

**IN THE MATTER OF THE INQUIRY ON COPYRIGHT POLICY,  
CREATIVITY AND INNOVATION IN THE INTERNET ECONOMY**

**COMMENTS OF THE FUTURE OF MUSIC COALITION**

**November 13, 2013**

Docket Number: 130927852-3852-01

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**I. Introduction**

Future of Music Coalition (FMC) is pleased to submit the following comments to the United States Patent and Trade Office in the Internet Policy Task Force Green Paper on Digital Copyright Policy.

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

As FMC is a music organization, our comments will focus on matters relevant to our core constituency of musicians and composers. While we recognize the importance of all of the questions posed by the Task Force, we have chosen to speak specifically to those issues in which we have particular standing and expertise.

**II. Government Role in Improving the Online Licensing Environment**

*A. The Obstacles to Improving Access to and Standardizing Ownership Information*

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

As the Green Paper itself recognizes, “the most basic prerequisite for obtaining licenses is reliable, up-to-date information about who owns what rights in what territories.”<sup>1</sup> To that end, it seems necessary to establish a comprehensive, publicly searchable informational database (or databases) of copyright information with functionality allowing for the uniform entering of relevant data about ownership.<sup>2</sup>

While there are a number of such databases extant or in development, they are either lacking in accuracy or depth of information or are to one or another extent proprietary. The Copyright Office offers one example of a publicly searchable rights database, but as the Green Paper notes, its records are incomplete and not always available online.<sup>3</sup>

Proprietary databases serve some purposes, particularly to the members or clients of the companies and organizations who operate them. Examples include YouTube’s Content ID system or databases maintained Performing Rights Organizations (PROS) and the Harry Fox Agency. Although proprietary systems may pave the way in establishing a technological framework that is efficient for input and access, it is likely that stakeholders across the board will have more confidence in systems overseen by nonprofit entities rather than businesses with highly specific interests. An example of a nonprofit organization deeply involved in database management is SoundExchange, which was established to collect and distribute money generated by the digital public performance right for sound recordings. While the SoundExchange was not designed to provide publicly searchable information on who owns what specific piece of music, the organization may have valuable insights into how to organize and maintain rightsholder data in a digital context.

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

While FMC recognizes that copyright registration cannot be compelled, we see benefit in aligning incentives so that accessible informational resources are something in which a majority of stakeholders find participation worthwhile. Government can and should play a role in encouraging various parties to understand the economic and organizational benefits of good-faith involvement in such systems.

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<sup>1</sup> USPTO Green Paper p. 89

<sup>2</sup> Joe Silver, “In Pursuit of a Global Music Registry.” Future of Music Coalition (Sept. 27, 2012). <http://futureofmusic.org/blog/2012/06/27/pursuit-global-music-registry>

<sup>3</sup> The Green Paper further notes that the Copyright Office’s records: (1) do not provide comprehensive coverage of all copyright-protected works; (2) give only certain facts existing at the time of registration or recordation; (3) are not yet all available online; and (4) relate to the treatment of copyrights under U.S. law only, including as to rights and term of protection. Nevertheless they represent an important starting point for finding the owners of many works, particularly those of commercial value whose owners are likely to want a public record of their claims.

On the data entry side, there is much work to be done in standardizing musical metadata. Metadata is the information that accompanies a sound recording file and is delivered to online stores like iTunes and streaming platforms like Rhapsody and Spotify. Metadata includes things like performer, composer, record label, and release date. FMC Director of Programs Jean Cook presented research on this top at CASH Music Summit in Portland, Oregon in August 2013, demonstrating how inconsistencies in metadata have particularly impacted artists in the classical and jazz genres:

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

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

### *B. The Importance of Transparency, Leverage and Efficiency in Music Licensing*

Licensing is a vast and controversial topic, particularly with regard to issues around rate-setting and artist compensation. FMC has argued against one-size-fits all solutions to licensing concerns, as such proposals have a tendency to calcify developing marketplaces, frustrate innovation and disadvantage smaller operators, including musicians and composers as well as independent labels and publishers. We are adamant, however, that licensing and compensation structures must be as transparent as possible and allow artists to exercise some degree of leverage on various platforms.

