threat of a monopoly no longer existed and the fears concerning availability of non-exclusive licensing without the statutory licensing system were unpersuasive. *Id.* at 222; *see also* Pallante, *supra* note 20, at 334. The record companies strongly opposed the Register’s recommendation, and some music publishers expressed a willingness to preserve the system, subject to a more equitable royalty structure. Abrams, *supra* note 16, at 225. As a result, the compulsory licensing system was maintained. *Id.*

22. 17 U.S.C. § 115(a)(1) (2012) (“When phonorecords of a nondramatic musical work have been distributed to the public in the United States under the authority of the copyright owner, any other person, including those who make phonorecords or digital phonorecord deliveries, may, by complying with the provisions of this section, obtain a compulsory license to make and distribute phonorecords of the work.”).

23. *Id.* (“A person may not obtain a compulsory license for use of the work in the of making phonorecords duplicating a sound recording fixed by another, unless: (i) such sound recording was fixed lawfully; and (ii) the making of the phonorecords was authorized by the owner of copyright in the sound recording or, if the sound recording was fixed before February 15, 1972, by any person who fixed the sound recording pursuant to an express license from the owner of the copyright in the musical work or pursuant to a valid compulsory license for use of such work in a sound recording.”).

24. 17 U.S.C. § 115(a)(2). A “cover song” is defined as “a recording of a song that was first recorded or made popular by somebody else; ‘they made a cover of a Beatles’ song.” *Cover Song*, THE FREE DICTIONARY (Jan. 11, 2016, 10:25 AM), <http://www.thefreedictionary.com/cover+song> [<https://perma.cc/T4WM-JEFF>].

25. 17 U.S.C. § 115(a)(2).

26. The Copyright Act of 1976 defines phonorecords as “material objects in which sounds, other than those accompanying a motion picture or other audiovisual work, are fixed by any method now known or later developed, and from which the sounds can be perceived, reproduced, or otherwise communicated, either directly or with the aid of a machine or device.” 17 U.S.C. § 101.

digital phonorecord deliveries (DPDs)²⁷ of a musical work, including cover songs,²⁸ after the musical work has been publicly distributed in the United States under the authority of the copyright owner.²⁹ Thus, the current compulsory licensing system applies to the reproduction and distribution of musical works in both physical formats, such as phonorecords, and digital formats, such as DPDs.

II. COPYRIGHT AND THE MUSIC MARKETPLACE REPORT

A. Principles of the Music Marketplace Report

In 2014, the U.S. Copyright Office examined the licensing of music in the United States and solicited and analyzed industry participants' views of the licensing system.³⁰ As part of the information-gathering process, the Office solicited public comments³¹ and conducted public roundtables³² on music licensing issues. On February 5, 2015, the Copyright Office released a report entitled "Copyright and the Music Marketplace."³³ The report summarizes the Copyright Office's findings from the study and

27. In 1995, "Congress enacted the Digital Performance Right in Sound Recordings Act of 1995, which, in addition to granting a digital performance right for sound recordings, amended section 115 to expressly cover the reproduction and distribution of musical works by digital audio transmissions, or DPDs." See *Music Marketplace*, *supra* note 2, at 27 (citing S. REP. NO. 104-128, at 10 (1995), reprinted in 1995 U.S.C.C.A.N. 356, 357).

28. Section 115(a)(2) limits the compulsory license to arrangements that do not "change the basic melody or fundamental character of the work." 17 U.S.C. § 115(a)(2).

29. 17 U.S.C. § 115(a)(1).

30. *Music Marketplace*, *supra* note 2, at 14-15.

