UNLOCK THE MUSIC: REPLACING COMPULSORY MUSIC LICENSES WITH FREE MARKET NEGOTIATION

*Karen (Kai-Wen) Hsieh**

I. INTRODUCTION

Underneath the glamour of top-selling hits, legendary rock bands, and sold-out live concerts is an indispensable system of music licensing. Ranging from an indie songwriter to a major film studio, music licensing connects all the players of the music and entertainment industry. Music licenses are crucial to the music industry because they enable the distribution, recording, and performance of song compositions. For example, record labels need to obtain mechanical licenses from songwriters or publishers in order to produce and distribute records to the public.[1] Similarly, music users—radio stations, online streaming services, restaurants, and concert venues—must acquire performing rights licenses to play and/or perform top forty hits or any music not within the public domain.[2] Sync licenses permit film studios and advertising agencies to incorporate music into audiovisual works, such as movies, television shows, and commercials.[3] Despite the importance of licensing, two of the music industry's most important licenses—the mechanical license and the performing rights license—stay stagnant as compulsory licenses,[4] thereby depriving copyright holders the full value of their song compositions and robbing them of the control they should have over their creations.[5]

---

* Articles Editor, *Cardozo Journal of Conflict Resolution*; B.A., 2011, New York University; M.A., 2013, New York University; J.D. Candidate, 2016, Benjamin N. Cardozo School of Law. The author would like to thank her family and friends for their support, love, and encouragement.

1 *What is a Mechanical License?*, THE HARRY FOX AGENCY (last visited Nov. 10, 2014), https://www.harryfox.com/license_music/what_is_mechanical_license.html.

2 *BMI and Performing Rights*, BROADCAST MUSIC, INC. (last visited Nov. 10, 2014), http://www.bmi.com/licensing/entry/business_using_music_bmi_and_performing_rights.

3 *Types of Copyright*, BROADCAST MUSIC, INC., http://www.bmi.com/licensing/entry/types_of_copyrights.

4 17 U.S.C. § 115(a) (2011); U.S. v. Am. Soc'y of Composers, Authors, & Publishers, No. 41-1395(WCC), 2001 WL 1589999 (S.D.N.Y. June 11, 2011).

5 Glenn Peoples, *'Free' & 'Market' Often Repeated at Music Licensing Hearing*, BILLBOARD (June 10, 2014), http://www.billboard.com/biz/articles/news/digital-and-mobile/6114165/free-market-often-repeated-at-music-licensing-hearing.

On March 17, 2014, in its effort to evaluate the music licensing environment, Congress published a Notice of Inquiry ("Notice"), soliciting comments on the current methods of licensing.[6] Included in this Notice are inquiries on the effectiveness of the mechanical and performing rights licenses.[7] The Notice garnered eighty-five comments from a diverse group of music professionals and companies, including performing rights organizations, record labels, songwriters, publishers, and online radio and streaming services.[8] After the Notice's publication and the submission of the comments, two Congressional hearings took place on June 10 and June 25, 2014 to consider the reform on U.S. copyright law;[9] Congress also held three public roundtables on music licensing issues in Nashville, Los Angeles, and New York in June.[10] Following Congress' footsteps in evaluating the music licensing sector, the Department of Justice ("DOJ") opened review of the decades old consent decrees that currently compel two major performing rights organizations, ASCAP and BMI, to issue licenses to every music user upon request.[11]

Congress's inquiry into the effectiveness of licensing practices puts the term "free market negotiation" in the spotlight.[12] During the Congressional hearings, "[r]epresentatives for songwriters, music publishers, performers and producers expressed their desire for royalty rates that result from, or approximate, free market negotiations"[13]—in other words, the royalty rates agreed upon by a willing buyer and a willing seller.[14] One of the witnesses, David Israelite, the president and CEO of the National Music Publishers Association ("NMPA"), asserted that the current standard employed to set royalty rates pays rights owners far below the fair market value.[15] On the other hand, there were individuals, such as Lee Knife, Executive Director of the Digital Music Association, who warned against free market negotiation, arguing that the interests of copy-

---

6 Music Licensing Study: Notice and Request for Public Comment, 78 Fed. Reg. 14739 (Mar. 17, 2014), http://copyright.gov/fedreg/2014/79fr14739.pdf [hereinafter Notice].