Establishing a legitimate digital music marketplace that rewards creators and other rightsholders while providing fans with the level of access and interoperability they have come to expect is the key challenge on the road towards a sustainable music ecosystem. Since compensation and payment mechanisms are subject to contracts, market value, and other factors (some experimental or technological in nature), finding the appropriate balance between creator compensation and innovation is not an easy task, but one that nonetheless must be undertaken.

In order to legitimately offer digital music to consumers, services must license two separate copyrights: the sound recording copyright and the underlying musical composition copyright.<sup>4</sup> The picture is even more complicated when one factors in the numerous independent labels, publishing companies, individual performing artists, and

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4. See generally 17 U.S.C. § 102(a)(7) (2006).

songwriters whose licenses add tremendous perceived and actual value to a digital music service.<sup>5</sup>

Often, a work has multiple owners, which makes the process of obtaining licenses that much more difficult.<sup>6</sup> In addition to determining who owns what, there is the issue of not being able to license a work due to disagreements among the various owners of a copyright (or their heirs).<sup>7</sup> These are among the many reasons why informational databases are essential to a functional environment for music licensing.

There are many differences between how music is licensed to digital services. Those platforms that sell downloads or provide “interactive” (i.e., on-demand) listening must negotiate licenses with labels and publishers in order to build a catalog vast enough to attract listeners.<sup>8</sup> Negotiations do not always produce results: the relatively brief history of digital music is something of an elephants’ graveyard of failed startups with depleted venture capital reserves.

Although webcasters are able to obtain blanket licenses that allow them to avoid time-consuming negotiations with uncertain outcomes, there are still points of contention between Internet broadcasters and rights-holders. Pandora, an ad-supported “predictive radio” service, functions under law as a webcaster, meaning it is required to obtain licenses from SoundExchange for the digital public performance right and from the Performing Rights Organizations for the underlying composition copyright.<sup>9</sup> In recent years, the service has engaged in intense proceedings before with the Copyright Royalty Board (CRB)—the government entity that sets rates for compulsory licenses—to achieve a fee structure that makes sense for their business model.<sup>10</sup> Other stakeholders have pushed back against these efforts, reacting particularly aggressively to the Internet Radio Fairness Act (IRFA), a bill that aimed to change the standard under which “pureplay” webcaster rates are calculated. Regardless of these debates, the digital broadcasting space remains a rare section of the music industry that is growing, rather than shrinking.<sup>11</sup>

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5. See, e.g., Todd Martens, *Amoeba Music to Open Download Site*, L.A. TIMES, Jan. 29, 2010, at D14

6. See Knobler, *supra* note 89, at 13 (discussing the steps download providers must take in order to obtain the required licenses needed to sell digital music).

7. See Jeff Price, *The Three Licenses Holding Back the Music Industry*, TUNECORE BLOG (May 12, 2011), <http://blog.tunecore.com/2011/05/the-three-licenses-holding-back-the-music-industry.html>

8. See Ben Sisario & Miguel Helft, *Apple Is Called Poised to Offer ‘Cloud’ Music*, N.Y. TIMES, May 21, 2011, at B1

9. See generally 17 U.S.C. § 114 (2006) (codifying the compulsory license for digital audio transmissions); Vanessa Van Cleaf, Comment, *A Broken Record: The Digital Copyright Act’s Statutory Royalty Rate-Setting Process Does Not Work for Internet Radio*, 40 STETSON L. REV. 341, 359–62 (2010) (discussing the role of SoundExchange as the statutory licensing representative).

10. See Claire Cain Miller, *Music Labels Reach Deal with Internet Radio Sites*, N.Y. TIMES, July 8, 2009, at B2 (discussing the new royalty rate agreement between record labels and online radio stations); see also John Timmer, *Pandora Lives! SoundExchange Cuts Deal on Webcasting Rates*, ARS TECHNICA (July 7, 2009, 5:20 PM), <http://arstechnica.com/media/news/2009/07/soundexchange-cuts-deal-on-music-webcasting-rates.ars>

11. See Miller, *supra* note 126, at B2 (discussing the nature of the negotiations between stakeholders); see also Arbitron/Edison Research, *The Infinite Dial: Navigating Digital Platforms* (2011), available at [www.edisonresearch.com/Infinite\\_Dial\\_2011\\_ExecSummary.pdf](http://www.edisonresearch.com/Infinite_Dial_2011_ExecSummary.pdf) (discussing growth trends in the online music industry).