31. The Copyright Office's first Notice of Inquiry, dated March 17, 2014, received responses from eighty-five commenters. See U.S. Copyright Office Music Licensing Study: Notice and Request for Public Comment, 79 Fed. Reg. 14739 (Mar. 17, 2014), available at <http://copyright.gov/fedreg/2014/79fr14739.pdf> [<https://perma.cc/7G8D-3DNZ>]; U.S. Copyright Office, *Music Licensing Study: Comments* (May 23, 2014), http://copyright.gov/policy/musiclicensingstudy/comments/Docket2014_3/ [<https://perma.cc/QW9G-K89H>]. The second Notice of Inquiry, dated July 23, 2014, received responses from fifty-one commenters. See U.S. Copyright Office Music Licensing Study: Second Request for Comments, 79 Fed. Reg. 42833 (July 23, 2014), available at <http://copyright.gov/fedreg/2014/79fr42833.pdf> [<https://perma.cc/V3P5-TV63>]; U.S. Copyright Office, *Music Licensing Study: Extension Period Comments* (Sept. 12, 2014), http://copyright.gov/policy/musiclicensingstudy/comments/Docket2014_3/extension_comments/ [<https://perma.cc/C5Y3-W9CH>].

32. On May 5, 2014, the Copyright Office announced it would conduct two-day public roundtables on the effectiveness of current methods of music licensing in Nashville, Tennessee; Los Angeles, California; and New York, New York in June 2014. See U.S. Copyright Office Music Licensing Study: Notice of Public Roundtables, 79 Fed. Reg. 25626 (May 5, 2014), available at <http://copyright.gov/fedreg/2014/79fr25626.pdf> [<https://perma.cc/78QD-Y9NM>]; U.S. Copyright Office, *Public Roundtables on Music Licensing* (June 2014), <http://copyright.gov/policy/musiclicensingstudy/transcripts/> [<https://perma.cc/8LG5-2A4X>].

33. See generally *Music Marketplace*, *supra* note 2.

recommends significant revisions to copyright law in response to the rapidly changing demands of the music industry.³⁴

The report adopts four key “Guiding Principles” from its study of music industry stakeholders and their views of current methods of music licensing: (1) fair compensation for the contributions of music creators, (2) more efficient licensing, (3) access to authoritative data to identify and license sound recordings and musical works, and (4) transparent and accessible usage and payment information.³⁵ It also identified four additional principles that the Copyright Office believes should inform any changes to the music licensing system: (1) government licensing processes should aspire to treat like uses alike, (2) government supervision should enable voluntary transactions while still supporting collective solutions, (3) rate-setting and enforcement of antitrust laws should be separately managed and addressed, and (4) a single, market-oriented rate-setting standard should apply to all music uses under statutory licenses.³⁶ According to the Copyright Office, it seeks to use these principles as a guide for its recommendations for reform of music licensing and to “balance[] tradeoffs among the interested parties to create a fairer, more efficient, and more rational system for all.”³⁷

B. Cover Song Recommendation of the Music Marketplace Report

The Copyright Office proposes numerous recommendations for reform of the current music licensing system, such as the ability of copyright owners to opt out of the compulsory licensing system for digital uses of musical works,³⁸ expansion of the sound recording performance right to include recognition of a terrestrial radio performance right,³⁹ and the extension of federal copyright protection to pre-1972 sound recordings.⁴⁰

Regarding cover recordings of songs, the Copyright Office recommends the following:

[A]n approach whereby those who seek to re-record songs could still obtain a license to do so, including in physical formats. But the dissemination of such recordings for interactive new media uses, as well as in the form of

34. *See generally Id.*

35. *Id.* at 1.

36. *Id.* at 2.

37. *Id.* at 1, 134.

38. *Id.* at 136–37, 166–67.

39. *Music Marketplace*, *supra* note 2, at 138–39.

40. *Id.* at 140–42.

downloads, would be subject to the publisher's ability to opt out of the compulsory regime.⁴¹

The Office then explains the newly created discretion of a publisher who opts out of the current compulsory licensing system:

Thus, a publisher's choice to negotiate interactive streaming and DPD rights for its catalog of songs would include the ability to authorize the dissemination of cover recordings by those means. Or, put another way, where the publisher had opted out, someone who produced a cover recording would need to obtain a voluntary license to post the song on an interactive streaming or download service (just as would someone who wished to offer streams or downloads of the original recording of that work).⁴²

The Office's proposed amendment to section 115(a)(2), which provides for the compulsory licensing of cover recordings, would create an inefficient, unfair, format-driven system. If a cover song creator wishes to record and distribute a song in physical format, such as a compact disc (CD), then the distributor can obtain a compulsory license through the existing system of section 115.⁴³ However, if the same cover song creator wishes to record and distribute the song in a digital format, such as a digital download, the distributor must seek the permission of the copyright owner of the song,⁴⁴ assuming the copyright owner opts out of the compulsory licensing regime.⁴⁵

41. *Id.* at 166.