7 *Id.* at 14742.

8 *Music Licensing Study: Comments*, U.S. COPYRIGHT OFFICE (May 23, 2014), http://copyright.gov/docs/musiclicensingstudy/comments/Docket2014_3/index.html.

9 *Congressional Hearings*, U.S. COPYRIGHT OFFICE, http://copyright.gov/laws/hearings/ (last visited Nov. 10, 2014).

10 Notice, *supra* note 6.

11 *Antitrust Consent Decree Review*, U.S. DEP'T OF JUSTICE, http://www.justice.gov/atr/cases/ascap-bmi-decree-review.html (last visited Nov. 10, 2014).

12 Peoples, *supra* note 5.

13 *Id.*

14 *Id.*

15 *Id.*

right owners should be balanced with the interests of music licensees.[16] Rep. Zoe Lofgren implied that free market negotiation would create an unworkable system where both online streaming services and rights owners do not get paid.[17]

Therefore, the issue that music professionals, Congress, and the DOJ want to resolve is whether free market negotiation should replace the compulsory mechanical and performing right licenses in order to establish fairness and efficiency within the music licensing sector. To understand the impact that compulsory licenses have on the music industry, Section II of this Note focuses on the three major licenses for music compositions—the mechanical license, the performing rights license, and the sync license. Section III discusses why compulsory licenses no longer benefit the music industry and why free market negotiation is the superior approach. This section will also address the potential problems arising from free market negotiation, such as the power imbalance in negotiations between major record labels and new artists. Finally, Section IV proposes online mediation to remedy the difficulties that may occur due to unrestricted private negotiation.

II. Overview of the Music Industry's Major Music Licenses

A. *The Mechanical License*

Mechanical licenses enable licensees, such as record labels, to reproduce and distribute copyrighted music compositions.[18] Section 115(a) of the Copyright Act provides the following the rule:

> When phonorecords of a nondramatic musical work have been distributed to the public in the United States under the authority of the copyright owner, any other person, including those who make phonorecords or digital phonorecord deliveries, may, by complying with the provisions of this section, obtain a compulsory license to make and distribute phonorecords of the work.[19]

Therefore, after a songwriter's composition has first been recorded and distributed, any subsequent individual may record and dis-

---

16 *Id.*

17 *See* Peoples, *supra* note 5.

18 *What is a Mechanical License?*, *supra* note 1.

19 17 U.S.C. § 115(a) (2011).

tribute the same composition even if it goes against the copyright holder's intent on how he or she wants the music to be used.

Currently, for physical and permanent digital downloads, the statutory rate for the compulsory mechanical license is $0.91 per track for song compositions five minutes or less and $0.0175 per minute for compositions longer than five minutes.[20] The Copyright Royalty Board ("CRB"), which consists of three copyright royalty judges, is in charge of setting the statutory rate.[21] Out of the three copyright royalty judges, § 802(a) requires only one judge to have "significant knowledge of copyright law."[22] To determine the rate, the CRB considers the following objectives: "to maximize availability of song uses; to afford a fair return to the copyright owner and a fair income to the song user that reflect the roles of each; and to minimize the disruptive impact on the structure of the industries involved"[23]—there is no requirement to consider evidence related to fair market negotiation.