Meanwhile, terrestrial radio giants such as Clear Channel have struck direct deals with superstar bands such as Fleetwood Mac, large independent label Big Machine Records (home of Taylor Swift) and Warner Music Group to pay—for the first time ever—a percentage of revenue allocated from AM/FM airplay.

Compensating performers for over-the-air radio is something that FMC has long pushed for. However, these deals are hardly a panacea, and may end up negatively impacting the broader licensing space. As we point out in an Op-Ed published in *Billboard* regarding the Clear Channel Big Machine deal<sup>12</sup>:

“Before we break out the bubbly, it’s important to look at the other aspects of this deal, and ask whether it will make a difference to the vast majority of performers.

“First, there are additional questions regarding terrestrial royalties. Clear Channel has reportedly agreed to pay Big Machine based on a percentage of revenue, but what proportion of these royalties are flowing down to Big Machine’s artists who are getting this airplay? And, are these royalties recoupable against other label costs? We assume that Big Machine and its artists are faring well in this relationship, but since this was a private negotiation, we do not know the details.

“Next is the digital royalties tradeoff. Remember, digital is the only use for which Clear Channel has to obtain a license, as there is no public performance right for over-the-air broadcasts. As part of this deal, Clear Channel and Big Machine have agreed to a direct licensing deal for digital performances that covers the digital stream of Big Machine’s repertoire on Clear Channel’s digital channels. A chief concern is that by paying a reduced per-digital-play rate, compensation for musicians and labels could actually be lower— especially if such deals become commonplace, or if digital radio achieves greater market share than its terrestrial counterpart.

“The direct licensing deal bypasses the statutory licensing arrangement managed by SoundExchange, the nonprofit entity that collects and distributes royalties when sound recordings are performed on digital platforms like Sirius XM and Pandora. SoundExchange’s splits are straightforward... the performers’ share goes directly to performers—it’s not passed through their labels, where it could be held against their recoupables or other label debt...

“... By abandoning this structure and going to direct licensing for digital performances, artists cede power, and record labels and broadcasters hold all the cards.”

### *C. Collective and Other Approaches*

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<sup>12</sup> Rae, Casey. "Guest Opinion: Clear Channel/Big Machine Deal Is Step In Right Direction, But Not Far Enough, by Future of Music's Casey Rae." *Billboard*. N.p., 26 July 2012. Web. 13 Nov. 2013.

Almost since the arrival of the Internet, many industry experts and observers have called for any number of collective licensing arrangements to alleviate transactional pressures and achieve a wide-scale alternative to unauthorized file sharing.<sup>13</sup> Proposals exist (and continue to propagate) that describe collective licensing mechanisms for both the sound recording and the composition copyrights.<sup>14</sup> These include—but are not limited to—ISP surcharges immunizing users against infringement,<sup>15</sup> a flat fee for all online music file transactions,<sup>16</sup> a tax on certain consumer computing and electronics devices,<sup>17</sup> and the creation of a voluntary or compulsory blanket license for music files outside that which exists for non-interactive streaming.<sup>18</sup>

Although none of these proposals have been wholly embraced by a critical mass of rightsholders, it is important to note that collective licenses already exist in the music business.<sup>19</sup> In fact, public performance licenses for terrestrial broadcasts were key to the growth of one of the most historically significant sectors of the industry: over-the-air radio.<sup>20</sup> It is safe to say that without the establishment of a performance right for the composition copyright, terrestrial radio would not have been able to play such a pivotal role in the development of a recorded music industry.<sup>21</sup> The establishment in 1995 of a homologous right for digital broadcasts that covers the sound copyright can be seen as an important step in rightsholder compensation, although there is frequent debate regarding appropriate rates.<sup>22</sup> The benefits may offset any friction: if webcasters were required to individually negotiate licenses for sound recordings, that sector is unlikely to have experienced such remarkable growth.<sup>23</sup>