42. *Id.* at 166–67.

43. *Id.* at 166.

44. It is reasonable to assume most copyright owners of songs would opt out of the compulsory licensing system for the recording and digital distribution of cover songs. As recognized by the Copyright Office, “[m]any music creators seek more control over their works.” *Id.* at 166. If a copyright owner is given the option to exercise greater control over one's song, it enables the copyright owner to refuse permission to license the work or seek higher compensation for a license to the work. Indeed, according to the Office's report, music publishers and songwriters have identified the following areas as a primary concern regarding the compulsory licensing system—(1) lack of ability “to control the use of their works or seek higher royalties” and (2) “lack of an audit right under section 115 and practical inability to enforce reporting or payment obligations against recalcitrant licensees.” *Id.* at 162. Thus, it is highly likely that copyright owners will decide to opt out of the current compulsory licensing regime.

45. *Music Marketplace*, *supra* note 2, at 166–67.

1. Lack of Harmonization of the Cover Song Recommendation with Principles and Other Recommendations of the Report

The Copyright Office characterizes its proposals for change as “high-level and preliminary in nature” and stresses the importance of analyzing the recommendations of the Music Marketplace report together, rather than in isolation.⁴⁶ However, it is difficult to consider the report as a whole when at least one recommendation, the “Cover Recordings” proposal under the “Mechanical Licensing and section 115” section, not only contradicts the report’s foundational series of principles for reform of the music licensing system but also appears to be inconsistent with other proposed changes throughout the report. Most important, this recommendation would make music licensing more inefficient and complex, contrary to Office’s overall goal of reform identified in the report.⁴⁷

The Office proposes broadening the sound recording performance right to include a terrestrial radio performance right.⁴⁸ A related recommendation proposes amendments to sections 112 and 114, which (upon the payment of a statutory fee) permit internet and digital radio service providers to engage in non-interactive streaming activities, to include terrestrial broadcasts.⁴⁹ The Office observes that the current statutory licensing system for such uses of sound recordings, which is administered by nonprofit entity SoundExchange,⁵⁰ works well.⁵¹ Further,

46. *Id.* at 133–34.

47. The Office repeatedly refers to the inefficiencies in the current music licensing system, and it views its proposed reform of the system as a means for creating a more efficient system. For example, in the first page of the Executive Summary of the *Music Marketplace* report, it observes that “[r]ecord labels and digital services complain that the licensing process is burdensome and inefficient, making it difficult to innovate.” *Music Marketplace*, *supra* note 2, at 1. Then, the Office responds that its proposals aspire to “present a series of balanced tradeoffs among the interested parties to create a fairer, more efficient, and more rational system for all.” *Id.* Further, one of the four guiding principles of the report is that the “licensing process should be more efficient.” *Id.*

48. *Id.* at 138–39.

49. *Id.* at 177.

50. SoundExchange licenses qualifying digital uses of sound recordings. *Music Marketplace*, *supra* note 2, at 22; *see also* <http://www.soundexchange.com/artist-copyright-owner/digital-royalties/> [<https://perma.cc/6LWX-5YTS>]. Its responsibilities were designated by the Copyright Royalty Board, which is composed of three administrative judges appointed by the Librarian of Congress. *See* 17 U.S.C. § 801 (a) (“The Librarian of Congress shall appoint 3 full-time Copyright Royalty Judges, and shall appoint 1 of the 3 as the Chief Copyright Royalty Judge.”); *see also* 37 C.F.R. § 301.1 (“The Copyright Royalty Board is the institutional entity in the Library of Congress that will house the Copyright Royalty judges, appointed pursuant to 17 U.S.C. 801(a), and their staff.”); 17 U.S.C. § 101 (“A ‘Copyright Royalty Judge’ is a Copyright Royalty Judge appointed under section 802 of this title, and includes any individual serving as an interim Copyright Royalty Judge under such section.”).

