
**COMPULSORY LICENSING OF MUSICAL WORKS
IN THE DIGITAL AGE: WHY THE CURRENT PROCESS
IS INEFFECTIVE & HOW CONGRESS IS
ATTEMPTING TO FIX IT**

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“Intellectual property law cannot be patched, retrofitted, or expanded to contain digitized expression...”¹

Essayist John Perry Barlow made this statement in 1994.² His words are no less true today. As the use of computers and the Internet has grown since the mid-1990s, it has become increasingly clear that current copyright law is far from adequate in its application to this modern medium.³ Amendments to the law have not proven as effective as Congress hoped or intended.⁴ In no area is this truer than in the application of copyright law to the digital music industry.

Napster and Apple’s iTunes brought the digital music industry into

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1. John Perry Barlow, *The Economy of Ideas*, Wired, Issue 2.03, Mar. 1994, archived at <http://www.webcitation.org/5VPomm9T9>.

2. Barlow discussed the difficulty in copyrighting works that are not in a physically-fixed format. *Id.*

3. U.S. Census Bureau, Computer & Internet Use in the United States: 2003 (2005), archived at <http://www.webcitation.org/5VPpMW100>. In 1993, according to the U.S. Census Bureau, only 22.8% of Americans reported that they had a computer in their home. *Id.* at 1. The 2003 report states that the number of household computers has more than doubled to now include over 60% of American households. *Id.* at 1-2. The Census Bureau did not begin to track Internet usage among American homes until 1997 when they found that 18% of households had Internet access, a number that tripled in less than ten years. *Id.* at 1-3.

4. See, e.g., Digital Millennium Copyright Act, Pub. L. No. 105-304, 112 Stat. 2860 (1998) [hereinafter DMCA]. The DMCA allowed for the introduction of anti-copying technology and measures to prohibit the circumvention of such technologies. 17 U.S.C. § 512. Many believed that the DMCA would allow copyright owners to avoid future copyright issues on the Internet, including the problems that ultimately became associated with peer-to-peer file sharing. Rob Kasunic, *Solving the P2P “Problem” – An Innovative Marketplace Solution*, Stanford University Libraries Copyright and Fair Use, Mar. 10, 2004, archived at <http://www.webcitation.org/5VPpaeq9X>.

the mainstream with the creation of their music downloading services.⁵ In 2005, the industry continued its assault on traditional music recording and distribution, including the traditional album format.⁶ It does not appear that this stranglehold will release any time soon.

Despite its evident success, the digital music industry continuously faces problems with copyright law, causing it to become a major focus of Congress' efforts to amend the Copyright Act.⁷ Congress' latest attempt to revise the statute to better handle the special issues arising out of Internet music sales comes in the form of the Section 115 Reform Act of 2006 (SIRA).⁸

This note evaluates whether the proposed SIRA will provide a better method of obtaining the rights required to sell music on the Internet than the method already in existence. Part II discusses the history of music copyright law, focusing on the current section 115 and its evolution since the inception of the compulsory license in 1909. Part III discusses the effect that music piracy has had on the digital music industry in recent years and how the current compulsory licensing scheme operates in the face of this piracy. Part IV explains how SIRA proposes to amend the current process while Part V assesses whether SIRA is actually the best solution and whether any other alternatives may propose a better answer to the issue of music piracy on the Internet.

5. The original Napster was introduced as a peer-to-peer file sharing network in 1999. Damien A. Riehl, *Peer-to-Peer Distribution systems: Will Napster, Gnutella, and Freenet Create a Copyright Nirvana or Gehenna?*, 27 WM. MITCHELL L. REV. 1761, 1766 (2001). It was shut down in 2001 by a court order which recognized that the program was promoting illegal activity but continues on today in a subscription format. *A & M Records, Inc. v. Napster, Inc.*, 239 F.3d 1004 (9th Cir. 2001) (affirming the lower court's finding of direct copyright infringement and imposition of a preliminary injunction to shut down the service). On the other hand, Apple introduced iTunes in 2003 as a legal alternative to the illegal file sharing networks that were in proliferation. Kelly Leong, *iTunes: Have they Created a System For International Copyright Enforcement?*, 13 NEW ENG. J. INT'L & COMP. L. 365, 384 (2007). It requires users to pay for every song they download. *Id.*

6. In the first half of 2006, there were 270.6 million physical albums sold whereas at the same point in 2005, 282.6 million were sold. Edna Gundersen, *Without a Superstar, Album Sales Dip, Digital Tracks Increase 77%*, USA TODAY, July 12, 2006, at 1D, archived at <http://www.webcitation.org/5VPpp5ZAi>. In contrast, 280.9 million songs were downloaded between January and June 2006 compared to 158.8 million in the same period in 2005. *Id.* See also International Federation of the Phonographic Industry, IFPI:05 DIGITAL MUSIC REPORT, at 4-6 (2006), archived at <http://www.webcitation.org/5VPqA42WQ> [hereinafter IFPI] (discussing the state of the market for digital music in 2005).

7. Lydia Pallas Loren, *Untangling the Web of Music Copyrights*, 53 CASE W. RES. L. REV. 673, 679 (2003) (arguing that music copyright is one of the most confusing area of law within copyright law); see also *supra* note 4 and accompanying text.

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

II. The Current State of the Copyright Act

A. The Purpose of Copyright Law

The purpose of copyright law, as derived from the United States Constitution, is “[t]o promote the Progress of Science and useful Arts” by reserving to authors certain exclusive rights in their works.⁹ Congress has sought to provide authors with an incentive to create while avoiding the creation of monopolies.¹⁰ To this end, it chose to allow authors to retain control over their works for a limited time period.¹¹ During this time, it was envisioned that authors would be compensated by allowing others to take advantage of one or more of their exclusive rights.¹² However, as the law has changed over the years, this purpose appears to have morphed from one focused on the creation and dissemination of works to one focused on the author’s ability to control his works.¹³ Nowadays, people care less about being paid and more about protecting their property from being stolen.¹⁴

B. A Brief Summary of the History of Copyright Law

Over the past two hundred years, copyright law has evolved to meet the author’s needs. Congress enacted the first copyright statute in 1790.¹⁵ The law reserved to the author the right to control copies of maps, charts, and books.¹⁶ This right lasted only 14 years.¹⁷ Since then,

9. U.S. CONST. art I, § 8, cl. 8. The first copyright law in the world, the Statute of Anne, was enacted by the British in 1709. Statute of Anne, 1709, 8 Ann., c. 19 (Eng.).

10. Lydia Pallas Loren, *The Purpose of Copyright*, Open Spaces Quarterly, Jan. 2000, archived at <http://www.webcitation.org/5VPqWnmas>. In Europe, authors were left with full and unlimited control over their works. *Id.* Congress was afraid of this monopolization and sought to avoid these situations through the enactment of United States copyright laws. *Id.*

11. Loren, *supra* note 10.

12. JESSICA LITMAN, *DIGITAL COPYRIGHT: PROTECTING INTELLECTUAL PROPERTY ON THE INTERNET* 78 (Prometheus Books 2006). This is done through licensing and other contractual agreements. *Id.*

13. *Id.* at 80; see also Marcy Rauer Wagman & Rachel Ellen Kopp, *The Digital Revolution is Being Downloaded: Why & How the Copyright Act Must Change to Accommodate an Ever-Evolving Music Industry*, 13 VILL. SPORTS & ENT. L.J. 271, 274 (2006).

14. Litman, *supra* note 12, at 81; Wagman, *supra* note 14, at 274 n.11.

15. Copyright Act of 1790, 1 Cong. Ch. 15, 1 Stat. 124 (1790) [hereinafter 1790 Act].

16. *Id.*

the statute has been amended several times but has only been substantially revised twice: first in 1909 and again in 1976.¹⁸ The 1909 Act extended the duration of copyright to 28 years and required the author to secure federal copyright notice before he received any protection.¹⁹

The 1976 Act was the first major overhaul of copyright law in over 50 years.²⁰ It outlined the five exclusive rights reserved to the author in section 106.²¹ Further, it extended copyright duration again, struck the notice requirement in the 1909 Act, and codified the fair use doctrine, a defense available for claims of copyright infringement.²²

C. The Creation & Evolution of Section 115

17. *Id.*

18. *See* Copyright Act of 1909, 60 Cong. Ch. 320, 35 Stat. 1075 (1909) [hereinafter 1909 Act]; Copyright Act of 1976, Pub. L. No. 92-140, 85 Stat. 391 (codified as amended at 17 U.S.C. §§ 101-810 (1976)) [hereinafter 1976 Act]. In 1909, Congress adopted a method of revising the law that required interested parties to hold their own negotiations and then inform Congress what should be enacted. Litman, *supra* note 12, at 23. This process is the only appropriate way to amend copyright law in the United States. Litman, *supra* note 12, at 23, 36. Because the parties are deeply involved with its actual development, if they decide they do not like something, they can block its adoption. Litman, *supra* note 12 at 23, 36. It does not appear that this process will be changed any time soon. Litman, *supra* note 12, at 62. Although it sounds like this would be successful, allowing the people in the know to figure it out amongst themselves, it has actually resulted in copyright laws that contain broad rules and very specific exemptions. Litman, *supra* note 12, at 58. Although the parties created laws broad enough to take into account developing technologies, they also chose to include specific exemptions that covered their activities to make sure they would not be held liable under the new law. Litman, *supra* note 12, at 56.

19. *See* Copyright Act of 1909, 60 Cong. Ch. 320, 35 Stat. 1075 (1909).

20. *See* Copyright Act of 1976, 17 U.S.C. §§ 101-810 (1976).

21. *See* 17 U.S.C. § 106 (2007) (outlining exclusive rights). The author of a copyrighted work was given five exclusive rights in the 1976 Act: the right to reproduce the work, the right to make derivative works, the right to distribute copies, the right to perform the work publicly, and the right to display the work publicly. § 106(1)-(5). In 1995, the Digital Performance Right in Sound Recordings Act of 1995 (DPRSRA) added a sixth exclusive right to section 106: the right to perform a sound recording publicly through a digital audio transmission. DPRSRA, 17 U.S.C. § 106(6) (2007). This note focuses on the right of reproduction and distribution of the musical work as applied to the sale of digital music.