Congress enacted the statutory rate following the 1908 Supreme Court case, *White-Smith Music Pub. Co. v. Apollo Co.*, where the Court ruled that the unconsented reproduction of a music composition through a mechanical piano player did not constitute copyright infringement, reasoning that since only the piano player—and not humans—could read the perforated roll, the reproduction was not a "copy" within the meaning of the Copyright Act.[24] In response to the ruling, Congress in 1909 amended the Copyright Act, expanding copyright protection to include mechanical reproduction and also introducing the compulsory mechanical license.[25] The enactment of the compulsory license was Congress's effort to keep a player piano roll company, the Aeolian Company, from monopolizing the market.[26]

---

20 *What are Mechanical Royalty Rates?*, THE HARRY FOX AGENCY (last visited Nov. 10, 2014), https://www.harryfox.com/license_music/what_mechanical_royalty_rates.html.

21 17 U.S.C. § 801(a) (2011).

22 17 U.S.C. § 802(a) (2011).

23 Ed Christman, *Songwriter Equity Act Picks Up Momentum in Senate, Aims to Modernize Copyright Law*, BILLBOARD (May 12, 2014, 8:39 PM) http://www.billboard.com/biz/articles/news/publishing/6084822/songwriter-equity-act-senate-copyright-law; *see also* 17 U.S.C. § 801(b) (2011).

24 White-Smith Music Pub. Co. v. Apollo Co., 209 U.S. 1, 18 (1908).

25 WILLIAM F. PATRY, PATRY ON COPYRIGHT § 1:45 (2014).

26 Kal Raustiala & Chris Sprigman, *White-Smith Music case: A terrible 1908 Supreme Court decision on player pianos*, SLATE (May 12, 2014, 10:00 AM), http://www.slate.com/articles/technology/history_of_innovation/2014/05/white_smith_music_case_a_terrible_1908_supreme_court_decision_on_player.html. Aeolian, the equivalent of Microsoft or Google in the early 20th century, "[a]nticipating that Congress would overturn *White-Smith Publishing* . . . swiftly bought up

Today, more than a hundred years later, the compulsory mechanical license is still in effect, with the statutory rate having increased only 7.1 cents from two cents[27] to 9.1 cents.[28] For songwriters, royalties are "dictated" by the Copyright Act, whereas recording artists have the freedom to negotiate the royalties for their performances of the music compositions.[29] According to Israelite, "[r]oughly two-thirds of a songwriter's income is heavily regulated by law or through outdated government oversight[, which] results in devalued intellectual property rights . . ."[30] The compulsory mechanical license therefore prevents songwriters and music publishers from obtaining rates that reflect the free market value.[31]

B. *Performing Rights License*

Section 106 of the Copyright Act provides that a copyright owner has the exclusive right to "perform [and display] the copyrighted work publicly."[32] Performing "in a place open to the public or at any place where a substantial number of persons outside of a normal circle of a family and its social acquaintances is gathered" is a public performance subject to the Act.[33] Additionally, transmitting "by means of any device" to the public is a public performance or display, "whether the members of the public capable of receiving the performance or display receive it in the same place or in separate places and at the same time or at different times."[34] Thus, music users, such as radio stations, concert venues, television networks, and restaurants, need to obtain performing right licenses (usually from performing rights organizations) in order to play or perform music.[35]

Currently in the United States, there are three major performing rights organizations ("PROs") for songwriters and publishers—

---

song rights from musicians and publishing companies so it could copy them onto player piano rolls. Aeolian's weaker competitors complained to Congress about this attempt to corner the music market." *Id.*

27 *What are Mechanical Royalty Rates?*, *supra* note 20.

28 17 U.S.C. § 115(a) (2011).

29 *Id.*

30 *Id.*

31 *Id.*

32 17 U.S.C. §§ 106(4)–(5) (2011).

33 17 U.S.C. § 101 (2011).

34 *Id.*

35 *Get an ASCAP License*, ASCAP, http://www.ascap.com/licensing/licensefinder (last visited Jan. 7, 2015).