51. *Music Marketplace*, *supra* note 2, at 175.

the Office reasons this reform of music licensing, an expansion of the existing scope of sections 112 and 114 licenses, follows its principle that analogous uses be treated alike.⁵²

Another recommendation aims to create parity between the law's treatment of sound recordings made prior to February 15, 1972 and recordings made after that date.⁵³ All musical works and post-1972 sound recordings are subject to the protection of federal copyright law.⁵⁴ Satellite and Internet radio service providers rely more heavily on pre-1972 sound recordings for their playlists because sections 112 and 114 of the Copyright Act do not cover pre-1972 sound recordings, and therefore, do not require the payment of the federal statutory licensing fees for these works.⁵⁵ The Office characterizes this lack of protection of pre-1972 sound recordings as a market distortion and seeks to address it.⁵⁶ It believes the full federalization of pre-1972 sound recordings, including all limitations and exceptions provisions of the Act, will "improve the certainty and consistency of copyright law, encourage more preservation and access activities, and provide the owners of pre-1972 sound recordings with the benefits of any future amendments to the Copyright Act."⁵⁷

The Office asserts that permitting copyright owners to opt out of the compulsory licensing system for digital distribution comports with its philosophy of treating like uses of music alike.⁵⁸ Because interactive uses of sound recordings are negotiated in the free market (for higher rates, which the Office theorizes results from publishers' inability to negotiate free from government control), the Office reasons that digital uses of musical works should be negotiated in the free market as well.⁵⁹ While similar treatment for digital uses of sound recordings and musical works is sensible, it is an inequitable recommendation if it results in disparate treatment of the same type of work, musical works, in digital and physical formats.

Unlike other recommendations in the Office's report, the "Cover Recordings" recommendation contradicts the Office's principles. The Office adopts the key principles of fair compensation and more efficient licensing from its study of music industry stakeholders and their views on the licensing system.⁶⁰ Yet, the compensation for distribution of musical works in physical formats would greatly differ from the compensation for distribution of musical works in digital formats if the compulsory licensing system is eliminated for digital uses of musical works. In addition, the

52. *Id.* at 177.

53. *Id.* at 140–42.

54. *Id.* at 43.

55. *Id.* at 140.

56. *Id.*

57. *Music Marketplace*, *supra* note 2, at 140–41.

58. *Id.* at 135–36.

59. *Id.* at 136.

60. *Id.* at 1.

recommendation would create licensing inefficiencies for creators and distributors of covers songs who distribute their music in both formats.

2. Harmful Effects of the Cover Song Recommendation on the Music Licensing System

The “Cover Recordings” proposal, albeit succinct and straightforward, would have extensive adverse effects on the music licensing system. While the Copyright Office views its recommendation as a compromise between the values of free market negotiation and collective management of rights and a balance between the goals of fair compensation to creators and licensing efficiency,⁶¹ the proposed solution will create more problems than it solves for the licensing of cover songs.

A case study of hip hop albums concluded “[a]rtists are increasingly self-releasing materials in digital form.”⁶² The Copyright Office may anticipate the eventual phasing out of distributing music in physical formats, which would cause private negotiation for the remaining digital distribution of all cover recordings. However, at least at the present time, distribution of music via physical format, such as CDs, remains prevalent in the marketplace.⁶³ If copyright owners of musical works opt out of the compulsory licensing system and directly license digital distribution of their songs, then they are free to negotiate the payment of a fair market rate by licensees.⁶⁴ However, users who distribute cover songs in physical format will pay the below-market rate of section 115.⁶⁵ This disparity in the pay structure for licensing of cover songs creates inequity

61. *Id.* at 164.

62. E-mail from Brenda Nelson-Strauss, Head of Collections, Indiana University, Archives of African American Music and Culture and Langston Collin Wilkins, PhD Candidate, Indiana University to Library of Congress, Copyright Office (May 23, 2014), http://copyright.gov/docs/musiclicensingstudy/comments/Docket2014_3/Indiana_University_Archives_of_African_American_Music_and_Culture_MLS_2014.pdf [<https://perma.cc/DX39-SEQF>].