22. *See* Copyright Act of 1976, 17 U.S.C. §§ 101-810 (1976). As of today, an author's copyright will last until 70 years after he dies. 17 U.S.C. § 302 (2007). Courts already allowed fair use as a defense; however, it wasn't put into statutory law until 1976. 17 U.S.C. § 107 (2007). Section 107 defines certain "fair uses" which are not considered copyright infringement. *Id.* The court considers several factors in determining whether to characterize an activity as fair use. *Id.* These factors include the purpose and character of the use, the nature of the work, the portion used, and the effect use has on the market for the work. *Id.*

Two copyrights are implicated in a single song. They are the musical work, also known as the composition, and the sound recording.²³ The musical work consists of the notes and words written by a composer which is then used to make the sound recording.²⁴ Musical compositions were not originally included as part of copyrightable subject matter.²⁵ It was not until 1831 that copyright protection was extended to musical compositions.²⁶ In the 1800s, composers took advantage of their rights of reproduction and distribution by selling the copyright in their sheet music, which contained the musical composition, to a music publisher who would then sell it to the public.²⁷

This procedure was sufficient for many years, but when the new player piano industry gained momentum in the early 19th century, the rights afforded to copyright holders began to change.²⁸ In *White-Smith Music Pub. Co. v. Apollo Co.*, the Supreme Court held that the perforated rolls of music used in player pianos did not constitute reproductions of the musical work, and therefore, there was no copyright infringement.²⁹ White-Smith sued Apollo, a manufacturer and distributor of player pianos and perforated rolls, for copyright

23. 17 U.S.C. § 102(a)(2), (7) (2007).

24. See R. Anthony Reese, Article, *Copyright & Internet Music Transmissions: Existing Law, Major Controversies, Possible Solutions*, 55 U. MIAMI L. REV. 237, 240-41 (2001); see also 17 U.S.C. § 101 (2007) (defining sound recordings as “works that result from the fixation of a series of musical...sounds...regardless of the nature of the material objects, such as...phonorecords, in which they are embodied.”).

25. See *supra* note 15 and accompanying text. The 1790 Act only provided protection to books, charts, and maps. *Id.*

26. Act of Feb. 3, 1831, 21 Cong. Ch.16, 4 Stat. 436 (1831). Composers were given the right to reproduce and distribute their musical compositions. *Id.*

27. Wagman, *supra* note 13, at 283; Loren, *supra* note 7, at 679.

28. See *White-Smith Music Pub. Co. v. Apollo Co.*, 209 U.S. 1, 9 (1908) (stating that over 70,000 pianos and over a million perforated rolls were sold in 1902); see also Wagman, *supra* note 13, at 283; Loren, *supra* note 7, at 680. This practice of revising copyright law in response to new technologies became the standard. Litman, *supra* note 12, at 47. When faced with the possibility of a loss of control, the affected parties will convene to amend the law to meet their needs. Litman, *supra* note 12, at 47. In the early 1900s, revision was in response to the player piano industry; in the early 2000s, it was in response to the digital music industry. *Section 115 Compulsory License: Hearing Before the Subcomm. on Courts, The Internet & Intellectual Property of the H. Comm. on the Judiciary*, 108th Cong. 1 (2004) [hereinafter *Section 115 Hearing*] (statement of Marybeth Peters, Register of Copyrights).

29. *White-Smith*, 209 U.S. at 18 (holding that the perforated rolls were parts of the machine and produced music when used with the piano and were not copies under the statute).

infringement, arguing that the rolls were reproductions of the musical works in which they held copyrights.³⁰ The Court reasoned that because the perforated rolls were unreadable as musical compositions, they did not fall under the definition of a copy.³¹ Instead, the rolls were functional parts of a machine and not copyrightable.³²

Congress responded to the Court's holding in *White-Smith* in the 1909 Act and granted the owners of musical works a copyright to control the mechanical reproduction of their work.³³ Under this new provision, the Court's holding in *White-Smith* became invalid: piano rolls were now considered copies of the musical work.³⁴ Additionally, Congress, in an effort to avoid the creation of an industry monopoly, subjected the right to a compulsory license.³⁵ Under the provision, as long as the copyright holder already licensed the musical work, any manufacturer of piano rolls could obtain a license for the mechanical work by paying a statutory fee.³⁶ Although acquiring the compulsory license was burdensome, composers and music publishers rallied for its inclusion in the 1976 redraft.³⁷ To respond to the complaints of the interested

30. *Id.* at 8-9.

31. *Id.* at 17-9. The Court stated that a musical work was not a copy until it was fixed in a form that could be seen and read. *Id.* at 17. A roll used in a player piano consisted of a series of holes, not written notes, and therefore, it could not be read by a person. *White-Smith*, 209 U.S. at 10.

32. *Id.* at 18; *see also* 17 U.S.C. § 102(b) (2007) (asserting that there is no copyright protection for functional aspects of works). Functional aspects are generally protected under patent law. 35 U.S.C. § 101 (2007).

33. Copyright Act of 1909, 60 Cong. Ch. 320, 35 Stat. 1075 (1909).

34. *See* Wagman, *supra* note 13, at 284; Loren, *supra* note 7, at 681. Congress' intent was to balance their goal of promoting the development of the music industry against their goal of compensating and protecting copyright owners. *Section 115 Hearing, supra* note 28, at 2 (statement of Jonathan Potter, Executive Director, Digital Media Association [hereinafter DiMA]). *See also* H.R.Rep. No. 2222, 60th Cong. 2d Sess. 7 (1909) (stating that their goal was "to so frame an act that it would accomplish the double purpose of securing to the composer an adequate return...and...prevent the formation of oppressive monopolies").

35. Wagman, *supra* note 13, at 285. Aeolian Company, a piano roll manufacturer, had refused to license the use of their musical works, causing a fear of monopolization. *Id.* at 284-85. *See also* Loren, *supra* note 7, at 681; *Section 115 Hearing, supra* note 28, at 1. The Supreme Court decided this case at a time when fears of monopolization were running high: Congress enacted the Sherman Antitrust Act in 1890 and the Clayton Antitrust Act in 1914. 51 Cong. Ch. 646, 26 Stat. 209 (1890); 63 Cong. Ch. 323, 38 Stat. 730 (1914). The inclusion of the compulsory license was in line with Congress' purpose in enacting the Copyright Act. *See supra* note 10 and accompanying text.

36. Copyright Act of 1909, 60 Cong. Ch. 320, 35 Stat. 1075 (1909). The manufacturer did not have to negotiate with the copyright holder any longer as the copyright holder could not refuse to license the musical work under the compulsory license. Loren, *supra* note 7, at 681.

37. *Section 115 Hearing, supra* note 28, at 2. The terms of the statute required the potential licensee to serve notice on the copyright owner, which was made more

parties, Congress amended the compulsory license's provisions.³⁸ Congress also clearly stated that this section only applied to the mechanical reproduction, not the sound recording, of the same work.³⁹ All of these provisions still exist today in the Copyright Act, codified at section 115.⁴⁰ In addition to being widely used to create cover songs, section 115 is the provision of the Copyright Act applicable to the licensing of digital music for sale.⁴¹

In 1995, Congress was well aware of the potentially detrimental impact of the Internet on existing copyright law.⁴² The Internet was not a blip on the radar when the Copyright Act was amended in 1976, let alone when it was originally written.⁴³ The Digital Performance Right in Sound Recordings of 1995 (DPRSRA) was Congress' initial attempt to deal with issues arising from music distribution on the Internet.⁴⁴ In addition to allowing for a limited public performance right in digital sound recordings, it expanded the scope of the compulsory license in section 115 to include digital phonorecord deliveries (DPD), the method by which phonorecords are transmitted digitally.⁴⁵ To be considered a

difficult when the copyright owner could not be found. *Id.*

38. One such amendment was the inclusion of the licensee's ability to file notice with the Copyright Office if the copyright owner could not be found. *Id.* at 3.

39. *Id.* at 2. *See also* Loren, *supra* note 7, at 683-85. Musical compositions and sound recordings may also implicate the public performance right in some situations; however, this Note is focused on the licensing of the mechanical composition. *Id.* at 683.

40. Scope of exclusive rights in nondramatic musical works: Compulsory license for making & distributing phonorecords, 17 U.S.C. § 115 (2000). The "mechanical reproduction" of a musical work is known today as a "phonorecord." *Section 115 Hearing, supra* note 28, at 1. A "phonorecord" is a "material object in which sounds...are fixed by any method...from which the sounds can be perceived, reproduced, or otherwise communicated, either directly or with the aid of a machine or device." § 101 (defining "phonorecords").

41. 17 U.S.C. § 115 (2000).

42. Copyright law was specifically designed to deal with print media and has been extended over the years to new forms of technology. Litman, *supra* note 12, at 31. It was far from adequate in its ability to deal with the Internet, specifically the digital transmission of musical works. S. Rep. No. 104-128, at 361 (1995).

43. Copyright Act of 1976, 17 U.S.C. §§ 101-810 (1976); Litman, *supra* note 12, at 26.

44. DPRSRA, 17 U.S.C. §106(6) (2006); *see also Section 115 Hearing, supra* note 28, at 3. In 1995, Congress was aware of the likelihood that "digital transmission technologies" would eventually lead to ease of acquisition of phonorecords. S. Rep. No. 104-128, at 361. However, Congress was also aware that without sufficient protections, people would be discouraged from creating new musical works and sound recordings. *Id.*

45. 17 U.S.C. §115(d) (defining a DPD). The statute states that a DPD is the "digital transmission of a sound recording."

DPD, the DPRSRA states that the delivery or transmission must result in a “specifically identifiable reproduction.”⁴⁶ After enactment of the DPRSRA, under section 115, one could obtain a compulsory license to reproduce and distribute a musical work over the Internet.⁴⁷ Congress made sure, however, that the revised statute continued to apply only to the musical work.⁴⁸ The licensee was still required to obtain an additional license for the sound recording under section 114.⁴⁹

III. Music Piracy’s Effect on the Compulsory Licensing System for Mechanical Works

Just as Congress responded to the player piano industry and the Supreme Court’s holding in *White-Smith* by enacting the Copyright Act of 1909, it has continuously responded to changing technologies and Supreme Court holdings by amending the current statute.⁵⁰ The Internet

46. According to the Senate Report, a “specifically identifiable reproduction” is defined as “a reproduction specifically identifiable to the transmission service.” S. Rep. No. 104-128, at 391. This is independent of whether or not the DPD also results in a public performance of the musical work or sound recording. § 115(d). Although this Note focuses on the licensing of the musical work, because the public performance right may be implicated in the transmission of a DPD, the public performance right will be discussed as it relates to SIRA.

