Abstract:
The system for licensing music in the United States for public performances through radio, television, digital services, and other distribution media is complicated, arcane, and heavily regulated. Its basic structure is oriented toward transmitting music through analog channels. Although much of the pricing of music rights is supposed to be based on competitive prices, the current interdependent system of collective licensing of performing rights and widespread regulation of music prices (royalties) is inconsistent with the development of a competitive market and its associated efficiencies. Collective licensing by a handful of performing rights organizations (PROs) provides the current rationale for price regulation. However, the existence of price regulation has entrenched collective licensing and the position of those PROs. Accordingly, a more competitive system entails moving away from collective licensing.

In this paper we review the current structure of the music licensing system and suggest ways of making it more competitive and less reliant on regulation. Central to our proposals are: a) a comprehensive, standardized database of musical compositions—including the specific sound recording version, where relevant—and their owners so that distributors and users can readily identify the rights-holder from whom they need to license rights, along with a safe harbor provision that would provide the appropriate incentives for rights-owners to contribute their information to the database; b) a greater ability of intermediaries to aggregate the various categories of music ownership rights; and c) the consequent development of more competitive negotiations and transactions between music rights-holders and music distributors.

Moving Music Licensing into the Digital Era:
More Competition and Less Regulation*

Thomas M. Lenard**
and Lawrence J. White***

> " . . . the time is ripe to question the existing paradigm for the licensing of musical works and sound recordings and consider meaningful change. There is a widespread perception that our licensing system is broken."[1]

ABSTRACT

The system for licensing music in the United States for public performances through radio, television, digital services, and other distribution media is complicated,

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[1] U.S. COPYRIGHT OFFICE, COPYRIGHT AND THE MUSIC MARKETPLACE: A REPORT OF THE REGISTER OF COPYRIGHTS 1 (2015), *available at* http://www.copyright.gov/policy/musiclicensingstudy/copyright-and-the-music-marketplace.pdf.

arcane, and heavily regulated. Its basic structure is oriented toward transmitting music through analog channels. Although much of the pricing of music rights is supposed to be based on competitive prices, the current interdependent system of collective licensing of performing rights and widespread regulation of music prices (royalties) is inconsistent with the development of a competitive market and its associated efficiencies. Collective licensing by a handful of performing rights organizations (PROs) provides the current rationale for price regulation. However, the existence of price regulation has entrenched collective licensing and the position of those PROs. Accordingly, a more competitive system entails moving away from collective licensing.

In this paper we review the current structure of the music licensing system and suggest ways of making it more competitive and less reliant on regulation. Central to our proposals are: a) a comprehensive, standardized database of musical compositions—including the specific sound recording version, where relevant—and their owners so that distributors and users can readily identify the rights-holder from whom they need to license rights, along with a safe harbor provision that would provide the appropriate incentives for rights-owners to contribute their information to the database; b) a greater ability of intermediaries to aggregate the various categories of music ownership rights; and c) the consequent development of more competitive negotiations and transactions between music rights-holders and music distributors.

I. INTRODUCTION

The system for licensing music in the United States for public performances through radio, television, digital services, and other transmission media is complicated, arcane and heavily regulated. Its basic structure is oriented toward transmitting music through analog channels.[2] Although much of the pricing of music rights is supposed to be based on competitive prices, the current interdependent system of collective licensing of performing rights and widespread regulation of music prices (royalties) is inconsistent with the development of a competitive market and its associated efficiencies.

Collective licensing by a handful of performing rights organizations (PROs) provides the current rationale for price regulation. However, the existence of price regulation has entrenched collective licensing and the position of those PROs. Accordingly, a more competitive system entails moving away from collective licensing.

The current licensing system is also cumbersome, as it requires distributors, such as the new streaming services, to obtain multiple licenses from multiple sources for even a single piece of music. Creating a more competitive system would entail moving away from collective licensing and permit the emergence of more efficient bundles of licenses. Digitization is important not only for how music is distributed,

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[2] *See id.*, (" . . . much of the legal framework for licensing of music dates back to the early part of the twentieth century, long before the digital revolution in music.").

but also for how the contracting and monitoring—essential components of the licensing process—occur.

Licensing is already beginning to occur outside of the centralized performing rights and regulatory institutions. The changes we suggest would reinforce the tentative steps that are already being taken, and would offer the prospect for a simpler, more competitive, and therefore more efficient marketplace.

II. Background

Copyright law gives the creator of an original artistic work—including music—a property right in that creation for a limited duration.[3] This property right allows the creator to determine who may copy the artistic work (hence the name that is usually attached to this form of property) and also the ability to authorize, and thus license, whatever copying the creator chooses to allow.

Giving creators a property right encourages creative efforts, as it allows creators to earn a return on their creation and prevents unrestricted copying, which would erode the creator's ability to capture that return. The limited duration of the property right, as compared to the unlimited duration of most other forms of property, is a recognition that the creation is a public good that should be freely available to all users at some point. The Framers of the Constitution considered such property rights sufficiently important to warrant a clause in the Constitution itself, authorizing Congress to draft legislation to establish such rights for authors and inventors.[4]

Congress promptly passed the first federal copyright law in 1790.[5] However, this law did not explicitly cover musical compositions until 1831.[6] Copyright for music creations initially protected composers and/or the publishers of the sheet music that embodied the composers' creation against the copying of that sheet music. Copyright protection was extended to cover public performances of music in 1897.[7]

During the late nineteenth century, physical and electrical music recording supplemented the earlier development of player piano rolls. Accordingly, Congress passed the 1909 Copyright Act, which formally recognized mechanical rights to the physical reproduction of copies of recorded music.[8] In 1927, the Harry Fox Agency

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[3] Under current law, which was last revised with respect to the length of copyright in 1998, a copyright lasts for the life of the creator plus 70 years or, if the copyright is owned by a corporation, 95 years after publication. After the term of the copyright expires, the creation enters the public domain, and anyone can freely copy it.

[4] U.S. Const. art 1, § 8, cl. 8 (stating that Congress shall have the power to "promote the progress of science and useful arts, by securing for limited times to authors and inventors the exclusive right to their respective writings and discoveries.").

[5] Copyright Act, New York (1790), *available at* http://www.copyrighthistory.org/cam/tools/request/showRecord.php?id=record_us_1790.

[6] Copyright Act, Washington D.C. (1831), *available at* http://www.copyrighthistory.org/cam/tools/request/showRecord.php?id=record_us_1831.

[7] Copyright Act (Public Performance of Musical Compositions), Washington D.C. (1897), *available at* http://www.copyrighthistory.org/cam/tools/request/showRecord.php?id=record_us_1897 .

[8] In light of the discussion below with respect to the regulatory determination of copyright royalty

(HFA)[9] was formed as a subsidiary of the National Music Publishers Association to serve as the collective agent for the major publishers and their composers in collecting royalties from record companies for the physical reproduction of musical compositions.[10] The HFA's role continues today,[11] and the notion of mechanical rights has evolved to include digital downloads of various kinds of music, including ringtones.[12]

Furthermore, the issue of how composers/songwriters and music publishers could best enforce their rights with respect to public performances came to the fore during the analog era 1920s, where public performances became increasingly important, and over-the-air local music broadcasting became widespread. During the analog era, there were difficulties associated with contracting, enforcing against infringers, monitoring frequency of use, and distributing royalties (which we henceforth refer to as performance rights functions) between the many thousands of composers and music publishers that owned the copyrights, and the many radio stations and other performance venues that wanted to play the music. These difficulties justified the centralization of functions in a few large PROs from a perspective of reducing transaction costs.[13]

Several PROs formed during this era in response to this changing landscape. The American Society of Composers, Authors, and Publishers (ASCAP) was formed in 1915 as a one-stop shop that provided the following services with respect to public performances for its members: licensing of music, enforcement against infringers, monitoring the frequency of play, and distributing royalties to rights-holders. Broadcast Music Inc. (BMI) was formed in 1939, and performed similar functions. Both of these PROs developed their standard operating procedures in the analog era, including the granting of blanket licenses (that covered the PRO's entire catalogue) to radio stations and other public broadcasters of music, such as bars and restaurants. Two smaller PROs—the Society of European Stage Authors and Composers (SESAC),[14] established in 1930, and Global Music Rights (GMR), established in 2013—also perform similar functions.