63. In 2015, sale of music in physical format accounted for approximately 39% of all music sales globally. See *Global Music Report 2016: State Of The Industry*, INTERNATIONAL FEDERATION OF THE PHONOGRAPHIC INDUSTRY (April 12, 2016), <http://ifpi.org/news/IFPI-GLOBAL-MUSIC-REPORT-2016> [<https://perma.cc/QA76-K2RC>].

64. In its proposed change to the licensing of covering songs, the Office concludes that under its new licensing system, “someone who produced a cover recording would need to obtain a voluntary license to post the song on an interactive streaming or download service.” *Music Marketplace*, *supra* note 2, at 167.

65. *Id.* at 12. (“There is a profound conviction on the part of music publishers and songwriters that government regulation of the rates for the reproduction, distribution, and public performance of musical works has significantly depressed the rates that would otherwise be paid for those uses in an unrestricted marketplace. The standards employed for the section 115 and PRO rate-setting proceedings—section 801(b)(1)’s four-factor test for mechanical uses and the ‘reasonable fee’ standard of the consent decrees (which cannot take into account sound recording performance rates)—are perceived as producing below-market rates . . .”).

based on the format of distribution and unfairly burdens distributors of music in digital formats.

Imagine an instance when an up-and-coming artist seeks to distribute his or her cover of a popular song. The cover is released on the artist's website (or a third party website), and listeners can purchase a CD or digital download of the song. The artist, or third party distributor, would pay two rates for licensing of the same musical work on the same website—a market-based rate negotiated with the copyright owner for the digital download and the compulsory licensing fee, or at least a rate capped by the statutory fee, for the CD. This licensing scenario is not efficient for the licensee. The licensee must negotiate in the free market for one use of the musical work and pay the government-controlled fee for the other use of the work. In addition, while the licensor may be paid the fair market rate for the digital use, the licensor is underpaid for the physical distribution of the same song. Even if the current system is not the ideal payment structure for licensing musical works, at least the fees for cover song licensing are determined by one means.

III. THE FUTURE OF THE COMPULSORY LICENSING SYSTEM

The Copyright Office should recommend the elimination of the compulsory licensing system altogether. A recommendation that includes the repeal of section 115 could follow, for all formats of distribution of musical works, one of the Office's additional principles that "government supervision should enable voluntary transactions while still supporting collective solutions."⁶⁶ Also, it would follow the Office's additional principle that any licensing system of music should treat analogous uses in the same manner.⁶⁷ Therefore, because of the lack of need and purpose for a compulsory licensing system in today's industry, the current licensing regime should be eliminated for all uses, physical and digital, of musical works.

The Copyright Office acknowledges that "[s]ongwriters and publishers appear almost universally to favor the elimination of the section 115 statutory license, albeit with an appropriate phase-out period[.]" which would allow the development of the free market for the licensing of musical works.⁶⁸ The Office also recognizes digital music service providers' position that section 115 acts as "an *essential counter-balance to the unique market power of copyright rights owners . . .* by providing a mechanism for immediate license coverage, thereby negating the rights owner's prerogative to withhold the grant of a license."⁶⁹ First, this concern of the danger of the monopoly power of copyright owners is speculative because

66. *Music Marketplace*, *supra* note 2, at 134.

67. *Id.*

68. *Id.* at 111.

69. *Id.* at 112 (emphasis in original).

free market negotiation of licensing for musical works has not existed.⁷⁰ Second, even if there is validity to this concern, it is not grave enough to justify the deprivation of the copyright owners' exclusive rights to their works, including their rights to refuse to license certain uses.⁷¹

Leading up to the enactment of the 1976 Act, then-Register of Copyrights Abraham L. Kaminstein proposed the abandonment of the mechanical licensing system because, among other reasons, the threat of a monopoly no longer existed and the fears concerning availability of nonexclusive licensing without the statutory licensing system were unpersuasive.⁷² Former Register of Copyrights Marybeth Peters testified before Congress and expressed her belief that section 115 should be repealed:

[T]he evolution of technology and business practices has eroded the effectiveness of this provision. Despite several attempts to amend the compulsory license and the Copyright Office's corresponding regulations in order to keep pace with advancements in the music industry, the use of the section 115 compulsory license has steadily declined to an almost non-existent level. It primarily serves today as merely a ceiling for the royalty rate in privately negotiated licenses A fundamental principle of copyright law is that the author should have the exclusive right to exploit the market for his work, except where doing so would conflict with the public interest. While the section 115 statutory license may have served the public interest well with respect to a nascent music reproduction industry after the turn of the century and for much of the 1900's, it is no longer necessary and unjustifiably abrogates copyright owners' rights today.⁷³

70. Former Register of Copyrights Marybeth Peters eloquently stated, "Compulsory licenses should only be instituted as a last resort, when the marketplace has failed. We cannot say that the marketplace has failed with respect to reproduction and distribution of nondramatic musical works because the marketplace has never been given a chance to succeed." See Marybeth Peters, *Statement of Marybeth Peters, the Register of Copyrights*, Hearing Before the Subcommittee on Courts, the Internet, and Intellectual Property of the House Committee on the Judiciary (June 21, 2005), <http://www.copyright.gov/docs/regstat062105.html> [<https://perma.cc/MH9L-3FE8>].

71. *Id.* at 10.

72. STAFF OF H.R. COMM. ON THE JUDICIARY, 87TH CONG., REP. OF THE REGISTER OF COPYRIGHTS ON THE GENERAL REVISION OF THE U.S. COPYRIGHT LAW 33-35 (Comm. Print 1961). The report "propos[ed] that the present compulsory licensing provisions be left in effect for one year" after the elimination of compulsory licensing in order to allow time for negotiations between music publishers and record companies. *Id.* at 36.

73. Marybeth Peters, *Statement of Marybeth Peters, the Register of Copyrights*, Hearing Before the Subcommittee on Courts, the Internet, and Intellectual Property of the

In 2005, former Register Peters proposed the elimination or reformation of section 115 to Congress.⁷⁴ Her first option was the elimination of the compulsory licensing provision because, as she had expressed to Congress a year earlier, “the section 115 license should be repealed and . . . licensing of rights should be left to the marketplace, most likely by means of collective administration.”⁷⁵

This Article concurs with former Registers Peters’ and Kaminstein’s assessments of the compulsory licensing system. The statutory licensing regime of Section 115 deprives copyright owners of musical works from exercising their federally protected rights—the exclusive rights of reproduction and distribution.⁷⁶ Rightsholders of other categories of copyrighted works do not face this diminution of their exclusive rights in their works.⁷⁷ If the basis for a compulsory licensing provision of copyright law was controversial in the 1900s,⁷⁸ it is even more so now.⁷⁹

House Committee on the Judiciary (June 21, 2005), <http://www.copyright.gov/docs/regstat062105.html> [https://perma.cc/MH9L-3FE8].

74. *Id.*

75. *Id.* (citing Marybeth Peters, *Statement of Marybeth Peters, the Register of Copyrights, before the Subcommittee on Courts, the Internet, and Intellectual Property of the House Committee on the Judiciary* (March 11, 2004), <http://www.copyright.gov/docs/regstat031104.html> [https://perma.cc/M4FV-5VRD]).

76. 17 U.S.C. § 106 (“Subject to sections 107 through 122, the owner of copyright under this title has the exclusive rights to do and to authorize any of the following: (1) to reproduce the copyrighted work in copies or phonorecords; (2) to prepare derivative works based upon the copyrighted work; (3) to distribute copies or phonorecords of the copyrighted work to the public by sale or other transfer of ownership, or by rental, lease, or lending; (4) in the case of literary, musical, dramatic, and choreographic works, pantomimes, and motion pictures and other audiovisual works, to perform the copyrighted work publicly; (5) in the case of literary, musical, dramatic, and choreographic works, pantomimes, and pictorial, graphic, or sculptural works, including the individual images of a motion picture or other audiovisual work, to display the copyrighted work publicly; and (6) in the case of sound recordings, to perform the copyrighted work publicly by means of digital audio transmission.”).