47. § 115(a)(1) (stating that the scope of the compulsory license includes DPDs). Although DPDs were subjected to a compulsory license for the underlying mechanical work, the issue remained as to what would constitute a DPD. *See generally Section 115 Hearing, supra* note 28 (statement of Marybeth Peters, Register of Copyrights). The definition of what was considered a “specifically identifiable reproduction” left much to be desired. *See supra* note 45.

48. § 115(c)(3)(G)(i)(I) (asserting that a DPD of a sound recording will constitute infringement unless the licensee obtained the permission of the sound recording copyright holder).

49. *Id.*; *see also* 17 U.S.C. § 114 (2000) (outlining the scope of exclusive rights in a sound recording).

50. *See supra* note 28 and accompanying text. For example, in 1992, the Audio Home Recording Act (AHRA) was enacted in response to the creation of digital audiotapes and the Supreme Court’s ruling in *Sony Corp. of America v. Universal City Studios, Inc.* 17 U.S.C. § 1008 (2000); *Sony Corp. of America v. Universal City Studios, Inc.*, 464 U.S. 417 (1984). In *Sony Corp.*, the Supreme Court held that time-shifting (recording for later use) copyrighted television programs using Sony’s Betamax recorder fell under the doctrine of fair use. 464 U.S. at 455. The Court based its holding on the fact that viewers were time-shifting programs for private, not commercial, use, and that the respondents were unable to show any harm to the value of their copyrighted works. *Id.* at 456. The Court hinted that Congress may review this situation in light of new technology, which it did when enacting the AHRA in 1992. *Id.*; § 1008. The recording industry lobbied for the passage of the AHRA which requires manufacturers of digital audio tape recorders to include a feature which prevents making copies of digital copies. § 1008; *see also* Gary M. Lawrence & Carl Baranowski, REPRESENTING HIGH TECH COS. § 7.08B (2006) (explaining issues relating to Internet file sharing).

became available to the public in 1992.⁵¹ During that same year, the International Organization for Standardization (ISO) approved use of the MPEG-1 Audio Layer3 or MP3.⁵² The MP3 is a format for digitally storing music in which large audio files can be compressed into much smaller files, preserving the music's sound quality.⁵³ MP3s and the Internet were a perfect marriage because MP3s could be easily transmitted over the Internet, depending on the speed of connection.⁵⁴ The Internet was a low-cost means of distributing music as compared to traditional music formats, such as CDs.⁵⁵ The ease of transmission of

51. Litman, *supra* note 12, at 89. Although many saw great potential in the early version of the Internet, many others saw it as a threat to controlling their copyrighted works. Litman, *supra* note 12, at 89. In order to develop and popularize use of the Internet through support from the private sector, policy makers needed to guarantee broad control to copyright holders. Litman, *supra* note 12, at 89. *But see* Litman, *supra* note 12, at 89 (suggesting that there may have been other methods of developing the Internet considering that early on the Internet was funded through the government and focused around academia). *See also* Marc G. Tratos, *Entertainment on the Internet: The Evolution of Entertainment Production, Distribution, Ownership & Control in the Digital Age*, 862 PLI/PAT 127, 157 (2006).

52. *See* Lawrence, *supra* note 50. *See also* Overview of the ISO System, archived at <http://www.webcitation.org/5VPr6sMnM>. The ISO is a non-governmental group comprised of members of national standards groups throughout the world and is based in Geneva, Switzerland. *Id.* The organization only endorsed use of the MP3, which made it more appealing to the public. Lawrence, *supra* note 50, n. 1. The MP3 was actually created by the Moving Picture Experts Group in 1987. *Id.*

53. Lori A. Morea, Article, *The Future of Music in a Digital Age: The Ongoing Conflict Between Copyright Law & Peer-to-Peer Technology*, 28 CAMPBELL L. REV. 195, 197 (2006) (defining the MP3); Lawrence, *supra* note 50. Compact discs (CDs) are also a format for storing digital music and have similar advantages to the MP3. Tratos, *supra* note 51, at 150. Like MP3s, CDs allow music to be easily read and copied, resulting in a perfect reproduction of the original. *Id.* CDs are just one of the many technologies which were targeted by the DMCA's anti-copying technology. *Id.* at 151.

54. *See* William Sloan Coats, Heather D. Rafter, Vickie L. Feeman, & John G. Given, *Blows Against the Empire: Napster, Aimster, Grokster & the War Against P2P File Sharing*, 765 PLI/PAT 445, 453 (2003) (describing why the MP3 has emerged as the digital format of choice); Morea, *supra* note 53, at 197; Lawrence, *supra* note 50.

55. Coats, *supra* note 54, at 450-51; *see also* Tratos, *supra* note 51, at 132. Traditionally, four record companies have controlled the sale of music to consumers: Sony BMG, Warner Music Group, EMI Recorded Music, and Universal Music Group. Coats, *supra* note 54, at 449. While the creation of the MP3 allowed for the distribution of music to cost next to nothing, about 50% of traditional music costs were due to distribution expenses. Alejandro Zentner, *Symposium: Piracy & File Sharing: Measuring the Effect of File Sharing on Music Purchases*, 49 J. L. & ECON. 63, 70 (2006). Those costs are passed on to the consumer: in 2002, the price of a CD in the United States was between \$14.19 and

MP3s over the Internet, however, brought concerns because the MP3 posed a potential threat to the rights of copyright holders as it allowed for easy reproduction and distribution of music by consumers.⁵⁶

The era of music piracy was born.⁵⁷ People, especially teenagers and college students, began taking advantage of MP3s by creating websites where they could upload music files for people all over the world to listen to and download.⁵⁸ Overnight, peer-to-peer file sharing programs emerged, allowing easy sharing of music files on the Internet.⁵⁹ No such program had more of an impact on the digital music phenomenon than Napster.⁶⁰ Napster was created in 1999 by a college student named Shawn Fanning.⁶¹ This peer-to-peer program facilitated the sharing of copyrighted music files through their 150 centrally-located servers.⁶² Just as in the early 1900s, songwriters and recording artists quickly viewed Napster as a threat to their control over copyrighted music.⁶³

\$19.98. *Id.* at 69.

56. See Lawrence, *supra* note 50; Morea, *supra* note 53, at 197.

57. The practice of transmitting copyrighted music over the Internet in violation of the copyholder's rights has been referred to as music piracy, a term that has been considerably expanded from what it was originally meant to describe. Litman, *supra* note 12, at 85. Piracy referred to the making of bootleg copies of records; however, it has been expanded to refer to any type of unlicensed activity even though many such activities have been deemed legal. *Id.*

58. See Tratos, *supra* note 51, at 174-75; Kasunic, *supra* note 4. More than any age group, teenagers and college students felt that they were entitled to receive music for free, especially after the introduction of Napster, and did not see why they should be required to pay. Tratos, *supra* note 51, at 174. One of the first websites showcasing MP3 music files was created in 1993 by a group of college students. Coats, *supra* note 54, at 450. It was called the Internet Underground Music Archive (IUMA). *Id.* Their website, now obsolete, allowed music artists to create their own sites on IUMA by paying a small fee. *Id.* at 451.

59. Coats, *supra* note 54, at 453.

60. *Id.* at 454. At the height of its popularity, Napster had over 64 million users with about 10,000 files shared every second. *Id.* See also Zentner, *supra* note 53, at 63 (stating that Napster was "the fastest software adoption in history" according to Mediatrix).

61. Tratos, *supra* note 51, at 169.

62. Lawrence, *supra* note 50; Tratos, *supra* note 51, at 169. After users downloaded the Napster software from the Napster website, they could upload their MP3 files to Napster's servers and download MP3 files that other users had already uploaded. Tratos, *supra* note 51, at 169-170; Coats, *supra* note 54, at 453-54. Napster made the file sharing process even easier by compiling organized lists of every user's MP3 files which were updated every time the user logged online. Tratos, *supra* note 51, at 170. The program even automatically categorized the music file's sound quality and the approximate time it would take to download. *Id.*

63. Lawrence, *supra* note 50; see also *supra* note 33 and accompanying text. They had every right to be scared: album sales had grown by about \$15 billion in only six years but had leveled off in 1999, the same year Napster was introduced. Zentner, *supra* note 55, at 63. Sales have been consistently falling from 2004 to 2006, including sales of CDs, which fell for the first time in 2001 since their introduction in 1983. Zentner, *supra* note 55, at 63.

The Recording Industry Association of America (RIAA) responded to music piracy just as songwriters responded to the player piano industry in *White-Smith*: its members sued the perceived offender, in this case, Napster.⁶⁴ In *A & M Records*, the Ninth Circuit of the United States Court of Appeals, in reviewing the lower court's decision, held that because Napster had actual knowledge that its users were using the program to download copyrighted works for free, they were liable for contributory infringement.⁶⁵ Because compliance with the court's injunction order would not allow Napster to continue operating as it had been, Napster met its demise as a free peer-to-peer file sharing program in July 2001.⁶⁶

The downfall of Napster, however, did not mean the end of peer-to-peer file sharing websites.⁶⁷ Napster's format required that MP3 files be stored directly on their servers, positioning the company as a middleman between users and involving them in the transmission.⁶⁸ The remaining peer-to-peer programs, however, do not require that files be stored in a central location.⁶⁹ Because there is no central body to file suit against,

64. *A & M Records, Inc. v. Napster, Inc.*, 114 F.Supp.2d 896 (N.D. Cal. 2000), *aff'd* 239 F.3d 1004 (9th Cir. 2001) (granting preliminary injunction against Napster for contributory infringement of copyrighted musical works). The RIAA is the trade group that represents the United States recording industry. Recording Industry Association of America – Who We Are, *archived at* <http://www.webcitation.org/5VPrNPneD>. Considering the fact that RIAA members account for about 90% of the sound recordings sold in the United States, it is no wonder that the group has led the way in fighting illegal file sharing. *Id.*; Morea, *supra* note 53, at 197. In fact, the RIAA claims the music industry loses over \$300 million annually to piracy in the United States. *Id.*

65. *A & M Records*, 239 F.3d at 1020-22; *see also* Lawrence, *supra* note 50. In ultimately granting a preliminary injunction, the court denied Napster's three primary defenses: its actions were characterized as fair use, its users' actions were protected by section 1008 of the AHRA, and its activities were exempt under the DMCA's Safe Harbor provision in section 512(a), relating to "transitory digital networks." *A & M Records*, 239 F.3d at 1014-19, 1024-25. *See also* Tratos, *supra* note 51, at 171; Coats, *supra* note 54, at 472-73, 481 (discussing in detail the reasoning behind the court's rejection of Napster's arguments).