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13. See Matt Earp & Andrew McDiarmid, *An Investigation of Voluntary Collective Licensing for Music File-Sharing at UC Berkeley*, UC BERKLEY SCH. OF INFO. (May 8, 2008), available at [http://www.ischool.berkeley.edu/files/earp\\_mcdiarmid\\_vcl\\_at\\_berkeley.pdf](http://www.ischool.berkeley.edu/files/earp_mcdiarmid_vcl_at_berkeley.pdf) (analyzing collective licensing models). Many of these proposals were rejected out-of-hand at the beginning of the last decade, but rights-holders have, in recent years, seemed more willing to at least entertain new concepts in licensing and digital distribution. See *id.* at 15–27 (providing a history of the music industry’s approach to file sharing culminating in various calls for collective licensing models).

14. See, e.g., Fred von Lohmann, *A Better Way Forward: Voluntary Collective Licensing of Music File Sharing*, ELECTRONIC FRONTIER FOUND. (Apr. 30, 2008), available at <http://www.eff.org/wp/better-way-forward-voluntary-collective-licensing-music-file-sharing> (presenting a voluntary collective licensing mechanism that would allow consumers to download music via a P2P system in exchange for a monthly fee).

15. See Eric Pfanner, *A Fix for Piracy: Tack a Fee on Broadband*, N.Y. TIMES, Jan. 26, 2009, at B4 (documenting how the Isle of Man has instituted a policy where citizens are able to download an unlimited amount of music after paying a nominal fee).

16. See Paul Resnikoff, *The 5-Cent Download... Does It Need a Comeback?*, DIGITAL MUSIC NEWS (Sept. 24, 2009), <http://www.digitalmusicnews.com/stories/092409five> (discussing flat-rate pricing as an alternative to payments for individual MP3 downloads).

17. See Maija Palmer, *Tech Groups Break Off Copyright Levy Talks*, FINANCIAL TIMES (Jan. 8, 2010, 1:45 AM), <http://www.ft.com/cms/s/0/980044d0-fba8-11de-9c29-00144feab49a.html#axzz1YbZ32ZaY> (reporting industry controversy over hardware levies to fund compensation for parties injured by copyright infringement).

18. Nate Anderson, “Functionally Voluntary” Music May Lead to Blanket Licenses, ARS TECHNICA, (Aug. 18, 2008, 10:40 PM), <http://arstechnica.com/old/content/2008/08/paying-for-music-has-become-functionally-voluntary.ars>.

22. See Vanessa Van Cleef, *A Broken Record: The Digital Millennium Copyright Act’s Statutory Royalty Rate-Setting Process Does Not Work for Internet Radio*, 40 STETSON L. REV. 341, 362–78 (2010)

23. *Chart: Media Use Consolidated 2006–2012*, BRIDGE RATINGS, LLC (2010), available at <http://www.bridgeratings.com/Media%20Use%20Consolidated%202006-2012.JPG> (showing an increase in public consumption of webcasts since 2006); see also Karen Feassler, *Webcasting Royalty Rates*, 18 BERKELEY TECH. L. J. 399, 402 (2003)

There are, of course, antitrust considerations when collective license schemes are enacted,<sup>24</sup> but history of the public performance license at least offers guidelines for how to balance competition with increased efficiencies within the scope of antitrust law.<sup>25</sup> Indeed, government can and should play a role in setting marketplace guidelines if and when any new collective license proposition becomes actionable.<sup>26</sup> It is also safe to say that any collective license that is non-voluntary would likely implicate sections 114 and 115 of the U.S. Copyright Code,<sup>27</sup> which would inherently necessitate active government participation.<sup>28</sup>

### III. Online Services and the DMCA

Future of Music Coalition has paid close attention to various stakeholder concerns regarding the notice-and-takedown and safe harbor provisions of section 512. As is not uncommon for our organization, we find ourselves occupying a middle-ground position. On one hand, we see clearly the benefits of safe harbors that allow Internet companies to deliver useful online services to millions of people, including musicians and other creators. On the other, we understand the frustration expressed by many rightsholders—including individual artists and independent labels and publishers—that it is difficult, if not impossible, to keep up with the scale and scope of infringement. The escalation of rhetoric between major rightsholders and large-scale Internet companies related to section 512 does little to mitigate the issues faced by the independent creator community and technology startups alike. The interests of these parties—while not perfectly aligned—must be taken into account in order to honor the intent of the statute, which as we see it, was crafted to encourage innovation while offering copyright owners a means through which to exercise their exclusive rights under the law.