ASCAP, BMI, and SESAC.[36] The PROs collect and distribute performing right royalties to their songwriter and publisher members.[37] Instead of issuing licenses on a song-by-song basis, PROs usually offer music users blanket licenses that cover all of the music in their repertoires.[38] In 1941, as a result of an investigation of antitrust violations, the Department of Justice ("DOJ") established consent decrees for ASCAP and BMI, limiting the two PROs' licensing practices.[39]

While there is no statutory compulsory license for performing rights, the consent decrees require ASCAP and BMI to "provide a license to any person who seeks to perform copyrighted musical works publicly, [and to] offer the same terms to similarly situated licensees."[40] Moreover, if the PROs and licensees are unable to reach an agreement on the royalty fee, they need to bring their issue to the rate court, which will dictate the fees for them; an interim fee supplements the actual fee during the rate court process.[41] Last revised in 1994 (BMI) and 2001 (ASCAP), both consent decrees were "amended before the proliferation of digital music," thus prompting music publishers, songwriters, and PROs to urge the DOJ to eliminate the consent decrees.[42] Currently, the Department of Justice is considering making major changes to the consent decrees, such as allowing music publishers to establish direct deals for digital licenses while letting ASCAP and BMI continue administering royalty payments to songwriters or with respect to other licenses.[43] The rate courts have prohibited such practice, ruling that publishers cannot partially withdraw—they

---

36 Chris Robley, *What is a Performing Rights Organization*, THE DIY MUSICIAN (Apr. 29, 2013), http://diymusician.cdbaby.com/2013/04/what-is-a-performing-rights-organization.

37 *Id.*

38 Notice, *supra* note 6.

39 *Id.* ("SESAC, a smaller performing rights organization created in 1930 to serve European publishers, is not subject to similar consent decrees, although it has been involved recently in private antitrust litigation"). *See* U.S. v. Am. Soc'y of Composers, Authors, & Publishers, No. 41-1395(WCC), 2001 WL 1589999 (S.D.N.Y. June 11, 2011).

40 *Id. See* U.S. v. Am. Soc'y of Composers, Authors, Publishers, No. 41-1395, 2001 WL 1589999 (S.D.N.Y. Jun. 11, 2001) (ASCAP is "ordered and directed to grant to any music user making a written request therefor a non-exclusive license to perform all of the works in the ASCAP repertory"); U.S. v. Broadcast Music, Inc., No. 64 CIV. 3787, 1994 WL 90165264 (S.D.N.Y. Nov. 18, 1994).

41 Notice, *supra* note 6, at 14741.

42 *Id*.

43 Ed Christman, *Dept. of Justice Considering Major Overhauls on Consent Decrees, Sources Say*, BILLBOARD (Apr. 7, 2015, 2:29 PM), http://www.billboard.com/articles/business/6524359/dept-of-justice-consent-decrees-overhaul-publishing-ascap-bmi.

need to either stay with the PROs or completely withdraw their catalog from the PROs.[44]

Being two of the three PROs in the United States, ASCAP and BMI account for many, if not most, songwriters' performing rights.[45] Consequently, the consent decree directly affects the income of the copyright holders, similar to how the compulsory mechanical license affects songwriters, composers, lyricists, and publishers.

C. *Synchronization License*

To use a song in a film, television show, commercial, or any audiovisual works, the music user (for example, an advertising agency or a film studio) must obtain (1) a synchronization license ("sync license") from the songwriter or publisher and (2) a master use license from the recorded music's owner, such as a record label.[46] Unlike mechanical licenses and performing right licenses, the music publisher or songwriter directly issues sync licenses to the music user.[47]

Sync licenses are negotiated freely between the licensor and licensee, which, according to David Israelite, makes sync licenses the category with the "most free market success."[48] While there are some programs, such as Rumblefish, that permit songwriters to put their music in a pre-cleared catalog for music users to license,[49] songwriters and publishers ultimately have control over the use of their music. If the songwriter or publisher decides to issue a license directly, a variety of factors will determine the fee, such as the music placement (for example, background or on-screen perform-

---

44 Ed Christman, *Pandora Ruling Has Far-Reaching Implications for U.S. Publishing Industry*, BILLBOARD (Dec. 23, 2013, 11:53 AM), http://www.billboard.com/biz/articles/news/publishing/5847835/pandora-ruling-has-far-reaching-implications-for-us-publishing.