66. Lawrence, *supra* note 50. The injunction required Napster to remove all infringing MP3 files from their servers. *A & M Records*, 239 F.3d at 1027.

67. Coats, *supra* note 54, at 454-55. Other illegal peer-to-peer websites gained more popularity when Napster shutdown, including Gnutella, Aimster, Grokster, Bearshare, and Kazaa. *Id.*; Lawrence, *supra* note 50. *See also* Zentner, *supra* note 55, at 64. Just two years after the Napster decision in 2003, Kazaa had over 230 million users around the world, making it the most downloaded peer-to-peer program. *Id.* The Yahoo Buzz Index also found that Kazaa was the most searched term on the Internet in 2003. *Id.*

68. Lawrence, *supra* note 50.

69. Lawrence, *supra* note 50. Every song transmission can occur without any participation by the software provider, making these sites much harder to attack and

the RIAA resorted to filing suit against hundreds of individual file sharers with the hope that their actions would shut down the illegal peer-to-peer websites.⁷⁰ However, these individual lawsuits have not had the desired effect of decreasing the threat of pirated music on the industry, in terms of both copyright infringement issues and monetary loss.⁷¹ Not only are they incredibly time-consuming and expensive, it also appears that the lawsuits have just evoked hostile responses from the very people the recording industry wants to purchase their music.⁷² The RIAA claimed that these lawsuits were necessary to protect the artists they represent. However, they soon realized that lawsuits & threats do not pay their artists.⁷³

Some companies found a way to profit from this demand for music. In the 1980s, people said “I want my MTV,” and the industry responded with music videos. When people wanted their MP3s, the industry listened again and created legal downloading programs. In 2003, Apple

shut down. *Id.*; Tratos, *supra* note 51, at 176.

70. Every time the RIAA filed a successful lawsuit against a peer-to-peer file sharing website with centralized control, more programs were created that did not depend on such control. Tratos, *supra* note 51, at 176. The RIAA tried to take advantage of the subpoena provision outlined in the DMCA, which allowed the organization to subpoena Internet Service Providers (ISPs) for individual contact information. Morea, *supra* note 53, at 201. However, the process was attacked in *RIAA v. Verizon Internet Services, Inc.* 258 F.Supp.2d 6 (D. D.C. 2003) (holding that a direct subpoena could not be used to obtain information that was not stored on their network). As a result of the District of Columbia Circuit Court of Appeals’ decision, the RIAA announced that they would begin suing “John Does” using just IP addresses. Morea, *supra* note 53, at 203. After the IP address was sued, a subpoena could be issued to acquire the name attached to the IP address. *See also* Tratos, *supra* note 51, at 222-23. As of the end of 2005, the RIAA had filed over 17,000 lawsuits. *Id.* at 223.

71. *See generally* Morea, *supra* note 53, at 205-09; Tratos, *supra* note 51, at 223; Lawrence, *supra* note 50. Most of the RIAA’s lawsuits have resulted in settlements between \$4,000 and \$5,000, not enough to take a bite out of their estimated losses due to illegal file sharing. Tratos, *supra* note 51, at 223. *But see* Stan J. Liebowitz, *File Sharing: Creative Destruction or Just Plain Destruction?*, 49 J.L. & ECON. 1 (2006) (discussing opposing arguments on the actual effect of the RIAA lawsuits). Some argue that there has been a decline in illegal file sharing while others argue that the RIAA lawsuits have had practically no effect. *Id.*

72. As G. Richard Shell said, “Suing your customers is not a winning business strategy...and this sort of strategy does not play well in the court of public opinion.” Morea, *supra* note 53, at 206-07 (quoting G. Richard Shell, *Suing Your Customers: A Winning Business Strategy*, Electronic Frontier Foundation, *archived at* <http://www.webcitation.org/5VPrUeKLS>). *See* Lawrence, *supra* note 50 (discussing the weaknesses in the recording industry’s approach to illegal file sharing). The RIAA lawsuits have resulted in the wrong people being sued. They are suing people that did not have any file sharing programs on their computer. Lawrence, *supra* note 50; Morea, *supra* note 53, at 207-08.

73. Morea, *supra* note 53, at 232 (quoting *File Sharing*, Electronic Frontier Foundation, *archived at* <http://www.webcitation.org/5VPrXY4Rg>).

launched its iTunes service as an alternative to illegitimate downloading programs.⁷⁴ In May 2003, the service only offered 200,000 songs, priced at 99 cents per song and \$9.99 per full album.⁷⁵ iTunes has expanded significantly since its inception, now offering more than six million songs for downloading.⁷⁶ Around the same time, Napster reemerged as Napster to Go, utilizing a subscription format which allows users to pay a flat monthly fee in exchange for unlimited downloads.⁷⁷

Apple's iTunes, Napster's Napster To Go service, and other legitimate services represent a major step by the marketplace to combat music piracy while also compensating songwriters and artists, the parties on the losing end of illegal transactions.⁷⁸ However, no matter how many people may be willing to pay to download music, there will always be even more people unwilling to pay for their music.⁷⁹

74. See Morea, *supra* note 53, at 233; Tratos, *supra* note 51, at 174. "The Apple iTunes music service and the Apple iPod represent a significant benchmark in the battle against illegitimate peer-to-peer file trading." Kasunic, *supra* note 4.

75. See Morea, *supra* note 53, at 233. The low price for single songs was achieved through Steve Jobs', one of Apple's founders, negotiations with members of the recording industry. See Tratos, *supra* note 51, at 196. Early attempts at pricing by the record industry were set at \$2.99 and \$1.99 for singles and \$13.99 and \$10.99 for full albums. *Id.*

76. See Apple – iTunes – iTunes Store, *archived at* <http://www.webcitation.org/5VPrdAihS>. In addition to music, iTunes now allows users to download podcasts, audiobooks, TV shows, movies, and games, all for use on iPods. *Id.*

77. Napster, <http://www.webcitation.org/5VPrfVX03>. Unlike iTunes however, playing Napster MP3s is contingent upon continuing subscription as the songs will be lost as soon as a Napster subscription is cancelled. *Id.* See also Morea, *supra* note 53, at 233-34.

78. Morea, *supra* note 53, at 233. For example, many colleges and universities embraced legitimate services, entering into partnerships to provide unrestricted access to their students, considered to be among the most rampant illegal downloaders. *Id.* at 234. See also Press Release, Recording Industry Association of America, *Illegal File Sharing Targeted In Wave of New Lawsuits* (Nov. 18, 2004), *archived at* <http://www.webcitation.org/5VPriMX7r>.

79. See Press Release, RIAA, *supra* note 78. In November 2004, the RIAA reported that the number of people paying to download music increased 150% from late 2003 to late 2004. *Id.*; Morea, *supra* note 53, at 235. Nevertheless, Jack Valenti, the former President of the Motion Picture Association of America (MPAA), has stated that "No business model can compete with free. I've talked at six universities, and they all comment on the fact that it's so easy." Tratos, *supra* note 51, at 172 n.113. See also Eric Schlachter, *The Intellectual Property Renaissance in Cyberspace: Why Copyright Law Could Be Unimportant on the Internet*, 12 BERKLEY TECH. L.J. 15, 37 (1997). It is difficult to change the behavior of millions of people when they have become accustomed to receiving certain things for free. *Id.* But see *Music Licensing Reform: Hearing Before the Subcomm. on Courts, the Internet & Intellectual Property of the H. Comm. on the*

Legitimate services do not offer the same wide variety of music that illegal file sharing programs and websites are able to provide.⁸⁰

Although the section 115 compulsory license is only one of four necessary licenses to make a DPD available online, it is the license underlying the entire transaction, allowing the reproduction and distribution of the musical composition.⁸¹ Over the years, however, it has become clear, from the process and requirements promulgated by section 115, that the statute is inherently flawed. Under section 115, notice must be served on the copyright owner.⁸² However, a separate Notice of Intention to Obtain a Compulsory License must be served on the copyright owner for each and every musical work that the digital music provider wishes to add to its library.⁸³ This process, considered to cause both time delays and increased costs, is the major reason legitimate downloading services are unable to successfully compete with file sharing programs.⁸⁴ Additionally, the current statute requires a

Judiciary, 109th Cong. 1 (2005) [hereinafter *Music Licensing Reform Hearing I*] (statement of Marybeth Peters, Register of Copyrights) (arguing that more people would use legitimate downloading services if they could offer the same libraries as the illegitimate providers).

80. See Morea, *supra* note 53, at 235. At the beginning of 2006, there were 870 million songs available illegally as compared to about 1 million legal songs. Carlos Ruiz de la Torre, *Towards the Digital Music Distribution Age: Business Model Adjustments & Legislative Proposals to Improve Legal Downloading Services & Counter Piracy*, 8 VAND. J. ENT. & TECH. L., 503, 505 (2006) (discussing the state of legal downloading services). As of January 2007, although the number of songs available legally had grown to about four million songs, this is nowhere near the amount of songs available illegally. IFPI, *IFPI Digital Music Report 2007 – Key Facts* (2007), archived at <http://www.webcitation.org/5VPrn43Y7>.