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rates, it is worth noting that the 1909 Act also established – in the statute – an explicit royalty rate per physical reproduction. In connection with the latter, the Act established a compulsory licensing regime (which persists to the present day), whereby any party that meets a modest set of qualifications and is willing to pay the statutory royalty rate must be granted a license for this reproduction.

[9] See the "Abbreviations" list at the end of this paper for a complete list of all of the abbreviations that are mentioned in this paper.

[10] *About Us*, HARRY FOX AGENCY, https://www.harryfox.com/find_out/aboutus.html.

[11] In addition to the HFA, there are a number of smaller agencies that provide a similar service, including Music Reports Inc. (MRI), LOUDR, Easy Song Licensing, The Music Bridge, and the American Music Rights Association (AMRA, which was formerly the American Mechanical Rights Agency).

[12] Memorandum Opinion, In re: Mechanical and Digital Phonorecord Delivery Rate Adjustment Proceeding, No. RF 2006-1 (U.S.C.O. Oct. 16, 2006), *available at* http://www.copyright.gov/docs/ringtone-decision.pdf

[13] The same argument applied to centralizing the enforcement of mechanical rights through the HFA.

[14] In July 2015, SESAC acquired the HFA, giving SESAC a major role in the licensing of mechanical rights.

In addition to increasing efficiency, centralizing performance rights functions in a few large PROs also led to the accretion of market power. ASCAP became a locus of market power for the selling of music performance rights vis-à-vis the broadcasters/users of the music by becoming the common agent for thousands of otherwise competing composers/songwriters and music publishers.[15] This accretion of market power drew a government response: The Antitrust Division of the U.S. Department of Justice sued ASCAP in 1934 and again in 1941, arguing that ASCAP's collective setting of royalty rates for its thousands of otherwise competing members constituted a violation of the Sherman Act.[16]

These suits were eventually settled with a consent decree in 1941.[17] The decree allowed ASCAP to continue functioning as a collective licensor for its members; the decree was thus an implicit recognition of the PRO's role in reducing the contracting and monitoring transactions costs for its members. However, the decree, including subsequent modifications,[18] placed restraints on ASCAP's actions,[19] and specified (in its 1950 modification) that the Federal District Court for the Southern District of New York would arbitrate disputes when prospective licensees and ASCAP could not agree on terms. A similar suit against BMI in the early 1940s was settled with a similar consent decree,[20] with the New York District Court becoming the arbitrator of disputes in 1994.[21] As a result, that District Court, which is often described as the "rate court",[22] has become the *de facto* regulator of these license terms—including pricing—for musical compositions.

As the analog era gave way to the digital era, Congress attempted to modernize music licensing by enacting the Digital Performance Right in Sound Recordings Act (DPRA) in 1995, and the Digital Millennium Copyright Act (DMCA) in 1998. These Acts expanded copyright protection to public performances of sound recordings through certain digital audio transmissions,[23] including the then-emerging sat-

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[15] Indeed, it was the radio broadcasters' unhappiness with an increase in ASCAP's royalty rates in 1939 that led their trade association (the National Association of Broadcasters) to form BMI.

[16] Lionel S. Sobel, The Music Business and the Sherman Act: An Analysis of the Economic Realities of Blanket Licensing, 3 Loy. L.A. Ent. L. Rev. 1, 5–6 (1983).

[17] Second Amended Final Judgment at 1, U.S. v. Am. Soc'y of Composers, Authors and Publishers, No. 41-1395, 2001 WL 1589999 (S.D.N.Y. June 11, 2001), *available at* http://www.ascap.com/~/media/files/pdf/members/governing-documents/ascapafj2.pdf.

[18] The terms of the ASCAP consent decree and of a similar consent decree with BMI have been revised a number of times since the early 1940s. In August 2016, after two years of review the DOJ concluded that it would not seek new modifications of the decrees.

[19] For example, the members of ASCAP are free to license their works outside of the ASCAP framework (i.e., ASCAP cannot demand exclusivity from its members), and prospective licensees must have the option of licensing individual pieces of music from ASCAP (rather than being required to take a blanket license).

[20] U.S. v. Broadcast Music, Inc., 275 F.3d 168, 171–172 (2d Cir. 2001).

[21] *See, e.g.*, U.S. v. Broadcast Music, Inc., 275 F.3d 168 (2d. Cir. 2001).

[22] Memorandum of the United States in Support of the Joint Motion to Enter Second Amended Final Judgment, U.S. v. Am. Soc'y of Composers, No. 41-1395, 2001 WL 1589999 (S.D.N.Y. June 11, 2001), *available at* https://www.justice.gov/atr/case-document/file/485996/download.

[23] This created a property right for the copyright owners—in essence, the performing artists and/or

ellite services that were predecessors to Sirius XM and subsequent Internet-based streaming services such as Pandora and Spotify. The Acts also mandated compulsory licensing for non-interactive digital services.[24]

The Copyright Royalty Board (CRB) determines the rates that most digital services pay for sound recording performance rights under the compulsory license.[25] However, the CRB applies different statutory standards in determining the rates for different categories of digital services. A new PRO, SoundExchange,[26] collects and distributes the royalties and also participates in CRB proceedings on behalf of the copyright holders.

Interactive digital services (e.g., Spotify) are exempted from the CRB process, and instead negotiate directly with the performing artists and labels. Terrestrial radio broadcasting does not require such licenses.[27]

III. THE LICENSING MARKET

As of 2016, the market for music rights has developed largely into three regulated markets: one for musical composition public performance rights, a second for sound recording performance rights, and a third for mechanical reproduction rights.[28] In the absence of negotiated license agreements, rates are established through adversarial administrative proceedings. The U.S. District Court for the Southern District of New York establishes rates that ASCAP and BMI charge on behalf of songwriters and publishers; the CRB establishes rates for the performances of sound recordings that are collected by SoundExchange on behalf of performing artists and their record labels, and rates for the physical and digital reproduction of musical works that are collected by HFA and other administrators on behalf of publishers.[29] The prospect of such proceedings presumably affects any negotiated agreements.

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the record labels to which the artists may have assigned their rights—who released to the public sound recordings of musical works.

[24] Because of a quirk in the copyright laws, virtually all sound recordings that were made before 1972 are not included.

[25] The CRB was created in 2004. Prior to that, royalty rates were set by Copyright Arbitration Royalty Panels (CARP).

[26] SoundExchange was established in 2000 as a division of the Recording Industry Association of America (RIAA); it was spun off as a separate non-profit organization in 2003. The RIAA is the trade association of the recording industry (record labels) in the U.S.