45 Alan Dodson, *ASCAP, BMI, and SESAC Explained for DJs and KJs*, MOBILE BEAT (Jan. 26, 2014), http://www.mobilebeat.com/prosanddjs/.

46 *Type of Copyright*, BMI, http://www.bmi.com/licensing/entry/types_of_copyrights (last visited Jan. 10, 2015).

47 *Id.*

48 David Israelite, *Our Best Bet for Screwing Up Copyright Reform? More Government Intervention (Guest Post)*, BILLBOARD (Jul. 14, 2014, 12:10 PM), http://www.billboard.com/biz/articles/news/publishing/6157555/our-best-bet-for-screwing-up-copyright-reform-more-government.

49 *License Your Music*, CDBABY, http://members.cdbaby.com/license-your-music.aspx (last visited Jan. 10, 2015).

ance), the length used, the popularity of the song, and the type of audiovisual work.[50]

Currently, sync licensing is one of the main vehicles that generate income and exposure for songwriters.[51] While artists from earlier generations saw licensing their music to brands and advertisements as selling out,[52] many artists today, such as Ingrid Michaelson, perceive sync licensing as an opportunity to expose their music to a wider audience and to increase income.[53]

III. The Need for Free Market Negotiation

A. *Why Compulsory Licenses Do Not Work Anymore*

In 1908, Congress created the compulsory mechanical license to prevent the Aeolian Company (a company that no longer exists) from having a monopoly over the player piano roll market.[54] Similarly, due to the fear of monopolies, the DOJ bound ASCAP and BMI to consent decrees in order to prevent monopolistic behavior in the market for performing rights licenses.[55] While the compulsory mechanical license and the consent decree might have addressed the government's fear of monopolies more than half a

---

[50] *Negotiating Music for Films*, Boyenne Law, http://entertainment-lawyer.us/negotiating-music-for-films/ (last visited Jan. 10, 2015).

[51] Neil Gillis, *Jumpstart Your Music Career with Sync Licensing*, Hypebot (Apr. 28, 2014), http://www.hypebot.com/hypebot/2014/04/jumpstart-your-music-career-with-sync-licensing.html.

[52] *Still Fighting for the Right to His Voice*, N.Y. times (Jan. 20, 2006), http://www.nytimes.com/2006/01/20/arts/music/20wait.html?_r=0&adxnnl=1&adxnnlx=1415637127-sU4GY1aNQxHbmNGpnMWS/w ("At a time when musicians are increasingly open to licensing their music for advertising, television and other commercial uses, Mr. Waits has steadily built a reputation not only for refusing to license his music, but also for aggressively defending his style as a unique legal property.").

[53] Josh Sanburn, *Advertising Killed the Radio Star: How Pop Music and TV Ads became Inseperable,* TIME (Feb. 3, 2012), http://business.time.com/2012/02/03/advertising-killed-the-radio-star-how-pop-music-and-tv-ads-became-inseparable/3/ ("When Michaelson's "The Way I Am" got picked up by Old Navy, it was no accident that clothing was in the lyrics . . . Michaelson's song has since sold 1.5 million copies.").

[54] *See* Raustialia & Sprigman, *supra* note 26 (Aeolian, the equivalent of Microsoft or Google in the early 20th century, "[a]nticipating that Congress would overturn *White-Smith Publishing*, swiftly bought up song rights from musicians and publishing companies so it could copy them onto player piano rolls. Aeolian's weaker competitors complained to Congress about this attempt to corner the music market.").