81. Every recorded song implicates two different copyrights: the sound recording and the musical composition. See *supra* note 23 and accompanying text. In addition to the compulsory license for the mechanical work, the legal downloading services also need to acquire the right to reproduce and distribute the sound recording, the right to authorize a public performance of the musical work, and the right to authorize a public performance of the digital sound recording. Ruiz de la Torre, *supra* note 80, at 506. All of these licenses are granted through different entities which all utilize their own licensing processes. *Id.* at 507-08. See also Wagman, *supra* note 13, at 293 (outlining the various rights necessary for legal compliance). Even though the issue remains as to whether the public performance right is implicated in a DPD, any legitimate downloading services should obtain public performance rights to protect themselves against any potential liability. Ruiz de la Torre, *supra* note 80, at 507.

82. See *supra* note 37 and accompanying text.

83. See U.S. Copyright Office, *Circular 73: Compulsory License for Making and Distributing Phonorecords* (2003), archived at <http://www.webcitation.org/5VPrJOGD>. The Notice of Intention to Obtain a Compulsory License must be served on the copyright owner of the musical work or with the U.S. Copyright Office and monthly royalties must be paid to either the owner or the Office. *Id.*

84. See *Section 115 Hearing* (statement of Jonathan Potter, Executive Director, DiMA), *supra* note 28, at 4. The statute requires the online music service to either

compulsory license for every copy that is distributed, language that may implicate incidental copies created in the process of downloading.⁸⁵

Due to these problems, many digital music providers choose to use the only alternative to the statutory license and acquire the compulsory license through the Harry Fox Agency (HFA).⁸⁶ HFA, however, is not without its own problems. The provisions of section 115 control all transactions, restricting HFA's negotiated royalty rates and acting as a fallback for those musical works that HFA does not represent.⁸⁷

locate the copyright owner or pay a fee to the Copyright Office if the owner cannot be found in order to properly secure the compulsory license. *Id.* This fee can be quite high considering it must be paid for each musical work desired. *Id.* See also *Music Licensing Reform: Hearing Before the Subcomm. on Courts, the Internet & Intellectual Property of the H. Comm. on the Judiciary*, 109th Cong. 1 (2005) [hereinafter *Music Licensing Reform Hearing 2*] (statement of Marybeth Peters, Register of Copyrights). Instead of raising prices to allow for additional licenses and expanded libraries, services choose to keep prices low, resulting in a smaller selection of music.

85. § 115(c)(1); *Section 115 Hearing* (statement of Jonathan Potter, Executive Director, DiMA), *supra* note 28, at 5. Whenever a song is downloaded, copies, referred to as "incidental copies," are created and stored on the computer solely for the purpose of accomplishing distribution. *Id.* A DPD is defined as a "specifically identifiable reproduction." See *supra* note 45 and accompanying text. The statute does not make clear, however, whether these incidental copies constitute such a reproduction which would require its own license. *Section 115 Hearing, supra* note 28 (statement of Marybeth Peters, Register of Copyrights). The DPRSRA only provides that incidental copies may be created during a digital transmission; however, it does not state whether they are sufficient to require compulsory licenses. § 106(6); *Section 115 Hearing, supra* note 28 (statement of Marybeth Peters, Register of Copyrights). *But see* MAI Systems Corp. v. Peak Computer, Inc., 991 F.2d 511 (9th Cir. 1993) (holding that a copy created when a computer program is transferred into the computer's random access memory (RAM) is sufficient for copyright law purposes). See generally Mark A. Lemley, *Dealing with Overlapping Copyrights on the Internet*, 22 U. DAYTON L. REV. 547 (1997).

86. HFA was established by the National Music Publisher's Association (NMPA) in 1927 "to act as an information source, clearinghouse and monitoring service for licensing musical copyrights." Harry Fox Agency, About HFA (2007), archived at <http://www.webcitation.org/5VPrun5Ui>. See also *Section 115 Reform Act (SIRA) of 2006: Hearing Before the Subcomm. on Courts, the Internet & Intellectual Property of the H. Comm. on the Judiciary*, 109th Cong. 2 (2006) [hereinafter *SIRA Hearing*] (statement of David M. Israelite, President & CEO of the NMPA). HFA currently represents more than 27,000 music publishers which represent more than 160,000 songwriters. *Id.* at 11.

87. See *Music Licensing Reform Hearing 2, supra* note 84 (statement of Marybeth Peters, Register of Copyrights). The statute acts as a ceiling on privately negotiated licenses. *Id.* Originally, the rate was set at two cents and is currently set at only 9.1 cents per song. *SIRA Hearing, supra* note 86, at 23 (statement of Rick Carnes, President of the Songwriters Guild of America (SGA)). See also *SIRA Hearing, supra* note 86, at 11 (statement of David M. Israelite, President & CEO of the NMPA). Although HFA is a more attractive option than the statutory option, the agency does not represent all music publishers and cannot license the works

IV. The Section 115 Reform Act: Congress' Latest Attempt at Reformation

In 2006, Representative Lamar Smith of Texas introduced the Section 115 Reform Act (SIRA) in an effort to update section 115 to operate more effectively in the face of music piracy and the Internet.⁸⁸ The amendment proposed a new section for the current statute entitled "Licenses for Digital Uses of Musical Works."⁸⁹ It is an effort to end the confusion of how to apply section 115 to Internet downloads.⁹⁰

SIRA specifically concerns compulsory licensing for DPDs.⁹¹ This section would cover different types of DPDs: full downloads, limited downloads, and interactive streams.⁹² The compulsory license would cover all reproduction and distribution rights necessary for the transmission of a DPD just as under the current version of section 115.⁹³ In addition, the compulsory license would apply to any incidental reproductions created during the transmission of a DPD.⁹⁴

SIRA also specifically provides for a royalty-free license for non-interactive streaming.⁹⁵ This "free" license would encompass any server or incidental reproductions necessary for a stream.⁹⁶ However, the

they do not represent, making use of the statute necessary in some cases. *Id.*

88. Section 115 Reform Act of 2006 (SIRA), H.R. 5553, 109th Cong. (2006). The push to amend section 115 was spearheaded by DiMA beginning in 2004. *See also* Fred Koenigsberg, *Legislative Developments Regarding Online Use of Musical Works*, 877 PLI/PAT 315, 318 (2006). Representing online music users, the organization cited the previously stated problems with the compulsory license and with HFA as contributing to their inability to secure the proper licenses. *Id.* Various negotiations took place over the course of the next couple of years between interested parties, including DiMA, NMPA, and the Copyright Office, before SIRA was finally introduced as a compromise between NMPA and DiMA. *Id.* at 318-19. *See generally supra* note 87 and accompanying text.

89. SIRA, § 115(e).

90. *See supra* note 42 and accompanying text.

91. SIRA, § 115(e)(1).

92. SIRA, § 115(e)(1)(A). A "full download" is defined as a DPD that the user has full access to at all times, such as a song purchased from iTunes. SIRA, § 115(e)(14)(E). A "limited download" is only available to the user for a specified period of time or a specified number of listens, such as a song purchased from Napster to Go. SIRA, § 115(e)(14)(I). An "interactive stream" is a stream of music played for the user at the time it is selected. SIRA, § 115(e)(14)(G)(ii).

93. SIRA, § 115(e)(1)(B).

94. SIRA, § 115(e)(1)(B)(iii). This language is intended to clear up any existing confusion over the applicability of compulsory licenses to incidental reproductions. *See supra* note 85 and accompanying text.

95. SIRA, § 115(e)(3). Internet radio stations, for example, are considered "non-interactive streams" because the user has no control over what is played. SIRA, § 115(e)(14)(J).

96. SIRA, § 115(e)(3)(A). The license is not completely free as the DA is

stream absolutely must qualify as a non-interactive stream.⁹⁷ The royalty-free license will not apply if the service in any way encourages recording the program for future listening.⁹⁸

Instead of requiring a license for each separate musical work, SIRA would allow digital music providers to obtain a blanket license.⁹⁹ The amendment allows the Register of Copyrights to appoint “Designated Agents” (DAs) to administer blanket licenses for the reproduction and distribution rights in a musical work.¹⁰⁰ Under the statute, an agency can become a DA if they represent at least 15% of the market.¹⁰¹ SIRA also allows for the appointment of a single “General Designated Agent” (GDA) to perform the same duties as any DA.¹⁰² Under the statute, the GDA is defined as the mechanical licensing agency that represents the largest share of the music publishing industry.¹⁰³ The GDA would act as the default entity if a copyright owner did not choose another DA.¹⁰⁴

SIRA would end the “pass through” of royalties between record labels, songwriters and publishers, and third-party digital music providers.¹⁰⁵ Currently, record labels act as middlemen between the songwriter and the digital music provider.¹⁰⁶ The label collects royalties from the digital music provider and passes them along to the songwriter after taking a cut of the money.¹⁰⁷ SIRA would instead require that

allowed to charge a filing fee to issue the license. SIRA, § 115(e)(3)(B).

97. SIRA, § 115(e)(3)(A).

98. SIRA, § 115(e)(3)(C). The statute states that the royalty-free license “does not extend to any server or incidental reproductions used to enable a streaming service...that takes affirmative steps to authorize, enable, cause, or induce the making of reproductions of musical works...for future use.” *Id.*

99. SIRA, § 115(e)(2).

100. SIRA, § 115(e)(9).

101. SIRA, § 115(e)(9)(C)(i). The 15% market share is to be determined by looking at the revenues collected on licensing musical works by the entity in the preceding 3 years. SIRA, § 115(e)(9)(C)(i)(I).

102. SIRA, § 115(e)(9)(B).

103. SIRA, § 115(e)(9)(B)(i)(I). Again, the agency’s share of the market is determined by the amount of royalties that the agency collected during the previous three years. *Id.* Under this rubric, HFA would very likely be appointed as the GDA due to the number of songwriters and publishers that the agency currently represents. Koenigsberg, *supra* note 88, at 319.

104. Koenigsberg, *supra* note 88, at 319.

105. *SIRA Hearing*, *supra* note 86, at 13 (statement of David M. Israelite, President & CEO of the NMPA).

106. *SIRA Hearing*, *supra* note 86, at 13 (statement of David M. Israelite, President & CEO of the NMPA).