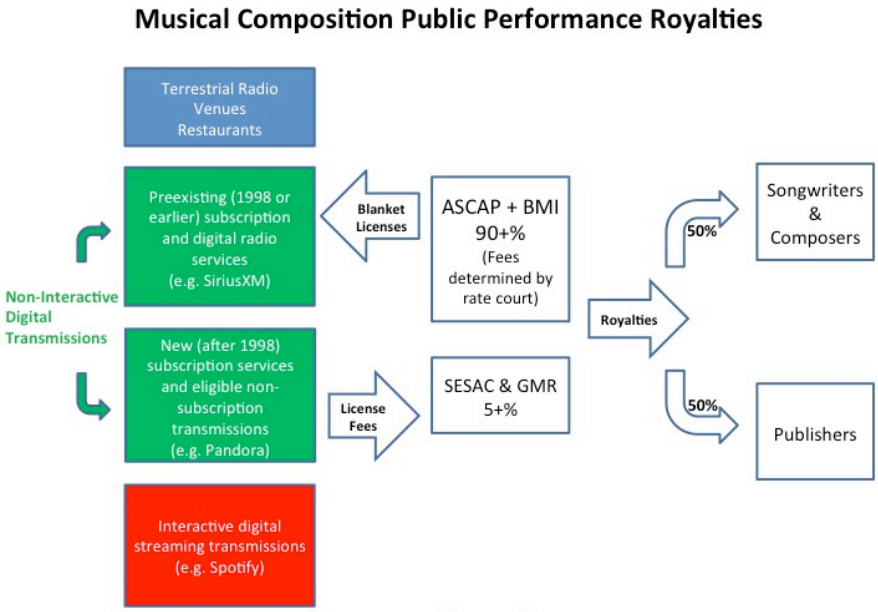
[27] The argument for exempting terrestrial broadcast radio from paying this category of royalties was that the playing of music on terrestrial radio was a form of free promotion for the records and their artists (and/or the record labels that had assembled and paid them), and thus the latter group(s) were already being compensated by the broadcasters.

[28] There are also "synchronization" rights (composition rights, and sound recording rights), which apply to the use of music in movies and television programs and are largely unregulated. And, as we discuss below, the sound recording performance rights for interactive digital media services (e.g., Spotify) are unregulated.

[29] As was noted above, the HFA is the dominant PRO for collecting royalties for mechanical rights. (The "PRO" designation is not often used in connection with the HFA; however, its function/activities are generally consistent with what PROs do.) Although these royalty rates were initially specified explicitly in statute, they are now reviewed and re-set every five years by the CRB.

Distributors that publicly perform music, regardless of the method of delivery, must obtain licenses for musical composition performance rights, which compensate songwriters and publishers (see Figure 1). Distributors typically obtain blanket licenses for the entire catalogue of works from ASCAP and BMI, the two predominant U.S. PROs that account for most titles, and from SESAC and GMR, two smaller PROs.[30] Royalty rates for the ASCAP and BMI catalogues can be negotiated with users/distributors subject to the provisions of their respective antitrust consent decrees. If negotiations are unsuccessful, the parties may apply to the District Court, which attempts to determine what a market rate would be. Royalty rates for the SESAC and GMR music catalogues are negotiated directly with users. There are no government consent decrees for these latter two PROs that apply when the parties fail to agree on terms.

Figure 1[31]



Sound recording rights were introduced by the DPRA in 1995, with categories of rates established by the DMCA in 1998. These rights are intended to compensate artists and record labels for the public performance of music by satellite and web-based services, and most such rates are subject to a category of statutory rates (see

[30] Although SESAC was founded in the U.S. in 1930 to help European music publishers enforce their performance rights in the U.S., it has remained considerably smaller than the two major PROs. It is currently owned by a private equity firm: Rizvi Traverse. GMR was founded in 2013.

[31] For statistical source information *see generally* COPYRIGHT AND THE MUSIC MARKETPLACE, *supra* note 1.

Figure 2).[32] Royalty rates for non-interactive digital services are often negotiated collectively with, and paid to, SoundExchange, the PRO for these rights. In the absence of negotiated rates, the CRB is tasked with establishing statutory royalty rates. Interactive digital services, such as Spotify, negotiate directly with the sound recording copyright owners—typically the record labels—without CRB intermediation.

Figure 2[33]

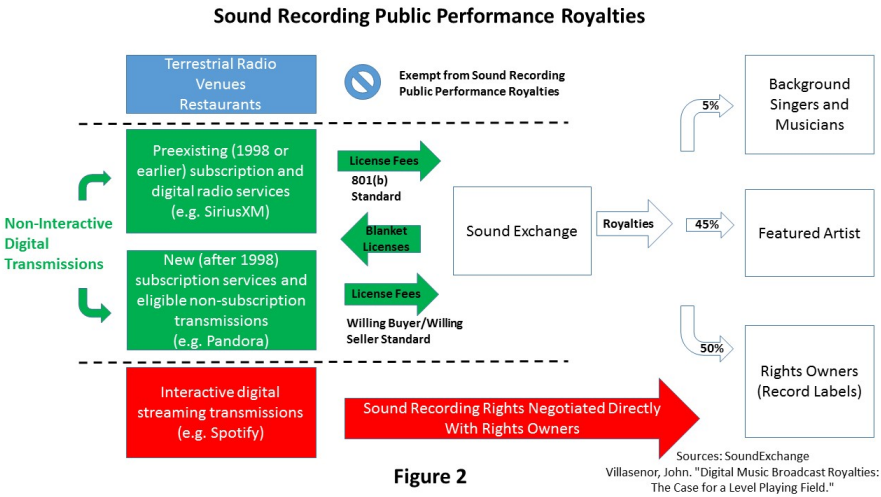


Figure 2

For statutory sound recording rights, rates are determined under either the "801(b)" standard[34] or the "willing buyer/willing seller" standard,[35] depending on the identity of the licensee and the technology used. The 801(b) standard applies to pre-1998 non-interactive digital services, and takes into account the "public interest" in a wide dissemination of music;[36] the willing buyer/willing seller standard applies to post-1998 non-interactive digital services,[37] is intended to approximate a market rate, and is generally higher than the 801(b) standard, as the 801(b) standard incorporates other objectives.[38]

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[32] "Statutory rates" refers to the fact that the statute specifies the criteria that the CRB should use in its determination of the specific rates that should apply to a specific category of music service.

[33] For statistical source information *see generally* COPYRIGHT AND THE MUSIC MARKETPLACE, *supra* note 1; *see also*, *Licensing 101*, SOUND EXCHANGE, http://www.soundexchange.com/service-provider/licensing-101 (stating that interactive streaming services negotiate directly with rights owners).

[34] *See, e.g.*, 17 U.S.C. § 801(b) et seq. (1976).

[35] *See* 17 U.S.C. § 114.

[36] Music Choice v. Copyright Royalty Board, 774 F.3d 1000, 1007 (D.C. Cir. 2014).

[37] *Id.*

[38] David Oxenford, *Court of Appeals Upholds Copyright Royalty Board Decision on Sirius XM and Music Choice Royalties*, BROADCAST LAW BLOG (Dec. 22, 2014), http://www.broadcastlawblog.com/2014/12/articles/court-of-appeals-upholds-copyright-royalty-board-decision-on-sirius-xm-and-music-choice-royalties.

IV. Regulatory Issues

The determination of market-rate benchmarks for both music composition and sound recording performance rights is problematic in an environment where rates are often determined administratively or by a rate court. The U.S. District Court for the Southern District of New York, serving as the antitrust rate court, has held jurisdiction over music composition performance rights for 95 percent of music (i.e., for the ASCAP and BMI catalogues) for more than 65 years (for ASCAP) and for more than 20 years (for BMI).[39] Similarly, royalty rates for the more-recent sound recording performance rights have always been determined either by, or against the backdrop of, the CRB or its predecessor, with the exception of rates for interactive services. Accordingly, it is difficult to determine the rates parties would voluntarily adopt in a competitive market.[40]

Basing royalty rates on costs (as is usually done in traditional public utility rate regulation) is likely not a possible answer, as musical works are classic examples of information goods[41] that are characterized by large first-copy sunk costs and very low—even zero—costs of reproduction. Optimal prices would instead likely be based on demand characteristics.[42] Indeed, neither the CRB, nor the antitrust rate court, appear to attempt to base royalty rates on costs. Instead, they determine rates based on contemporaneous and historic rates, which in turn are influenced by the regulated rates and the prospect of a court or CRB proceeding if negotiations fail; this is clearly a circular process. It is thus unlikely that the regulatory processes of the antitrust rate court and the CRB have yielded the efficient results that a competitive marketplace would be expected to achieve.