[55] Notice, *supra* note 6 ("SESAC, a smaller performing rights organization created in 1930 to serve European publishers, is not subject to similar consent decrees, although it has been involved recently in private antitrust litigation.").

century ago, they do not have the same effect in today's environment.[56] MaryBeth Peters, the former Register of Copyrights, in her statement on music licensing reform makes the following comment:

> At its inception, the compulsory license facilitated the availability of music to the listening public. However, the evolution of technology and business practices has eroded the effectiveness of this provision. Despite several attempts to amend the compulsory license and the Copyright Office's corresponding regulations in order to keep pace with advancements in the music industry, the use of the Section 115 compulsory license has steadily declined to an almost non-existent level. It primarily serves today as merely a ceiling for the royalty rate in privately negotiated licenses.[57]

As MaryBeth Peters implies in her statement, compulsory licenses do not serve their original purpose of making music available to the public. Instead, they adversely impact the music industry by burdening music composers and copyright holders for the following reasons: (1) Compulsory licenses deliver to copyright owners a substandard licensing rate that does not reflect the fair market value of song compositions,[58] and (2) they deny music composers, lyricists, and publishers the choice of how they want their compositions to be used.[59] Because of the negative impact compulsory licenses have on the songwriting industry, numerous music professionals perceive free market negotiation as the better alternative.[60] In the discussion below, this Note will address why com-

---

56 Aaron, *What is the Consent Decree with Danielle Aguirre at the NMPA*, EXPLORATION (Jul. 31, 2014), http://exploration.io/what-is-the-consent-decree-with-danielle-aguirre-at-the-nmpa-interview/("Since before WWII, songwriters have lived under consent decrees that unfairly burden them and result in below-market rates. The DOJ is beginning to acknowledge this burden and the fact that many provisions in the ASCAP and BMI consent decrees no longer make sense in this new digital music market.").

57 *Statement of MaryBeth Peters, The Register of Copyrights, before the Subcommittee on Courts, the Internet, and Intellectual Property, Committee on Judiciary*, 109th Cong. 1st Sess. (2005) (Hearing on Music Licensing Reform), http://www.copyright.gov/docs/regstat062105.html.

58 Peoples, *supra* note 5.

59 David Newhoff, *Compulsory Licensing & Chilling Effects*, THE ILLUSION OF MORE (Feb. 10, 2014), http://illusionofmore.com/compulsory-licensing/("The compulsory license strips one of the fundamental properties of copyright, the right of choice, from the artist; and this is why Tyler and LaPolt were supported with letters from other creators including, Don Henley, Joe Walsh, Sting, Ozzy Osbourne, and Mick Fleetwood.").

60 Peoples, *supra* note 5 ("Representatives for songwriters, music publishers, performers and producers expressed their desire for royalty rates that result from, or approximate, free market negotiations.").

pulsory licenses for song compositions should be removed from the music industry and be replaced by free market negotiation.

1. Compulsory Licenses Create Inefficiency

Compulsory licenses prevent rights holders from fully reaping the true value of their work. Set at 9.1 cents today,[61] the compulsory mechanical license does not reflect a music composition's market value, nor does it reflect inflation and other economic factors. The rate has not changed since January 2006.[62] Furthermore, the value of the rate first set in 1909 (two cents) would roughly be the equivalent of fifty-one cents today,[63] which is far greater than today's rate.

According to David Israelite of the NMPA, the songwriting industry sustained an enormous loss in revenue because of the compulsory licenses: "[c]urrently the U.S. songwriting industry is worth roughly $2.2 billion; however, over $2.3 billion is lost due to unjust government regulations."[64] In the event that ASCAP or BMI reaches a negotiation stalemate with its potential licensee and thus goes to rate court to establish the license fee, the court is not required to consider "all relevant evidence when determining songwriter compensation," which explains why the rates for performing rights licenses do not reflect their market value.[65] Similarly for mechanical licenses, the CRB is not required to consider the fair market value when setting a rate, which results in the arguably arbitrary rate of 9.1 cents.[66]

---

61 *What are Mechanical Royalty Rates?*, *supra* note 20.