107. *Id.* at 20 (statement of Rick Carnes, President of SGA). “Pass through” licensing is especially important to record labels because it makes it easier for them to enforce controlled composition clauses. *Id.* Controlled composition clauses let the record label pay songwriters and publishers only 75% of the statutory rate. *Id.*

licensees pay royalties collected on the musical composition directly to the DA.¹⁰⁸ The DA would then distribute those royalties directly to the copyright owner.¹⁰⁹

V. Will SIRA provide an effective solution?

Congress' 21st century problem with copyright law very closely parallels the problem it faced in the early 20th century. During the early 20th century, a new technology, the player piano, was widely used and threatened the development of the music industry.¹¹⁰ In order to avoid the decline of the music industry, Congress enacted section 115 to deal with the special issues raised by the player piano industry.¹¹¹ Similarly, during the early 21st century, a new technology, digital music downloads, is widely used and is allegedly again threatening the further development of the music industry. In 2006, in order to again avoid what it saw as the breakdown of the industry, Congress introduced SIRA to deal with the special issues raised by the Internet.¹¹²

Copyright law has enjoyed a rich tradition of being amended in response to fears over the effects of emerging technologies, a custom that dates back to its beginnings.¹¹³ The original compulsory license accomplished Congress' goal of assuaging fears of an industry monopoly.¹¹⁴ It also allowed for the growth of the music industry, making music available to the public at large.¹¹⁵ The provisions of section 115 were sufficient throughout most of the 20th century when only applied to the reproduction and distribution rights of phonorecords.¹¹⁶ Copyright holders' rights were well protected.¹¹⁷

108. SIRA, § 115(e)(8)(C).

109. SIRA, § 115(e)(11)(A).

110. See *supra* note 28 and accompanying text.

111. See *supra* note 33-36 and accompanying text; See also *Section 115 Hearing*, *supra* note 28 (statement of Marybeth Peters, Register of Copyrights). The compulsory license was a direct response to the holding in *White-Smith* and an attempt by Congress to clarify the copyright owner's control over his musical work. *Id.*; see also *supra* note 33 and accompanying text.

112. See *supra* note 88.

113. Litman, *supra* note 12, at 47; see also *Music Licensing Reform 2*, *supra* note 84 (statement of Marybeth Peters, Register of Copyrights). As the Supreme Court stated in *Sony Corp.*, "From its beginning, the law of copyright has developed in response to significant changes in technology." 464 U.S. at 430.

114. See *supra* note 35 and accompanying text; see also *Music Licensing Reform Hearing 1*, *supra* note 79 (statement of Marybeth Peters, Register of Copyrights).

115. Without the creation of the compulsory license, copyright holders likely would have continued refusing to license their musical compositions, causing the stagnation of the music industry. Wagman, *supra* note 13, at 285.

116. Congress has attempted over the years to extend provisions originally designed to apply to print media to new forms of technology. Litman, *supra* note

The Internet, however, introduced new fears over the application of copyright law to another new technology.¹¹⁸ While the Internet has made it possible for anyone to be an author if he or she is so inclined, it has also made rampant infringement possible.¹¹⁹ As recently as 1998, the Copyright Act saw its first major amendment, the DMCA, driven by fears of the Internet and a lack of control of copyrighted works.¹²⁰ However, in a time when technology is changing at an increasingly rapid pace, no single law can be considered a panacea.¹²¹

Section 115 and the current compulsory license were created almost one hundred years ago, and it is exceedingly clear that it is not adequately equipped to handle the issues raised by the Internet.¹²² This antiquated statute is restraining the development of technology and of the music industry rather than promoting its growth.¹²³ Currently, section 115 requires that each and every song requested by a downloading service must be accompanied by a separate notice, leading to severe delays and high costs in obtaining music for the downloading service's library.¹²⁴ These delays and costs directly contribute to the music industry's inability to successfully combat piracy.¹²⁵ The industry simply cannot keep up and compete with the rapid growth of

12, at 31.

117. Litman, *supra* note 12, at 31.

118. Congress had already revised section 115 in their mission to provide additional protections to copyright holders of musical compositions as evidenced by the DPRSRA. *See supra* notes 44-47 and accompanying text. However, the introduction of the MP3 brought new obstacles to satisfactory copyright protection. *See supra* note 56 and accompanying text.

119. *See supra* notes 56-58 and accompanying text.

120. DMCA, 112 Stat. 2860 (1998); *see supra* note 4 and accompanying text.

121. Litman, *supra* note 12, at 22. "Copyright laws become obsolete when technology renders the assumptions on which they were based outmoded." *Id.*

122. As previously stated, the compulsory license was created in response to issues arising out of the player piano industry in 1909. *See Section 115 Hearing, supra* note 28 (statement of Marybeth Peters, Register of Copyrights). No one knew that the digital revolution would occur less than one hundred years later. You cannot take into account events that have not yet occurred.

123. U.S. CONST. art I, § 8, cl. 8; § 115. This same provision is no longer working as Congress intended and dictates the necessity of a new process to ensure that the industry continues to grow. In *White-Smith*, Congress held that perforated piano rolls were not considered reproductions of the underlying musical work for purposes of copyright law. 209 U.S. at 18. Keeping in mind copyright law's goal of promoting the growth of the arts, Congress created a provision to encourage the growth of the music industry. *See Music Licensing Reform 2, supra* note 84 (statement of Marybeth Peters, Register of Copyrights).

124. *See supra* notes 82-84 and accompanying text.

125. *See supra* notes 82-84 and accompanying text.

peer-to-peer file sharing programs and websites.¹²⁶ Legitimate downloading services cannot attract consumers and convince them to pay for their music when a “better” alternative exists, especially one that offers a much wider music selection for free.¹²⁷

SIRA’s provisions appear very similar to the process used to obtain the right to publicly perform a phonorecord.¹²⁸ In stark contrast to the current process outlined by section 115 for acquiring the reproduction and distribution rights in the musical composition, the process to acquire the public performance right for the same work has evolved into a much more efficient process.¹²⁹ Public performance rights are administered through entities called “Performing Rights Organizations” (PROs).¹³⁰ The PROs utilize a blanket licensing system in which a licensee is able to pay a fee to the PRO in exchange for access to all the musical compositions in their repertoire.¹³¹ The PROs then pay out royalties to the songwriters based on the total revenue collected for the songs performed.¹³² While the PROs operate without any statutory restrictions, HFA, the only entity similar to a PRO, is completely restricted by section 115.¹³³ Not only must every composition be

126. See *supra* note 80 and accompanying text.

127. See *supra* notes 79-80 and accompanying text.

128. As previously stated, the sale of a single digital track implicates the copyright holder’s rights of reproduction and distribution as well as possibly the right of public performance for both the musical work and the sound recording. Ruiz de la Torre, *supra* note 80, at 506; See also *supra* note 81 and accompanying text.

129. Ruiz de la Torre, *supra* note 80, at 508. These two procedures developed separately, partly due to the fact that public performance rights and reproduction and distribution rights originally did not overlap each other and also due to anti-trust consent decrees against the PROs. *Music Licensing Reform 2*, *supra* note 84 (statement of Marybeth Peters, Register of Copyrights); Ruiz de la Torre, *supra* note 80, at 507. However, all three rights are potentially implicated in the transmission of a single song on the Internet. See *supra* note 81 and accompanying text. See generally Lemley, *supra* note 85, at 565-66 (providing an example of the overlapping rights involved in an “Internet radio” situation).

130. There are three major PROs in the United States that administer licenses for the public performance right in the musical composition. Ruiz de la Torre, *supra* note 80, at 507; Coats, *supra* note 54, at 462. The largest of the three PROs is Broadcast Music, Inc. (BMI), which represents more than 300,000 songwriters and publishers. BMI, BMI.com – About (2007), archived at <http://www.webcitation.org/5VPs6925m>. The Society of European Stage Authors and Composers (SESAC) is the smallest of the three while The American Society of Composers, Authors, and Publishers (ASCAP) represents more than 270,000 songwriters and publishers. SESAC, SESAC – About Us (2007), archived at <http://www.webcitation.org/5VPs9qdnV>; ASCAP, About ASCAP (2007), archived at <http://www.webcitation.org/5VPsCK3ST>.

131. Ruiz de la Torre, *supra* note 80, at 508.

132. Ruiz de la Torre, *supra* note 80, at 508.

133. See *supra* note 87 and accompanying text.

licensed separately, but HFA does not represent all musical compositions in existence whereas the PROs provide all public performance licenses.¹³⁴

SIRA has the potential to pose a significant threat to illegal downloading services.¹³⁵ It would bring the compulsory license into the 21st century by expressly providing a more efficient mechanism for reproducing and distributing digital musical works.¹³⁶ Its provisions endeavor to balance the public's obvious desire for music against the rights of the copyright holders to be compensated for their musical works sold over the Internet.¹³⁷ SIRA would significantly change the current structure of section 115 by creating a centralized entity responsible for issuing licenses and collecting royalties, a system similar to that of the PROs.¹³⁸ The PROs' system of licensing, utilized since the early 20th century, and the compulsory license both developed around the same time and are concerned with the same end product.¹³⁹ However, while the PROs operate in the marketplace, the compulsory license went the statutory route.¹⁴⁰ Despite the separate paths these two systems took, there is no evidence that the licensing of the reproduction and distribution rights of the musical composition could not fare just as well under the process laid out by the PROs.

Under SIRA's blanket licensing system, legitimate downloading services would no longer have to file a separate notice for each song they wish to acquire the rights to. The blanket license would provide digital music providers with access to all songs in the GDA's (or DA's) library of music.¹⁴¹ By modifying the arduous requirements of the

134. See *supra* note 87 and accompanying text. HFA represents a significantly lower number of songwriters and publishers than the PROs collectively represent. See *SIRA Hearing*, *supra* note 86, at 11 (statement of David M. Israelite, President & CEO of the NMPA); see also *supra* note 130 and accompanying text.

135. SIRA, § 115(e).

136. *Id.*

137. SIRA's new provisions attempt to retain the same balance Congress wanted to accomplish with the creation of the original section 115. See generally *Section 115 Hearing*, *supra* note 28, at 2 (statement of Jonathan Potter, Executive Director, Digital Media Association (DiMA)). Songwriters are compensated through the sale of the sound recordings of their musical compositions; therefore, due to the reduction in CD sales, everyone involved, especially the songwriters, is losing out on potential sales. Zentner, *supra* note 55, at 63 (reporting that album sales were at their peak in 1999 and have been on a decline since then). It is possible that the rise of peer-to-peer file sharing is responsible for at least a 30% decline in CD sales. See generally Zentner, *supra* note 55.