This conclusion is strengthened by the rate experience for sound recording performance rights under the DPRA and DMCA. At least four different rates for these rights apply to the various categories of music distribution services:

- the services to which the CRB applies the "801(b)" statutory standard (e.g., Sirius XM);

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[39] *See Broadcast Music, Inc.*, 275 F.3d at 172–73.

[40] In the recent Pandora case, the court used the EMI-negotiated rate with Pandora as a benchmark. *See* In re Petition of Pandora Media, Inc., 6 F.Supp.3d 317, 355–56 (S.D.N.Y. 2014) (hereafter "*Pandora Rate Case*.").

However, a rate that is negotiated with the backstop of a rate court proceeding should not necessarily be considered to be a market rate.

[41] Carl Shapiro & Hal R. Varian, Information Rules: A Strategic Guide to the Network Economy 22 (1999).

[42] If fixed costs are non-trivial and if marginal costs are constant with respect to the volume of output, then the "first-best" system of pricing from a social efficiency perspective—prices should be equal to marginal costs—will not allow the sales revenues to cover those fixed costs. A "second-best" alternative to cover those fixed costs, with the least distortion of social efficiency, should be sought. If those costs are to be covered solely from sales revenues, then some prices will have to exceed marginal costs; and the (second-best) optimum is achieved by charging higher prices to customer segments that are less price-responsive. This principle is frequently described as "Ramsey pricing"; *see, e.g.*, William J. Baumol and David F. Bradford, *Optimal Departures from Marginal Cost Pricing*, 60 Am. Econ. Rev. 265, 266–278 (1970).

- the services to which the CRB applies the "willing buyer/willing seller" statutory standard (e.g., Pandora);
- the services that negotiate for their licenses directly with the copyright holders without the intermediation of the CRB (e.g., Spotify); and
- the services that are not required to seek such licenses and thus "pay" a rate of zero (i.e., terrestrial radio broadcasters).

V. The Transaction Cost Rationale

Music licensing potentially involves tens or even hundreds of thousands of transactions between copyright holders and licensees. Licenses must be negotiated, performances must be monitored for frequency of licensed use, royalties must be collected and distributed, and infringing uses must be challenged. A system in which these transactions are performed collectively through PROs and blanket licenses could efficiently reduce transaction costs. Bruce Kobayashi suggests that "PROs are arguably the quintessential example of a Coasian organization—i.e., an organization whose existence is based on the mitigation of transactions costs that would be generated by the use of market transactions to license, price, collect, and distribute performance right royalties."[43]

Without PROs, publishers and other copyright owners would have to interact directly with users and distributors, including bars and restaurants, radio stations, and digital services. The number of transactions would be enormous.[44] However, with PROs in the middle, each of the entities, on both sides of the transaction, has to deal only with ASCAP and BMI for the composition rights for most music (and with SESAC and GMR for a much smaller amount), and SoundExchange for the administration of sound recording rights for non-interactive digital services. The PROs themselves are able to take advantage of economies of scale in negotiating licenses, monitoring licensees, and collecting and distributing royalties. Transaction costs are further minimized through the use of the blanket license.

Collective negotiation of rights is highly likely to create market power issues. ASCAP and BMI, for instance, control the overwhelming majority of music composition performance rights in the United States. However, the two PROs' potential market power is limited by the consent decrees and the antitrust rate court, which determines rates if negotiations fail. Similarly, SoundExchange has antitrust immunity, which enables it to represent the record labels with respect to sound recording rights. By setting rates for statutory licenses, the CRB is a check on the actual or potential market power of sound recording copyright owners.

Some licenses are negotiated without the benefit of a PRO intermediary, which suggests that the severity of the transaction cost issue differs depending on the license

[43] Bruce H. Kobayashi, Opening Pandora's Black Box: A Coasian 1937 View of Performance Rights Organizations in 2014, 22 Geo. Mason L. Rev. 925, 926 (2014).

[44] However, the terrestrial broadcast radio industry bargains collectively with ASCAP and BMI through the Radio Music License Committee (RMLC). Similar collective negotiation occurs between the Television Music Licensing Committee (TMLC) and the PROs.

and on the parties that are involved. Interactive digital services, such as Spotify, are not covered by the CRB rate-determination process and negotiate directly with the record labels. Interactive services also pay royalties for mechanical rights that non-interactive services are not required to pay, which reflects the belief that interactive services are a substitute for the actual purchase of the recording.[45] Increasingly, distributors that are covered by a statutory license, such as non-interactive services, are negotiating directly with record labels and publishers.

There are different transaction costs for licensing rights for digital distribution services and traditional distribution channels. Digital distribution services, including satellite radio, web-based radio, and interactive services, are different from traditional distribution channels; there are far fewer digital distribution services, as they are national or even global,[46] and monitoring digital distribution services is simpler, as digital technology could presumably compile a record of songs played and frequency of play automatically. As Kobayashi has suggested, the new technologies are more conducive to direct negotiation between users/distributors and publishers, which lessens the need for the PRO intermediary.

VI. Partial Withdrawal from PROs under the Current System

Some of the major music publishers, which now are often owned by the major record labels, withdrew music composition licensing rights for new media from ASCAP in 2011 and from BMI in 2013. Kobayashi argues that these publishers withdrew because technologies associated with digital distribution have changed transaction costs in a way that diminishes the usefulness of the PROs.[47] Following the publishers' withdrawal, the antitrust rate court held that withdrawal was inconsistent with the antitrust decree—the publishers could not selectively withdraw licensing rights, but instead had to be either all-in or all-out of the PROs.[48] Kobayashi concluded that the court's holding created a "Hobson's choice" for the publishers: they could either withdraw their licensing rights entirely, thereby losing the transaction cost efficiencies for traditional media, or they could stay in the PROs, thereby losing the ability to negotiate directly with the digital distributors.[49]

In addition to the transaction cost rationale, a 2014 Pandora rate case decision suggests that the publishers' withdrawal from the PROs was strategic. In April 2011, ASCAP modified its rules to permit a publisher to withdraw the rights to license

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[45] The interactive digital streaming service Spotify pays approximately 70 percent of its revenue to rights owners, while the non-interactive digital streaming service Pandora pays only about 50 percent of gross revenue to rights owners. *See* William A. Pittenger, *Digital Performance Royalties for Sound Recordings: Spotify v. Pandora*, The Digital Music Law Blog (Sept. 16, 2014), http://www.digitalmusiclaw.org/digital-performance-royalties-for-sound-recordings-spotify-vs-pandora.

[46] Although traditional radio is increasingly national, too, because of syndication.

[47] *Supra* note 43 at 927.

[48] In re: Pandora Media Inc., Nos. 12 Civ. 8035 (DLC) 41 Civ. 1395 (DLC), 2013 WL 5211927 (S.D.N.Y. Sep. 17, 2013).