Whether or not the existing system is indeed “broken” depends on whom you ask. Google’s most recent Transparency Report from September 2013 claims 21.5 million takedown requests, the majority of which are complied with.<sup>29</sup> This can be taken as evidence of one company’s compliance in the face of an immense number of notices. On the other hand, it is illustrative of the scale of potential infringement. For its part, trade industry groups like the RIAA point to such numbers as evidence that the underlying premise of the DMCA is flawed. “We are using a bucket to deal with an ocean of illegal downloading,” says RIAA Executive Vice President, Anti-Piracy Brad Buckles<sup>30</sup>. RIAA often points to the fact that, while their organization and its major label

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<sup>24</sup> . See, e.g., *Broad. Music, Inc. v. Columbia Broad. Sys., Inc.*, 441 U.S. 1, 10 (1979)

<sup>25</sup> . See generally Whitney Broussard, *The Promise and Peril of Collective Licensing*, 17 J. INTELL. PROP. L. 19 (2009).

<sup>26</sup> . See Matthew Fagin, Frank Pasquale & Kim Weatherall, *Beyond Napster: Using Antitrust Law to Advance and Enhance Online Music Distribution*, 8 B.U. J. SCI. & TECH. L. 451, 517–20 (2002); Jonathan B. Wiener, *The Regulation of Technology, and the Technology of Regulation*, 26 TECH. SOC’Y 483, 495 (2004)

<sup>27</sup> . 17 U.S.C. §§ 114–15 (2010); see also *Stewart v. Abend*, 495 U.S. 207, 228–29 (1990)

<sup>28</sup> . See *Stewart*, 495 U.S. at 228–29.

<sup>29</sup> *Copyright Removal Requests – Google Transparency Report*. N.p., n.d. Web. 13 Nov. 2013.

<sup>30</sup> Buckles, Brad. “Music Notes Blog.” *Http://www.riaa.com*. Recording Industry Association of America, n.d. Web. 13 Nov. 2013.

members utilize automated systems to sniff out potential instances of infringement and send notices to the appropriate service providers, smaller operators—such as independent labels—may not have the necessary resources at their disposal to take a similar tack.

Putting aside for a moment the authenticity of the RIAA’s concern for independent sector, the underlying point is valid. Many independent labels or artists may feel that they are better served directing their limited resources towards promoting and marketing their music rather than scouring the Internet for infringing links and firing off takedown notices. The law makes no distinction between large and small rightsholders; neither does it distinguish between superstars and developing artists. This is as it should be. However, it is important that the systems that assist copyright owners and creators in protecting their rights not disadvantage actors operating at a smaller scale. This argument can be extended to the startup community who may not be able to bring a new breakthrough to the marketplace if they are liable for the alleged infringements of their users, or if they must retain specialized legal counsel that might act as a disincentive to innovation and investment.

One clear takeaway from recent legislative attempts to address infringement is that an “obligation to monitor” is not in the interests of innovation and expression, creative or otherwise. The Stop Online Piracy Act (SOPA), for example, had the stated goal of expanding the ability of the United States to respond to large-scale, commercial infringement of American intellectual property abroad. This is a worthwhile objective, and certainly something within the authority of Congress to address, even following the massive blowback against SOPA. A clear concern with that bill, however, was that it appeared to include language compelling Internet service providers to police their networks for potential infringement committed by their users. Given the difficulty courts sometimes have in issuing rulings based on evidence presented under highly specific circumstances, it seems unwise to leave decisions about what is and isn’t an infringement up to technology companies who may lack the requisite expertise to make such calls. If adjusting the DMCA to reflect current technological and marketplace realities is something stakeholders can agree is worthwhile (a matter on which there is little evidence of consensus), then the place to do so is within the relevant areas of the statute, not in legislation with so many moving pieces that even the best-trained lawyers have difficulty comprehending their relevance to the bill’s stated goal.