138. See SIRA, § 115(e)(2); see also *supra* note 131 and accompanying text.

139. See *supra* note 129 and accompanying text.

140. See *supra* note 129 and accompanying text.

141. See *supra* notes 99-100.

current section 115 and replacing them with a system that has proven effective, SIRA would significantly reduce time delays and high costs. The benefits of a simpler and faster method for acquiring more music for less money will be passed along to the consumer in the form of a vastly superior library of music than is currently available through legitimate downloading services such as iTunes and Napster.

In addition to streamlining the process of acquiring the rights to the musical compositions, SIRA would also create a more efficient method of distributing royalties to the songwriter and publisher.¹⁴² The current use of the “pass through” mechanism from the digital music provider to the record label and then to the songwriter would no longer be necessary.¹⁴³ Digital music providers are fully capable of brokering deals directly with the songwriters themselves.¹⁴⁴

A. Criticisms

Although the proposed amendment would likely do much to alleviate the problems posed by music piracy, SIRA does have its share of critics as expected with any proposed piece of legislation. Some critics take issue with the planned position of the GDA. The GDA is intended to be the existing mechanical licensing agency that currently represents the largest share of music publishers.¹⁴⁵ Due to the language of the amendment, HFA would most certainly become the GDA as it currently represents almost 200,000 songwriters and publishers.¹⁴⁶ SIRA does have a provision allowing for the creation of other licensing entities, titled DAs.¹⁴⁷ However, to become a DA, the organization must have at least a 15% share of the market.¹⁴⁸ This percentage of the market could be difficult for smaller groups to acquire due to the fact that HFA already represents such a significant portion of the market.¹⁴⁹ Furthermore, giving HFA the title of GDA may lend itself to solidifying the agency’s reputation as a very highly respected licensor of

142. SIRA, § 115(e)(8)(C); SIRA, § 115(e)(11)(A).

143. See *supra* notes 105-107 and accompanying text. The “pass through” of royalties allows the record label to retain a significant amount of control over the relationship between themselves, the songwriters and publishers, and the third-party digital music providers. *Id.*

144. See *SIRA Hearing*, *supra* note 86, at 13 (statement of David M. Israelite, President & CEO of NMPA).

145. SIRA, § 115(e)(9)(B)(i)(I).

146. *SIRA Hearing*, *supra* note 86, at 11; Koenigsberg, *supra* note 88, at 319.

147. SIRA, § 115(e)(9).

148. SIRA, § 115(e)(9)(C)(i).

149. Most publishers are represented by HFA for their mechanical licensing needs. Koenigsberg, *supra* note 88, at 317.

mechanical works.¹⁵⁰ In turn, many songwriters and publishers would elect to be represented by HFA in the licensing of the reproduction and distribution rights to their works. This would increase the size of the agency's repertoire and would drive smaller entities, those that cannot acquire the required 15% market share, out of business. This would, in essence, create an unintentional monopoly, which is exactly what Congress intended to avoid with the creation of the compulsory license.¹⁵¹

A major point of contention among SIRA critics is language in the amendment relating to incidental copies created during the transmission of a DPD. In writing SIRA, one goal was to clear up any confusion relating to the applicability of the compulsory license to incidental copies.¹⁵² Although it was their intention to resolve this uncertainty, it does not appear that SIRA's writers were successful.

The amendment does contain language specifically exempting incidental copies created during a non-interactive stream from the compulsory license by allowing for a royalty-free license.¹⁵³ However, SIRA does not explicitly exempt incidental copies created during a full download, limited download, or interactive stream. In fact, SIRA's language states that the blanket license applies to "all reproduction and distribution rights necessary to engage in activities [full downloads, limited downloads, interactive streams]...including ...incidental reproductions...made in the normal course of engaging in activities..."¹⁵⁴

In regard to streams, rather than provide non-interactive streams with a royalty-free license, incidental copies created during the transmission

150. HFA already handles the reproduction and distribution rights of many songwriters and publishers. Koenigsberg, *supra* note 88, at 317. Giving them the title of "GDA" would clearly inform those in the music industry of their superiority to any other existing DAs.

151. *See supra* note 35 and accompanying text.

152. This debate has gone on through many hearings. *See supra* note 85 and accompanying text. *See also SIRA Hearing, supra* note 86 (statement of Marybeth Peters, Register of Copyrights). The marketplace itself even attempted to resolve this issue through specific language in licensing agreements between the RIAA, the NMPA, and the HFA, which was supported by the Copyright Office. *Section 115 Hearing, supra* note 28 (statement of Marybeth Peters, Register of Copyrights).

153. SIRA, § 115(e)(3)(A). *See also* *Rodgers & Hammerstein v. UMG Recordings*, 2001 WL 1135811 (S.D.N.Y. 2001) (holding that server copies created in non-interactive streams were not covered by the section 115 compulsory license). SIRA's provision exempting these incidental copies remains in line with the court's statement in *Rodgers*. SIRA, § 115(e)(3)(A).

154. SIRA, § 115(e)(1)(B)(iii). This section of SIRA states that it did intend to include copies stored in the computer's cache and buffer copies. *Id.* *See also SIRA Hearing, supra* note 86 (statement of Marybeth Peters, Register of Copyrights) (stating that this language does resolve this particular issue).

of both types of streams should be held to be completely outside the scope of the SIRA license and classified as fair use.¹⁵⁵ Weighing strongly in favor of a fair use characterization in this situation is the fact that these incidental copies have no commercial value in and of themselves.¹⁵⁶ They exist solely for the purpose of facilitating the transmission of a DPD to the end user.¹⁵⁷ Although it could be argued that these incidental copies are somewhat commercial in nature, they ultimately have no value independent of their necessity in the downloading process.¹⁵⁸ The copyright owner is already receiving payment from the consumer for the ability to listen to streaming music.¹⁵⁹ Subjecting streaming incidental copies to the license essentially allows the copyright holder to be compensated twice for a single transaction.¹⁶⁰

SIRA does not tackle whether its blanket license would apply in general to all incidental copies. Perhaps this fair use argument could be extended to the incidental copies created during a full or limited download.¹⁶¹ An incidental copy created during a stream is only necessary to be able to listen to the song.¹⁶² Similarly, incidental copies created during a download are only necessary for distribution of the song. If incidental copies created during an interactive stream are to be considered fair use, so too should incidental copies created during a download.¹⁶³

Ultimately, although this fair use analysis weighs heavily in favor of such a classification, many songwriters argue strongly against this and

155. *Digital Millennium Copyright Act Section 104 Report*, 107th Cong. 1 (2001) [hereinafter *DMCA Report*] (statement of Marybeth Peters, Register of Copyrights). See also *supra* note 22 (outlining factors involved in a fair use analysis). See *CIIP Subcommittee Approves Section 115 Reform Act*, TECH L.J., June 8, 2006, archived at <http://www.webcitation.org/5VVPsIgyHN>.

156. See *CIIP Subcommittee*, *supra* note 155.

157. *Section 115 Hearing*, *supra* note 28, at 5 (statement of Jonathan Potter, Executive Director, DIMA).

158. See *DMCA Report*, *supra* note 155. The incidental copies created during a stream are part of the overall commercial transaction in which the consumer pays to listen to the streaming music. However, as the Copyright Office repeatedly states, these copies are simply a means to an end. *Id.*

159. See *DMCA Report*, *supra* note 155.

160. See *DMCA Report*, *supra* note 155.

161. In the Copyright Office's *DMCA Report*, Peters focused on the issue of incidental copies created in a stream rather than discuss the issue of incidental copies in general. *DMCA Report*, *supra* note 155. Although it was held in *MAI Systems* that RAM copies do constitute reproductions for purposes of copyright law, it was not discussed in relation to copies created during a full or limited download. *MAI Systems*, 991 F.2d at 511; *DMCA Report*, *supra* note 155.

162. See *supra* note 157 and accompanying text.

163. See *supra* notes 156-160 and accompanying text.

the use of gratuitous licensing.¹⁶⁴ Songwriters already are required to split their royalties with their publisher and with the recording artist.¹⁶⁵ By distinguishing incidental copies as fair use or making them subject to a royalty-free license, songwriters are left with fewer avenues to collect royalties for the use of their musical work in the sale of a DPD.¹⁶⁶ It is safe to say that everyone would benefit from an explicit assertion in SIRA of what is an incidental copy and what constitutes an actual reproduction, ending the confusion once and for all.

Another major issue of debate among SIRA supporters and critics is whether streams, interactive and non-interactive, should be subjected to the compulsory license at all. The proposed amendment to the compulsory license continues to only apply to the reproduction and distribution of the mechanical work and not the performance right implicated during a stream.¹⁶⁷ The language of the amendment requires that digital music providers obtain a license for the mechanical work utilized in an interactive or non-interactive stream due to the incidental copies that are created during transmission.¹⁶⁸ But a question remains: is a stream, whether interactive or not, actually a reproduction *and* distribution of the musical work? During a stream, there is no permanent copy created.¹⁶⁹ The streamed music is only available to the

164. They contend that the Copyright Office erred in its conclusion that incidental copies created during a stream, whether interactive or not, do have an “intrinsic economic value.” *SIRA Hearing, supra* note 86 (statement of Rick Carnes, President of SGA). It should be not be downplayed by such characterizations.

165. *SIRA Hearing, supra* note 86 (statement of Rick Carnes, President of SGA). Under the current compulsory licensing process, the songwriter must divide his royalties in half with the publisher. *Id.* He must then split his payment in half again with the recording artist, assuming that he co-wrote the song, which today is commonplace. *Id.*

166. *SIRA Hearing, supra* note 86 (statement of Rick Carnes, President of SGA).

167. SIRA, § 115(e)(1). In this section, SIRA’s writers clearly intended for the amendment to section 115 to continue to apply only to the reproduction and distribution rights involved in the transmission of a DPD. *Id.* See also SIRA, § 115(f) (stating that “rights granted under subsection (e) shall not include, limit, or otherwise affect any right of public performance of a musical work”).

168. SIRA, § 115(e)(1)(A); *SIRA Hearing, supra* note 86 (statement of Marybeth Peters, Register of Copyrights) (stating that the temporary copies created make streams appropriately covered under section 115). See also *supra* note 154 and accompanying text.