[49] *Supra* note 43 at 927.

music to new media outlets from ASCAP while ASCAP retained the rights to license those works to everyone else.[50] New media outlets were defined as outlets whose transmissions were to the public in exchange for a fee exclusively via the Internet, a wireless mobile telecommunications network, and/or a computer network. The new rule allowed the publisher to rejoin ASCAP at any point, and required ASCAP to create a directory of the affected works no later than 90 days before the effective date of the withdrawal, so that both ASCAP and the publisher would have an accurate list of the affected works prior to the withdrawal. ASCAP was to continue providing administrative services for any withdrawing publisher.[51]

In December 2012, ASCAP further modified its rules to allow publishers to target individual large licensees, and to withdraw rights solely with respect to those licensees.[52] Effective January 1, 2013, Sony/ATV—the largest publisher—partially withdrew new media rights from ASCAP in order to negotiate directly with larger digital services, such as Pandora.[53] In the bargaining that ensued, Pandora requested a complete list of Sony's catalogue in order to be prepared to take down the Sony catalogue if the negotiation failed. According to the rate court opinion, Sony chose "deliberately not to" provide a list of its works in order to maintain a bargaining advantage.[54] Similarly, ASCAP did not provide the list when requested to do so.[55]

Without an accurate list, Pandora could not be confident that it was taking down the entire Sony catalogue, and therefore risked infringing Sony's rights. This gave Sony a substantial bargaining advantage, and Pandora ultimately signed an agreement on terms that were considered favorable to Sony.[56] Pandora had similar difficulties with respect to the availability of a usable list in its negotiations with Universal Music Publishing Group (UMPG).[57]

The rate court concluded that Sony and UMPG were coordinating their actions, rather than competing,[58] and that a critical part of their strategy was to withdraw their new media rights without making an accurate list of their works available. The court noted that, "Without that list, Pandora's options were stark. It could shut down its service, infringe Sony's rights, or execute an agreement with Sony on Sony's terms."[59] In addition to simply negotiating higher royalty rates, the publisher's goal

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[50] *Pandora Rate Case*, 6 F.Supp.3d at 336–337.

[51] EMI was the first publisher to exercise this option by negotiating licensing directly with new media outlets in May 2011. ASCAP continued to administrate these new media directly negotiated rates for EMI. *See id.* at 337.

[52] *Id*. at 338–339.

[53] *Id*. at 342.

[54] *Id*. at 344.

[55] *Id*. at 345.

[56] *Id*. at 346.

[57] *Id*. at 349.

[58] According to the decision there was "troubling coordination." The decision continues by noting that "the Sony and UMPG licenses were the product of, at the very least, coordination between and among these major music publishers and ASCAP." *Id*. at 357.

[59] *Id*.

was to create a higher benchmark if they subsequently rejoined the PRO and went through a rate court proceeding.[60]

While Kobayashi's Coasian analysis is reasonable as far as it goes, the publishers' desire to withdraw new media licensing rights reflected more than just a reaction to changed transactions costs. Clearly, at least in the court's view, the publishers were behaving strategically and attempting to increase their market power. The court also noted that, "Even if Sony had provided the list of its works to Pandora, Sony would have retained enormous bargaining power."[61]

VII. A Limited Proposal for Reform: The Copyright Office Report

In February 2015, the U.S. Copyright Office (USCO) issued a Report to Congress ("Report") that summarizes the current forms and procedures for music copyrights and offers recommendations for change.[62] While the Report suggests that the "time is ripe to question the existing paradigm",[63] it does so in only a limited manner, as it presents the USCO's views on how to improve the existing regulatory system, but does not examine in any detail how to make the system more competitive and less reliant on statutory licenses and government ratemaking. The Report recommends that the government "enable voluntary transactions while still supporting collective solutions." However, these two goals may be in conflict.

The Report essentially accepts the current system of statutory licenses while suggesting modifications around the edges. The recommended modifications include treating all like uses of music alike, allowing music publishers to opt out from PROs for the licensing of interactive services (i.e., the same treatment as with sound recording rights), and mandating that all rate-setting be performed by the CRB instead of the antitrust rate court. The Report also recommends a single, market-oriented rate-setting standard for all uses that are subject to statutory licenses, but does not address the difficulty of effecting this standard in a heavily regulated environment. In addition, the Report recommends that the government provide incentives to the private sector for establishing an authoritative database to facilitate the licensing process; however, the Report does not specify what those incentives should be.

VIII. The Feasibility of Competition in the Market for Music Licensing

The preceding discussion raises the questions of whether the music licensing market(s) can operate competitively, and what, if any, policy measures can contribute to that goal. An increasing number of negotiated contracts between streaming

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[60] Ed Christman, *Sony/ATV's Martin Bandier on New,"Quite Reasonable" Pandora Deal*, Billboardbiz (Jan. 20, 2013, 6:05 PM), http://www.billboard.com/biz/articles/news/legal-and-management/1510629/sonyatvs-martin-bandier-on-new-quite-reasonable.

[61] *Pandora Rate Case*, 6 F.Supp.3d at 102. Subsequent to this decision, Sony and UMPG have apparently placed their entire catalogue listings online.

[62] *Supra* note 1.

[63] *Id*. at 1.

services and rights holders, both for composition performance rights and sound recording rights, contain elements of competition. For example, Pandora, the largest non-interactive streaming service, has negotiated contracts for composition public performance rights with the major publishers.[64] Similarly, Apple Music recently struck deals with both major and independent labels[65] with respect to sound recording rights not covered by the statutory license.

In addition, the recent CRB rate proceeding provided evidence of negotiated contracts between record labels and non-interactive services Pandora and iHeartMedia:[66] Pandora negotiated an agreement with Music and Entertainment Rights Licensing Independent Network ("Merlin"), which represents thousands of independent music labels;[67] iHeartMedia negotiated agreements with both major and independent labels.[68] These contracts were presented to the CRB as evidence of the existence of competitive benchmarks for sound recording royalty rates for non-interactive services. Of course, the existence of such contracts that arguably reflect competitive prices also raises the question of whether a CRB proceeding to determine rates is generally needed.[69]

In the recent proceeding, Pandora's economic expert, Carl Shapiro, argued that the market for licenses for non-interactive services is workably competitive, as the webcaster's ability to steer users between different music, and thus between the sources (i.e., rights holders) of that music, implies a relatively high elasticity of demand for any individual piece of music, and provides significant bargaining power vis-à-vis any specific record label. Shapiro contrasted this with interactive streaming services, such as Spotify, which have less ability to steer users, a lower elasticity of demand, and therefore less bargaining power with the labels.[70]

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[64] Tim Ingham, *Revealed: What Pandora Agreed to Pay Major Publishers . . . And What It's Getting Away With Now*, MUSIC BUSINESS WORLDWIDE (June 3, 2015), http://www.musicbusinessworldwide.com/revealed-what-pandora-agreed-to-pay-major-publishers-and-what-its-getting-away-with-now.

[65] Ben Sisaro, *Apple Signs Thousands of Independent Labels in Royalty Deal*, N.Y. TIMES, June 24, 2015, http://www.nytimes.com/2015/06/25/business/media/apple-signs-thousands-of-independent-labels-in-royalty-deal.html?_r=0.

[66] *See* Written Direct Testimony of Carl Shapiro, In re Determination of Royalty Rates and Terms for Ephemeral Recording and Digital Performance of Sound Recordings (Web IV), No. 14-CRB-0001-WR (U.S.C.O. Oct. 6, 2014), *available at* http://www.loc.gov/crb/rate/14-CRB-0001-WR/statements/Pandora/14_Written_Direct_Testimony_of_Carl_Shapiro_with_Appendices_PUBLIC_pdf.pdf; *see also* Testimony of Daniel R. Fischel and Douglas G. Lichtman, In re Determination of Royalty Rates and Terms for Ephemeral Recording and Digital Performance of Sound Recordings (Web IV), No. 14-CRB-0001-WR (U.S.C.O. Oct. 6, 2014), *available at* http://www.loc.gov/crb/rate/14-CRB-0001-WR/statements/iHeartMedia/Vol%202_01%20Testimony%20of%20D%20Fischel%20&%20D%20Lichtman%20&%20Exhibits/Fischel_&_Lichtman_Report_[PUBLIC-REDACTED].pdf.

[67] Shapiro Testimony, *supra* note 66, at 23.

[68] Fischel & Lichtman Testimony, *supra* note 66, at 8.

[69] However, so long as the compulsory licensing regime remains in effect, some form of back-up arbitration (in the event that negotiations fail) would still be needed. And, as we discussed above, rates that are negotiated in the shadow of compulsory administrative proceedings need not reflect the rates that would prevail in a fully competitive market.