Given the complexities of addressing the needs of a broad array of stakeholders, FMC acknowledges that the DMCA does a fair job of establishing a balance between the interests of the technology and rightsholder communities. We also feel that the courts have, thus far, made the correct determinations with regard to their interpretation of section 512, which is to say that Congress established safe harbors for the very reasons brought to light in the many cases upholding them. There are, of course, some riddles within the subsections of this part of the Act, including the infamous 512(c), upon which the entire notice-and-takedown regime rests. It is outside of the purview of these comments to weigh in on one or another construal of these provisions. We will say,

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however, that any effort to assemble stakeholders in dialog around these issues may go some way towards mitigating tension and distrust among the various parties, and perhaps illuminate a way forward on persistent concerns.

#### **IV. The Legal Framework for the Creation of Remixes**

The framework for the utilization of existing musical works in new works presents similar challenges to those affecting the broader licensing environment. Access to ownership information is limited; financial costs and transactions costs are prohibitively high; and there is a lack of published, transparent pricing.

The challenge in addressing these obstacles is finding a solution that both facilitates a smooth, frictionless market for legitimate sampling and insures that copyright holders are fairly compensated.

For a comprehensive evaluation of the competing interests in sample licensing as well as proposals for reform, we refer to the research presented by FMC board member and Northwestern University professor Peter DiCola and University of Iowa professor and co-author Kembrew McLeod in their book *Creative License: The Law and Culture of Digital Sampling*.<sup>31</sup>

DiCola and McLeod's interviews with musicians, lawyers and record company executives conclusively demonstrate the chilling effect market uncertainty and litigiousness has had on sampling, remixing and audio collage as a form of expression.

For example, Chuck D, founder of legendary hip-hop group Public Enemy, laments that the legal landscape surrounding sampling has radically changed since the early 1990s. Public Enemy is celebrated for their innovative of sampling in service of dense collages, but he tells DiCola and McLeod that the group has since had to abandon this composition technique.

"By 1994, [sample licensing] had become so difficult to the point where it was impossible to do any of the type of records we did in the late 1980s because every second of sound had to be cleared," he says.

More recently, hip-hop star Jay-Z discussed the cajoling involved in clearing the copyright to sample "Hard Knock Life" from the Musical Annie for his hit song "Hard Knock Life (Ghetto Anthem)".<sup>32</sup> Because he had to request permission to use the sample directly from the rightsholder, he wrote a letter exaggerating the importance of the musical Annie to him personally, sharing a totally fabricated story about seeing the musical on Broadway. Seemingly persuaded that Jay-Z's intentions were in the right

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<sup>31</sup> Kembrew McLeod and Peter DiCola, *Creative License: The Law and Culture of Digital Sampling* (Duke University Press, 2011).

<sup>32</sup> "Jay-Z: The Fresh Air Interview." *NPR*. NPR, n.d. Web. 13 Nov. 2013.

place he was granted permission to use the sample, but not all artists have the leverage, time or intestinal fortitude to write appeasing letters every time they want to use someone else's work.

A compulsory licensing scheme may eliminate this kind of interplay between the rightsholder and the licensee, but it's unlikely that artists would be willing to give up control of their work for the sake of efficiency. Instead, it may be more advantageous to eliminate the transaction costs of individual negotiations by establishing a transaction-facilitating institution similar to the performance rights organizations (PROs) or mechanical licensing organization Harry Fox Agency. Radio stations are able to secure blanket licenses from the PROs which far easier and quicker than securing hundreds of individual licenses. A similar model could simplify the mechanism for samples. As DiCola and McLeod explain, the "sheer paperwork involved in clearing multiple samples may be discouraging some transactions." The clearinghouse model could address specific transaction costs such as how and where to contact copyright holders.

A one-stop shop sort of institution might also offer more transparent pricing schedules, simplifying the compensation process or at least disseminating more standardized information.