77. 17 U.S.C. § 115 limits the scope of rights in § 106 by requiring “nondramatic musical works” to be subjected to a compulsory licensing scheme, whereas “the exclusive right to reproduce a copyrighted pictorial, graphic, or sculptural work in copies under section 106 includes the right to reproduce the work in or on any kind of article, whether useful or otherwise.” 17 U.S.C. § 113, 115.

78. Abrams, *supra* note 16, at 222—25.

79. The United States’ compulsory licensing of music is an outlier in the global music community. Peters, *supra* note 73 (“Our compulsory license in the United States is an anomaly. Virtually all other countries which at one time provided a compulsory license for reproduction and distribution of phonorecords of nondramatic musical works have eliminated that provision in favor of private negotiations and collective licensing administration.”); *see also* Peters, *supra* note 74 (“Although the predecessor to section 115 served as a model for similar provisions in other countries, today all of those countries, except for the United States and Australia, have eliminated such compulsory licenses from their copyright laws.”).

The Copyright Office aptly recognizes the unique qualities of music and speculates that the psychological power of music may be one of the bases for its special treatment under the law:

It may be the very power of music that has led to its disparate treatment under the law. The songs we enjoy in our early years resonate for the rest of our lives. Human beings have a deep psychological attachment to music that often seems to approach a sense of ownership; people want to possess and share the songs they love. Perhaps this passion is one of the reasons music has been subject to special statutory treatment under the law.⁸⁰

While psychological and emotional connections to music may exist, and may even be powerful for all who experience music, the justifications for a statutory licensing system for music are unconvincing.⁸¹ The Copyright Office should recommend an approach to cover song licensing that includes the elimination of compulsory licensing for musical works.

CONCLUSION

On February 5, 2015, the U.S. Copyright Office released the report “Copyright and the Music Marketplace,” which was the culmination of its 2014 study of the existing music marketplace and its diverse industry participants.⁸² The report adopted four key “Guiding Principles” from the Copyright Office’s study: (1) fair compensation for the contributions of music creators, (2) more efficient licensing, (3) access to authoritative data to identify and license sound recordings and musical works, and (4) transparent and accessible usage and payment information.⁸³ The recommendation to allow copyright owners to opt-out of the compulsory licensing system for cover recordings distributed in digital formats would cause inefficient licensing, inequitable treatment of cover songs distributed in different formats, and unfair compensation for licensing musical works. Licensees of cover songs distributed in digital formats would pay a negotiated market rate, but licensees of cover songs distributed in physical

80. *Music Marketplace*, *supra* note 2, at 133.

81. The Copyright Office observed that “some licensees view section 115 as a protection against monopoly power that allows the public to enjoy musical works while still compensating copyright owners.” *Id.* at 112. For example, “Spotify argued that the free market is not stifled by the statutory license, but that section 115 instead acts as ‘an indispensable component to facilitating a vibrant marketplace for making millions of sound recordings available to the public on commercially reasonable terms.’” *Id.*

82. *Id.* at Preface.

83. *Id.* at 1.

formats would pay the government-controlled below-market rate under Section 115.

Finally, even though the Copyright Office's current recommendation appears to be partially consistent with one of the additional principles of the report, namely, "government supervision should enable voluntary transactions while still supporting collective solutions," this recommendation is not consistent with another additional principle of the report, namely, "[g]overnment licensing processes should aspire to treat like uses of music alike."⁸⁴ The recommendations of the Office should adhere to the principle of harmonization and aim for format neutrality. The Office may anticipate the eventual phasing out of distributing music in physical formats, which would cause private negotiation for the remaining digital distribution of all cover recordings. However, the Office should not advocate for an inefficient, unfair system in the meantime. The Office should recommend the elimination of Section 115, which would allow copyright owners to license their musical works in the free market.⁸⁵

84. *Id.* at 2.

85. This Article recognizes the impracticability of an immediate elimination of compulsory licensing for musical works and suggests an appropriate phasing out period, to be determined in consultation with industry stakeholders.