[70] Implicit in this argument is the belief that interactive services would not be able to charge differential fees to subscribers that were dependent on the types of music that the subscribers chose and/or that the

For consumers, however, interactive and non-interactive services are likely substitutable, perhaps enough that these services may coexist in the same market.[71] If this is the case, it would be illogical to argue that part of the market is competitive and part is not. Moreover, because of the high first-copy costs and low or zero marginal costs, some form of differential pricing (i.e., price discrimination) will be efficient, and necessary, to cover the costs of music production, from composers and artists through to the publishers and record labels. Therefore, greater efficiency will likely be yielded by a differential pricing structure wherein interactive services (and, ultimately their consumers), which have a less elastic demand, should cover a greater portion of the costs.

Interestingly, Shapiro also argued that the Merlin negotiated rates are below the statutory rates and are thus an important indication that the statutory rates are above competitive levels.[72] This suggests that the CRB process may not be particularly successful in protecting the digital distributors from the exercise of market power.

IX. Towards a More Competitive Market

The market for music licenses reflects its origins in the era when distribution meant sheet music and player pianos. As new music delivery technologies have emerged, *ad hoc* modifications have been introduced, reflecting political compromises. But the licensing system itself has been largely untouched by new technologies. It is doubtful that music licensing would have developed as it has if digital technologies had been available a century ago.

The current system of collective licensing of rights by the major PROs—ASCAP, BMI, and SoundExchange—and the granting of blanket licenses by these PROs reduces transaction costs (although the costs of long, drawn-out rate proceedings are not trivial). However, this collective licensing regime also provides the primary rationale for price regulation and is the major impediment to the emergence of a more competitive market.

Rate regulation by the antitrust rate court and the CRB is viewed as a way to address the market power issues that are created by collective licensing. However, the market for music licenses is very different from other rate-regulated industries, such as water, electricity, and natural gas distribution, which arguably are natural monopolies. In general, economic studies have shown that rate regulation of an otherwise competitive industry rarely, if ever, improves economic welfare, and that it should be reserved for situations where a competitive market is not possible.[73] Indeed, as noted in the previous section, regulation at the CRB may have kept rates at supra-competitive levels. Thus, the challenge is to move away from collective

subscribers would be insensitive to those fees.

[71] A rise in the price of subscription services will cause at least some consumers to substitute the advertising-supported non-interactive services.

[72] Shapiro Testimony, *supra* note 66, at 36.

[73] *See, e.g.*, Paul L. Joskow & Nancy L. Rose, *The Effects of Economic Regulation*, *in* Handbook of Industrial Organization, Vol. 2 1449, 1449–1506 (Richard Schmalensee & Robert D. Willig eds.,1989).

licensing and toward direct bargaining between publishers and labels on the one hand, and music distribution services on the other, while retaining, to the extent possible, the transaction cost reduction and administrative services that the PROs provide.[74]

A. *Identifiers*

As the recent Pandora case suggests, accurate ownership data are necessary for meaningful bargaining to take place. In the absence of accurate ownership data, Pandora was unable to bargain effectively with Sony. Because Pandora could not be confident that it could take down the entire Sony catalogue, it could not withdraw from the negotiation.

More generally, improving the functioning of the marketplace in music properties requires the full identification of those properties and the associated property rights. Therefore, an important step is the development of a standardized system of unique identifiers for each musical composition and, where relevant, the specific sound recording version, so that users and distributors can identify from whom they must license rights in order to avoid infringement. Systems of identifiers currently exist, but none is sufficiently complete or reliable to be the basis for an online market (see Table 1).

In one sense, a system of identifiers is similar to real estate records at the county courthouse: a reliable way to identify who owns what. This analogy would seem to call for a governmental body—e.g., the Copyright Office—to develop the standardized system of identifiers, and perhaps serve as the central repository for the database. However, in this era of widespread disillusionment with government's capacity to function efficiently, we believe that an alternative route should be pursued.

A standardized system of identifiers for music ownership information can also be analogized to the standardized system of identifiers that apply to items that are sold at retail in the U.S.: the barcode system. This system was developed and is now maintained by GS1 US (formerly the Uniform Code Council).[75] GS1 US coordinates product identification and transmission systems for radio frequency identification (RFID) tags and barcodes. It is a non-profit organization that is governed by its users, including manufacturers and retailers, and funded by users in proportion to sales revenue. GS1 US is not subject to regulatory oversight (although it is subject to the U.S. antitrust laws).[76]

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[74] Much of the discussion that follows will focus on music composition performance rights and sound recording performance rights. But the arguments generally hold equally validly for mechanical reproduction rights.

[75] *See GS1 US: A History*, GS1 US, http://www.gs1us.org/about-gs1-us/corporate/history/gs1-us-a-detailed-history.

[76] For a description of how that organization was formed and operates, *see, e.g.*, STEPHEN A. BROWN, REVOLUTION AT THE CHECKOUT COUNTER: THE EXPLOSION OF THE BAR CODE (1997). We suggest below that the governance structure of the GS1 US—or something similar to that structure—would be appropriate for the standardized system of music identifiers that we advocate; this does not mean that the barcode system

Table 1

Standard Identifiers	Copyright Covered	Administered By	Organization Type	Strengths/Weaknesses
International Standard Musical Work Code (ISWC)	Musical Composition	ASCAP (US and Canada)	Performance Rights Organization	Strength: accuracy Weakness: cannot be assigned until all songwriters on a musical work are identified
International Standard Recording Code (ISRC)	Sound Recording	RIAA (US)	Trade Organization for Recording Industry	Weakness: no single database (sound exchange currently compiling database with **ISRC**s); no requirement for complete list of owners before **ISRC** assignment.
Interested Parties Information Code (IPI)	Musical Composition	CISAC	Collective Management Organization	Note: required prior to obtaining an **ISWC**
International Standard Name Identifier (ISNI)	All types of copyright (including non-musical)	ISNI International Agency	Part of ISO (non-governmental organization)	Weakness: only one registration agency affiliate in the US. Limited use so far for music copyright.
Universal Product Codes (UPC)	Sound Recording	GS1 US	Non Profit	Weakness: need different UPC for each product/version of product (exp. Album, digital single, remix)
Audio Fingerprinting	Sound Recording*			Strength: can't easily strip song of audio fingerprint without changing quality of audio Weakness: some technical barriers to scaling this technology
US Copyright Public Registration System	All types of copyright	US Copyright Office	Government	Weakness: not mandatory therefore not comprehensive; static record that cannot reflect change in ownership unless registration is updated (again not mandatory)
Harry Fox Agency Database	Musical Composition	Harry Fox Agency	Rights Management Company	Weakness: songwriter and publisher data only for songs registered by member publishers
Digital Data Exchange (DDEX)	Musical Composition and Sound Recording	Joint Initiative (see http://www.ddex.net/current-ddex-members)		Note: still very early stages; strong incentives for stakeholders to standardize music meta data
UMPG and Sony/ATV Online Catalogs	Musical Composition and Sound Recording	Universal Music Publishing Group, Sony/ATV	Publishers	Weakness: separate catalogs where only songs published by UMPG and Sony/ATV are listed; no unique identifier attached that is compatible with other catalogs
MusicMark (not yet operational)	Musical Composition	Joint Initiative (ASCAP, BMI, and SOCAN)	Performance Rights Organizations	Weakness: only for songs using these PROs; if publishers withdraw from PROs in favor of direct administration of their relevant rights, effectiveness could be undermined

*Can only be used to identify a particular sound recording; does not provide authorship/ownership information, but could theoretically be associated with another sound recording identifier such as ISRC.

Sources: U.S. Copyright Office, Copyright and the Music Marketplace: A Report of the Register of Copyrights (2015); Universal Music Publishing Group; Sony/ATV; Harry Fox Agency.

itself would be the appropriate system for these music identifiers.