Of course, the success of a transaction-facilitating clearinghouse is dependent on the availability of a centralized information database so that the clearinghouse could efficiently and accurately make sure the correct rights holders are compensated. And the means for determining appropriate pricing is still hotly debated. The *Bridgeport Music, Inc. v. Dimension Films* decision in the Sixth Circuit effectively eliminated the *de minimus* doctrine (*de minimus* refers to the level below which courts deem the amount a musician takes from a copyrighted work too small to consider copyright infringement). The Sixth Circuit wants to define property rights clearly to avoid lawsuits and instead promote voluntary, well-informed transactions within the music industry. But that makes sampling more expensive and ignores both the quantitative and qualitative questions. Is a five-second drum fill equal in value to a five-second vocal hook? Is there no sample that is so insignificant or unrecognizable that it does not require a license? Clearly defined property rights mean musicians who sample would know ahead of time that they must pay and copyright owners can anticipate receiving licensing revenue. But there are compelling arguments for allowing some degree of flexibility.

The rigid precedent of the Bridgeport decision follows, in the words of law professor Tracy Reilly, "the common economic theme that, like it or not, has applied to American jurisprudence since the inception of our Constitution: if you want to 'borrow' or, more accurately, take something of value that belongs to somebody else, you had better obtain their permission and negotiation a free for such use."<sup>33</sup>

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<sup>33</sup> Tracy L. Reilly, "Debunking the Top Three Myths of Digital Sampling: An Endorsement of the *Bridgeport Music* Court's Attempt to Afford 'Sound' Copyright Protection to Sound Recordings," *Columbia Journal of Law and the Arts* 31 (2008): 401.

But as McCleod and DiCola argue, “pointing out that the sampling musicians take something of value doesn’t prove anything about whether a particular instance of sampling is copyright infringement.

“The Bridgeport court read the section as an extension of the rights of the sound recording copyright holders to everything not explicitly reserved to the public. Yet section 114(b) is better understood as a limitation on rights with respect to sound recordings.... Congress could revise section 114(b) to clarify its meaning. One approach would involve setting a quantitative threshold for *de minimis* use, such as one second of the sampled recording or 1 percent of its length. Another approach is to allow the federal court to determine the *de minimis* threshold on a case-by-case basis. Outside of the Sixth Circuit, courts need not follow the holding of Bridgeport and could apply a more defensible interpretation of section 114. The problem is that most cases never reach a judicial opinion, instead parties tend to settle beforehand because of the high cost of litigation.”<sup>34</sup>

Alternatively, McLeod and DiCola suggest that private-sector solutions may be more promising than statutory or judicial approaches. In addition to the proposal of setting up a collective-rights organization, record labels could alternatively offer an easy-to-use web interface for licensees to request sample clearance. Solutions of this kind already exist for obtaining compulsory licenses for cover songs; it is possible that by aligning incentives among those who would sample and those who may benefit from licensing works for sampling, remixes or other transformational uses may, using technology, implement systems to facilitate these transactions without invasive statutory surgery or litigation.

A solution to problems around sampling and remixes need not require expanded fair use protections, nor would they eliminate the ability of users of copyrighted material to avail themselves of a fair use defense under appropriate circumstances. We recognize the establishment of fair use as an affirmative defense against infringement claims, but feel strongly that fair use—even were it to be expanded—is insufficient to the broader goal of preserving or expanding the marketplace for sampling, as well as enhanced efficiencies around obtaining the necessary permissions to use musical copyrights in the creation of new works.

Lastly, we suggest that the ability for artists to build upon the artifacts of cultural expression is essential to a broader dialog that includes past works as well as contemporary artistic innovations. It is important not to lose sight of this as we look to establish a more functional commercial marketplace for the licensing of existing musical works in new creations.

## V. Conclusion

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<sup>34</sup> Kembrew McLeod and Peter DiCola, *Creative License: The Law and Culture of Digital Sampling* 233 (Duke University Press, 2011).

Future of Music Coalition appreciates the opportunity to comment on issues that impact the musician and composer communities, as well as the matters we believe most relevant to the ongoing development of the legitimate digital music marketplace. While we did not endeavor to provide insights on every topic raised by the Green Paper, we hope that the our perspectives—honed through thirteen years of direct engagement with musicians, songwriters, independent labels, publishers, PROs, unions and others with a direct stake in these issues—proves useful to the USPTO’s ongoing investigation into copyright and digital technology. We look forward to continued participation in this process.

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