169. See SIRA, § 115(e)(14)(N). SIRA defines a stream as a digital transmission that is “not intended or designed to result in a substantially complete reproduction...” *Id.* An interactive stream is further differentiated from a non-interactive stream. SIRA, § 115(e)(14). While both types of streaming music is listened to at the time the program is opened, the user is able to choose the music in an interactive stream whereas a non-interactive stream refers to radio-style

user while the streaming program is open and in use.¹⁷⁰

Rather, a stream of music is a performance of the song and should instead fall under the public performance rights of the copyright holder. The Copyright Act states that to “perform” means “to...play...either directly or by means of any device or process...to make the sounds accompanying it audible.”¹⁷¹ Approached literally, a stream is mainly a performance of the mechanical work: a device is allowing the sound to be audible to the user.¹⁷² Once the music is performed through a stream, the music is no longer available.¹⁷³ Because there is no permanent copy created on the user’s computer, it should not be classified as a distribution.¹⁷⁴ As Jonathan Potter of DiMA argues, consumers can enjoy music in only one way: “a performance that is heard and then is no longer available; or by possessing music...which occurs as a result of a distribution.”¹⁷⁵ Therefore, copyright holders of streaming music, whether interactive or non-interactive, should either be compensated for the distribution or for the performance, not both.

Classifying a stream under the reproduction right as well as the performance right may be beneficial to the owner of the mechanical work copyright because it would provide him or her another opportunity to collect royalties on one work.¹⁷⁶ However, it would also be detrimental to the digital music provider. This classification would require licensees that utilize streaming technology to pay twice.¹⁷⁷ In turn, digital music providers would likely pass this cost along to users of streaming services, making them more expensive and less appealing to the general public. Although SIRA contends that it resolves this issue in relation to non-interactive streams, SIRA does not resolve whether an

streaming. SIRA, § 115(e)(14)(G), (J). Many radio stations utilize the non-interactive radio-style streaming on their websites. For an example, *see* KISS 108, <http://www.kiss108.com> (last visited April 7, 2007).

170. SIRA, § 115(e)(14)(G), (J).

171. § 101 (defining “perform”).

172. *SIRA Hearing, supra* note 86 (statement of Marybeth Peters, Register of Copyrights).

173. *See supra* note 170 and accompanying text.

174. According to Marybeth Peters, the Register of Copyrights, the purpose of a distribution is to provide the end user with a “usable copy of the work.” *SIRA Hearing, supra* note 86 (statement of Marybeth Peters, Register of Copyrights). When a stream concludes, the user is not left with a usable copy of the music he or she heard.

175. *See SIRA Hearing, supra* note 86 (statement of Jonathan Potter, executive director, DiMA).

176. *See generally supra* notes 166-167 and accompanying text.

177. If a stream is held to be both a distribution *and* a performance, implicating both rights, copyright holders would engage in what has been referred to as “double-dipping,” allowing them to collect twice for a single transaction.

interactive stream results in a distribution or in only a performance.¹⁷⁸ If SIRA is to be the groundbreaking legislation it purports to be, classification in this area is necessary.

B. Alternatives to the Compulsory License

Although SIRA is a step in the right direction toward bringing the section 115 compulsory license up to date, the amendment arguably is not necessary. An alternative to amending the statutory license would be to do away with it altogether.¹⁷⁹ The original reasoning behind the enactment of the compulsory license was the impending monopoly in the player piano industry.¹⁸⁰ The compulsory license was necessary in the early 1900s to assist in the development of the music industry and guarantee that music would be available to the public.¹⁸¹ Enacting the compulsory license was intended to balance the public's right to music with the copyright owner's right to be compensated for that music.¹⁸² This rationale, however, no longer supports the use of the statutory license. The music industry has developed, and music is widely available everywhere you turn, whether in a digital or physical format. There are many indications that use of statutory compulsory licenses is simply not necessary in today's society.¹⁸³

Rather, the licensing of the mechanical work may be better left to negotiations in today's marketplace. Without any real benefit, the only remaining function of the compulsory license is to act as a ceiling on royalty-rates negotiated by HFA.¹⁸⁴ This limit directly impacts any potential investments to be made by the musical work owners. With a maximum royalty that the copyright holder can receive for his works, there is no incentive to invest more than any potential return through the

178. See *SIRA Hearing*, *supra* note 86 (statement of Marybeth Peters, Register of Copyrights).

179. This alternative is an especially popular stance of the Copyright Office. See generally *Music Licensing Reform Hearing 1*, *supra* note 79; *Music Licensing Reform Hearing 2*, *supra* note 84; *SIRA Hearing*, *supra* note 86. Elimination of the statutory license is in line with the Office's preference for marketplace solutions over statutory solutions. *Music Licensing Reform Hearing 1*, *supra* note 79.

180. See *supra* note 35 and accompanying text.

181. See *supra* note 34.

182. See *supra* note 137 and accompanying text.

183. "While the section 115 statutory license may have served the public interest well...for much of the 1900's, it is no longer necessary and unjustifiably abrogates copyright owners' rights today." *Music Licensing Reform Hearing 1*, *supra* note 79 (statement of Marybeth Peters, Register of Copyrights).

184. *Music Licensing Reform Hearing 2*, *supra* note 84 (statement of Marybeth Peters, Register of Copyrights).

limited royalty rate.¹⁸⁵ Forgoing the section 115 license and replacing the process with private negotiations would not only make sure music would be widely available to the public through legitimate downloading services, it would also allow copyright owners to negotiate their own royalty-rates and provide them with a greater incentive to work, one of the central purposes of copyright law. Arguably, privately negotiated royalty-rates may increase the cost of digital music to the consumer with copyright owners negotiating higher and higher rates for their mechanical works. However, considering the strong desire of the entire digital music industry to combat piracy, a major reason that an overhaul (or abolishment) of section 115 is necessary, high costs would likely not occur as it would have a negative effect on combating piracy and be met with strong opposition from consumer groups.

Furthermore, the United States' statutory compulsory license for mechanical works is inconsistent with the process utilized in almost every other country. Countries that once used section 115 as a model have forgone such provisions in favor of private negotiations and collective licensing societies.¹⁸⁶

Because SIRA appears to be modeled after the process utilized by the PROs, there is no reason that SIRA cannot be enacted similarly, resulting in the abolishment of current statutory limitations.¹⁸⁷ If enacted as an amendment of the statute, the compulsory license will only continue to act as a limit on negotiated royalty-rates, just like its predecessor.¹⁸⁸ However, in this instance, there would be nowhere else for licensees to go with their only alternative, HFA, being merged into the statute as the GDA.¹⁸⁹ The licensing process utilized by the PROs is a procedure that has proven efficient and effective. For as long as the copyright holder has had the ability to control the mechanical

185. Jason S. Rooks, Note, *Constitutionality of Judicially-Imposed Compulsory Licenses in Copyright Infringement Cases*, 3 J. INTELL. PROP. L. 255, 271-72 (1995) (outlining the main arguments for and against the use of compulsory licenses).

186. See *Section 115 Hearing*, *supra* note 86 (statement of Marybeth Peters, Register of Copyrights). Many collective rights societies in Europe license the reproduction and distribution rights and the public performance right. See generally Society for Musical Performing and Mechanical Reproduction Rights (GEMA), archived at <http://www.webcitation.org/5VPsUFP4D>.

187. See *supra* notes 128-134 and accompanying text.

188. See *supra* note 184 and accompanying text.

189. Under the current formulation of section 115, copyright holders have the choice of negotiating with HFA or utilizing the provisions under the statute. In many instances, copyright holders do choose to negotiate with HFA due to the many problems associated with the statutory license. See *supra* note 86 and accompanying text. This alternative will not longer exist if SIRA is enacted because HFA (most likely) will become the entity to provide the reproduction and distribution rights.

reproduction of his work, it has been subjected to a compulsory license.¹⁹⁰ Therefore, the licensing of these rights has never been given a chance to work itself out in the marketplace, as the public performance right did. There is no reason to suspect that a similar process used to distribute licenses for the reproduction and distribution rights of the musical work would not be as effective as that utilized by the PROs.

VI. What Happens Next?

The dawn of the digital era and the rise of the Internet have brought many advantages. However, in terms of copyright law, it has proven to add more confusion to an already confusing area of law. When enacted in the early 1900s, the section 115 compulsory license was necessary in order to create the type of music industry we have today and avoid potential monopolies. The statute, amended a few times over the past decades, is in need of an overhaul if legitimate downloading services ever want to have a chance to compete with pirated music. The number of songs available through iTunes, Napster, and other legitimate music downloading services does not come close to what can be found through illegal avenues on the Internet. Unless something is done, music piracy will continue to run rampant and grow at an increasingly faster pace than legitimate digital music downloads.

There is an answer out there that will balance the consumer's desire for a never-ending library of music at low prices with the copyright holder's right to be compensated for the reproduction and distribution of his musical work. However, will there ever be a perfect remedy to a situation that exists in such a fluid and ever-changing arena such as the Internet? In the early 20th century, technology changed at a snail's pace as compared to today when new and innovative technologies are being introduced on a daily basis. The debate over amending section 115 of the Copyright Act has been raging for years and years between all of the interested parties. However, the dispute has become increasingly heated in recent years as the digital music industry has grown faster and faster, and it has become all the more evident that change is not only necessary but imminent. Nevertheless, it is likely that as soon as Congress is able to come up with a satisfactory solution for all parties involved, it will be outdated.

SIRA is only the latest proposed remedy for the problems associated with the current formulation of section 115 and the problems created by

190. *See supra* notes 33, 35 and accompanying text.

illegal downloading services. There have been others; however, SIRA is the only proposal to almost become a reality.¹⁹¹ SIRA would be a solid improvement over the licensing process used now by digital service providers. With a blanket licensing system modeled after the PROs and the institution of the designated agent, providers will deal with less confusion and be able to license more musical compositions, allowing them to better fight piracy and make consumers happier. However, how effective such a proposal will actually have on the market for digital music remains to be seen.

191. Although as of the time of this writing SIRA has been tabled by the House of Representatives, it or another incarnation of it will likely be brought back up for debate in the near future.