In the music licensing context, a similar governance structure—in essence, the governing board—of the non-profit organization, responsible for the system of unique identifiers for musical composition and recordings, might be drawn from the publishers, record labels, radio broadcasters, and digital distribution services. The revenue to support the organization could be generated from a small levy on the revenues of the participating members, as is currently the method used by GS1 US to support the barcode system. The Copyright Office, which clearly has an interest in promoting a reliable system of identifiers, should also play a limited role in this organization.

The members of the various industry groups have a collective interest in making a comprehensive identifier system work within the structure of the competitive online marketplace for licensing rights. However, under the current framework, the individual parties' incentives are less clear. As the recent Pandora case shows, some parties might be incentivized to withhold information.[77]

To strengthen the incentive for publishers, labels, and individual music creators to contribute their ownership information to this database, as well as to support it financially, copyright law should be changed to create a safe harbor with respect to potential infringement by distributors. If a music distributor (e.g., a terrestrial broadcaster or a digital service) could show that it had made a good faith effort to determine the ownership of a piece of music (e.g., by searching through this newly established centralized data base) and was unable to ascertain the ownership of that piece of music, then the distributor should not be subsequently liable for infringement by the copyright owner.[78]

B. *Encouraging Direct Bargaining*

While a comprehensive system of identifiers would encourage direct bargaining without the intermediation of the PROs, more is probably necessary to encourage the movement away from the current collective licensing regimes. Publishers should have an incentive to withdraw or partially withdraw from the PROs. However, reentry should not be permitted in the short term to guard against the type of strategic behavior exhibited in the Pandora case. The rate court could incentivize direct

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[77] The Sony/ATV online database launched in July 2014, and the UMPG online database launched in September 2014. This may be in response to the *Pandora Rate Case*. *See* Chris Cooke, *Universal Music Publishing to Publish Catalogue Data*, COMPLETE MUSIC UPDATE (June 30, 2014), http://www.completemusicupdate.com/article/universal-music-publishing-to-publish-catalogue-data.

[78] This "safe harbor" provision should serve to discourage the kind of strategic non-revelation of information that we noted above with respect to the antitrust rate court's recent finding that some of the record labels had acted strategically in not revealing to Pandora their complete catalogues. Also, it appears (from the U.S.C.O. Report) that this type of safe harbor currently applies with respect to mechanical rights, *see supra* note 1, at 28–29. Registration should not imply that the owner is willing to grant a license. The composition could be registered with the condition that the owner is unwilling to license it. In turn, this suggests that in the more competitive framework that we envision, the compulsory licensing regime for the digital distribution of recorded works should be scrapped.

bargaining between publishers and distribution services, and incentivize publishers to withdraw from the collective licensing process, by setting low rates.

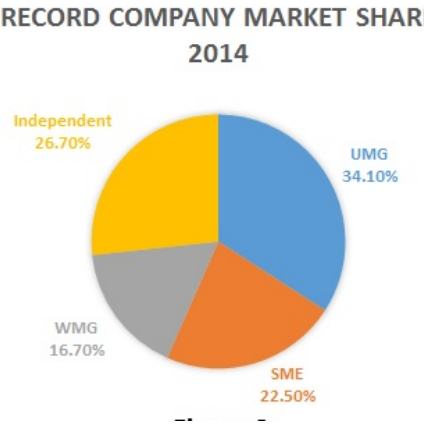
Similar logic does not apply to sound recordings, due to the existence of the compulsory license. Here, the establishment of low rates by the CRB would discourage direct bargaining between the labels and the distributors, as the statutory license would always be available.

As mentioned above, there is evidence of negotiated license deals with independent labels below the statutory rate. Accordingly, eliminating the statutory license would not necessarily cause royalty rates to rise.

Nevertheless, as a general matter, the existence of the statutory license—especially at a low rate—is an impediment to direct negotiation in this area.

In a world of direct negotiation, larger entities presumably have greater bargaining leverage. Three large companies dominate publishing and recording, although each sector also includes a large number of independents (see Figures 3 and 4). Moreover, the three largest labels and publishers are integrated with each other.[79]

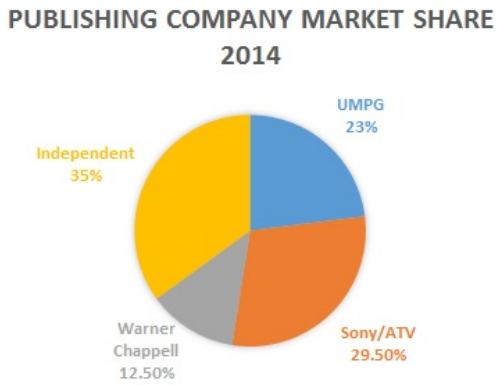
Figure 3[80]



[79] Universal Music Group (record label) owns Universal Music Publishing Group (publisher). Similarly, Warner Music Group (record label) owns Warner/Chappell Music (publisher). Sony owns both Sony Music Entertainment (record label) and 50 percent of Sony/ATV (publisher). Together the "big three" (as they are known) accounted for 73.3 percent of market share in the recording industry and 65 percent of market share in the publishing industry in 2014.

[80] For statistical source information *see generally Recorded Music Market Share Gains for WMG in 2014, Sony/ATV is the Publishing Leader*, Music & Copyright (Apr. 28, 2015), https://musicandcopyright.wordpress.com/2015/04/28/recorded-music-market-share-gains-for-wmg-in-2014-sonyatv-is-the-publishing-leader.

Figure 4[81]



The relationship between music licensees and licensors is somewhat analogous to the relationship between video content owners and cable TV distributors. Owners of "must-see" content generally have substantial bargaining leverage. However, content owners incur substantial costs if they fail to strike a deal with major distributors, so distributors also have leverage; and, generally, an agreement is reached. Similarly, owners of large catalogues of music have a strong incentive to reach a deal with large distributors. Moreover, it is generally not in the interest of content owners to charge prices that threaten the financial viability of their distributors. The ability of non-interactive streamers to steer their customers away from or toward specific music selections also limits the leverage of the content owner.

In addition, the new technologies and digital distribution platforms are permitting new forms of competition to emerge. For instance, artists do not need an established label to have their songs played on some of the new streaming platforms. The existence of a comprehensive identifier system could make it easier for such platforms to identify new artists. Additionally, the algorithms that the platforms use would facilitate the matching of listeners and content creators, making it easier for them to accumulate a fan base.

Nonetheless, the existence of large players calls for close antitrust scrutiny to assure that they do not coordinate with one another.

C. *Pricing*

Licensing contracts are complex, potentially involving a large number of terms. The socially optimal licensing schemes for Pandora, Spotify, Apple Music, and an unknown startup are likely to differ. A comprehensive database should also facilitate the formation of optimal bundles and more efficient pricing.

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[81] For statistical source information *see id.*

As indicated above, songs are information goods, with high fixed costs and low or zero marginal costs. In competitive as well as regulated markets, the pricing of such goods is often based on demand characteristics, where more price-sensitive consumers face lower prices than do less price-sensitive consumers.[82] This pricing structure is generally efficient so long as it increases total output as compared with the output that would result from a structure of uniform prices for all users and distributors.

In a market-based system, rights-holders would have an incentive to charge higher prices (prices here are used as a catch-all to encompass multiple contract terms) to categories of users that are less price-sensitive, while charging lower prices to those categories of users that are more price sensitive (e.g., perhaps because they can more easily switch to other music from other providers). This would be efficient to the extent that the overall amount of music that is consumed increases. Indeed, some of this is happening under the current system, where the interactive services (e.g., Spotify), with lower demand elasticity, pay higher royalties than do the non-interactive services (e.g., Pandora), with higher demand elasticity.

In addition, in a market-based system, a more nuanced system of differential pricing for different pieces of music—recorded by different artists, composed by different song writers—may well emerge. Under the current PRO-dominated system, all composers and artists receive approximately the same amount per play.[83] Popular artists and composers earn more only when their songs are played more often. But specific artists and songwriters may feel that their performances and compositions should receive a higher price per play. A more competitive framework would allow this form of differential pricing.

D. *Blanket Licenses*

Blanket licenses play a central role in the current system. They reduce transaction costs, but at the same time confer substantial market power on license holders collectively through their PROs, thereby necessitating the current use of statutory licenses and rate proceedings. Our proposal is designed to make blanket licenses less necessary, if not completely unnecessary.

With the availability of a comprehensive, electronic database, the market would likely develop various license bundles, of varying sizes and characteristics, to meet

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[82] The price to each category of user at least covers the marginal costs of selling to that category, as well as making a contribution toward covering the fixed costs. The hope of the seller, of course, is that the aggregate contributions more than cover the fixed costs.

[83] As is true of much else with respect to music copyright, these are generalizations, and the actual system is far more complex and arcane: The particular form of play can matter, and there can be extra amounts that accrue to especially popular pieces of music. For an explanation of ASCAP's system of royalty payments to its members, *see, e.g.*, *ASCAP Payment System*, The American Society of Composers, Authors, and Publishers (ASCAP) http://www.ascap.com/members/payment/royalties.aspx; *see also* Lee Ann Obringer, *How Music Royalties Work*, How Stuff Works: Entertainment, http://entertainment.howstuffworks.com/music-royalties7.htm.

different needs. If this occurs, blanket licenses should become less common. If users and distributors have the option to license smaller bundles, including individual songs, and if there are a sufficient number of separate suppliers or aggregators of licenses so that significant market power is unlikely to be exercised individually or collectively, the availability of larger bundles—even, for instance, an individual publisher's entire catalogue—should not be a problem and, indeed, should be welfare enhancing.

E. *Agents*

The availability of an accurate database is likely to facilitate the development of institutions that would serve as agents for many or most music creators, and as aggregators of rights. Indeed, this is happening already: Merlin represents thousands of independent record labels,[84] and numerous aggregators represent individual artists in negotiations with streaming services. For instance, Kobalt, which recently combined with AMRA, has developed a digital rights management platform that helps artists and publishers collect royalties from streaming services.[85] Kobalt collects royalties directly for 8000 artists, including Paul McCartney, and 500 publishers, including Disney.[86] Rdio[87] publishes a list of aggregators with which the company works.[88] All this suggests that the role of aggregators in the industry is growing, potentially displacing the more traditional intermediaries.

These agents would aggregate the potentially large number of licenses from many rights-holders that would be associated with any individual piece of music. Since they would likely represent multiple creators at the same time, these agents, as noted above, might find it worthwhile to offer bundles or packages of creators' licenses. These functions could be performed by publishers, labels—many of which are integrated with publishers—or PROs. It is not clear whether or why multiple layers would be needed.

As this system of agents for creators develops, vigorous antitrust scrutiny would be necessary to prevent the re-creation of the current structure of a handful of dominant PROs. In the current environment, however, the growth of aggregators is surely creating a less centralized system.

As the previous paragraphs indicate, PROs could conceivably maintain a role in this new system (e.g., as monitors, enforcers, and/or royalty distributors)—although that role would not be guaranteed, since the publishers, labels, or new institutions that might arise under the new system may turn out to be better agents from the music

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[84] *What We Do*, MERLIN NETWORK, http://www.merlinnetwork.org.

[85] *About Kobalt*, KOBALT MUSIC, https://www.kobaltmusic.com/index.php; *see also* AMRA MUSIC, http://www.amra-music.com.

[86] Ingrid Lunden, *Kobalt Quietly Acquired AMRA To Launch Its Own Global Collection Group For Digital Music*, TECHCRUNCH (June 8, 2015), http://techcrunch.com/2015/06/08/kobalt-quietly-acquired-amra-to-launch-its-own-global-collection-group-for-digital-music.

[87] Acquired by Pandora in November 2015.

[88] *Getting Content into Rdio*, RDIO (Oct. 26, 2015), https://web.archive.org/web/20151127151656/http://help.rdio.com/customer/portal/articles/58994-getting-content-into-rdio.

creators' perspective. It might even be the case that one or more of the PROs could, individually or collectively, serve as the operator of the online directory; however, in that case they would need to shed their role as agents for the music creators.

X. Conclusion

The current system for licensing music copyrights should be seen as largely an artifact of the analog era of music distribution and performance. In that analog context, the transaction costs of licensing, monitoring performances, enforcing copyrights, and collecting and transmitting payments from users to creators were substantial, and the aggregation and centralization of these functions into a very few PROs had a strong logic.

But with that aggregation came market power and in response to that market power, the antitrust royalty rate court to adjudicate composition royalty disputes. Separately, the CRB was tasked with the determination of sound recording performance right royalty rates and terms for statutory licenses for the new digital services.[89] A new organization, SoundExchange, was created to undertake the performance right functions. Thus, music pricing is now to a large extent determined by two parallel regulatory systems—the antitrust royalty rate court for composition royalties, and the CRB for sound recording royalties.[90] These regulatory regimes have entrenched collective licensing and the position of the PROs. Market processes and rates, though starting to develop, are still relatively rare.

In the current digital era, where electronic systems can greatly reduce transaction costs, we believe that a competitive marketplace can replace much, if not all, of the current regulatory structure for music licensing and rate determination, but this requires a move away from the current reliance on collective licensing for both composition and sound recording performance licenses.

The availability of a comprehensive database of identifiers alone could introduce significant competitive pressures into the existing system. In addition, the existence of statutory licenses is an impediment to the emergence of a competitive market.

A less regulatory system would require vigorous antitrust enforcement, both during the transition from the existing system to the new system and during the evolution of the new system. This will help guard against the continuation of the existing PROs' market power or the development of new (e.g., through subsequent consolidation) concentrations of market power.

The replacement of regulatory processes with a competitive marketplace, along the lines that we have sketched above, is feasible for the digital era. Indeed, we have mentioned in this paper some steps in this direction that are already being taken by market participants. Our proposals—especially the creation of a standardized and centralized database—would encourage more movement toward greater competition.

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[89] The most significant exception being that royalty rates for interactive streaming transmissions are negotiated directly with rights owners.

[90] As well as the CRB regulatory process for the determination of mechanical reproduction royalties.

The end result would certainly constitute the "meaningful change" that the USCO Report argues should be considered. This competitive marketplace would surely be important for maintaining the "innovative and influential music culture" in the U.S. that the Report describes.

Appendix 1: Abbreviations

ASCAP	American Society of Composers, Authors, and Publishers
AMRA	American Music Rights Association
BIEM	Bureau International de l'Edition Mécanique
BMI	Broadcast Music, Inc.
CARP	Copyright Arbitration Royalty Panel
CISAC	Confédération International des Sociétés d'Auteurs et Compositeurs
CRB	Copyright Royalty Board
DDEX	Digital Data Exchange
DMCA	Digital Millennium Copyright Act of 1998
DOJ	United States Department of Justice
DPRA	Digital Performance Right in Sound Recordings Act of 1995
GMR	Global Music Rights
HFA	Harry Fox Agency
ISNI	International Standard Name Identifier
ISRC	International Standard Recording Code
ISWC	International Standard Musical Work Code
PRO	Performance rights organization
RIAA	Recording Industry Association of America
RMLC	Radio Music Licensing Committee
SESAC	Society of European Stage Authors and Composers
SME	Sony Music Entertainment, Inc.
TMLC	Television Music Licensing Committee
UMG	Universal Music Group
UMPG	Universal Music Publishing Group
UPC	Universal Product Codes
USCO	United States Copyright Office
WMG	Warner Music Group