62 David Israelite, *Stop Shortchanging Songwriters*, THE HILL (Mar. 25, 2014, 1:11 PM), http://thehill.com/opinion/op-ed/201663-stop-shortchanging-songwriters ("[T]he dozen eggs that you buy for almost $3 at the grocery store today would have cost 14 cents in 1909, demonstrating that standard rates of inflation seem to somehow not apply to songwriters.").

63 Dina LaPolt, *RE: Music Licensing Study: Notice and Request for Public Comment*, U.S. COPYRIGHT OFFICE (May 23, 2014), http://copyright.gov/docs/musiclicensingstudy/comments/Docket2014_3/Dina_LaPolt_MLS_2014.pdf ("The current statutory mechanical royalty rate is 9.1 cents per reproduction for songs five minutes long or less. This is a pretty low rate considering that the statutory royalty rate was first set in1909 at 2 cents-the equivalent of 51 cents today.").

64 David Israelite, *Future of Streaming Music Must Include Fairness for Songwriters*, FOX NEWS (Jun. 26, 2014), http://www.foxnews.com/opinion/2014/06/26/future-streaming-music-must-include-fairness-for-songwriters/.

65 *The Songwriter Equity Act (SEA)—What You Need to Know*, NMPA (last visited Feb. 14, 2015), https://www.nmpa.org/media/showwhatsnew.asp?id=100; *see also* Songwriter Equity Act of 2014, H.R. 4079, 113th Cong. (2014), https://www.congress.gov/bill/113th-congress/house-bill/4079/text; 17 U.S.C. § 114(i) (2011).

66 *See* Songwriter Equity Act of 2014, H.R. 4079, 113th Cong. (2014), https://www.congress.gov/bill/113th-congress/house-bill/4079/text; *see also* 17 U.S.C. § 801 (2011).

i. The Inefficiency of Compulsory Performing Rights License

While ASCAP and BMI (hereinafter, also referred to as "PRO(s)") may from the outset negotiate with potential music users on the license fees, the consent decrees limit their ability to pursue the song compositions' true value that results from unrestricted negotiation. Due to the requirement of compulsory licenses, PROs are still obligated to license their repertoire if they and their potential licensees have trouble reaching an agreement on the fee.[67] During the time the PRO or rate court determines what the license fee should be, a licensee can start using music as an applicant or as an interim licensee.[68] Because the license fees are set retroactively, licensees may "strategically dela[y] or exten[d] the negotiation process" by withholding adequate information on the use of the music, thus preventing the PRO from coming up with a fair market price for both parties.[69] In that case, the licensee can start using the music without paying the PRO, which ultimately leads to nonpayment to the songwriter or publisher. Additionally, by failing to provide adequate information on the use, the licensee may choose to stay as an interim licensee until the PRO finally decides to go through a lengthy and expensive rate court proceeding.[70]

The PRO is stuck between a rock and a hard place. Unable to get adequate information from the licensee regarding the use, the PRO can only provide an interim license that is likely below the compositions' market value. In a recent report, the U.S. Copyright Office summarizes the inefficiency arising from consent decrees:

> Since the consent decrees do not provide for immediate and concurrent payment for uses made during these periods—and do not establish a timeframe for the commencement of a rate court proceeding—an applicant is able to publicly perform a

---

67 *Antitrust Consent Decree Review*, *supra* note 11; *see* ASCAP, *Comments of the American Society of Composers, Authors and Publishers*, U.S. COPYRIGHT OFFICE, http://www.copyright.gov/docs/musiclicensingstudy/comments/Docket2014_3/ASCAP_MLS_2014.pdf (last visited Feb. 14, 2014) (ASCAP's response to the Music Licensing Study: Notice of Inquiry).

68 ASCAP, *supra* note 67. Some music users may strategically decide to stay on interim terms if they find the interim license to be more favorable to them—this ultimately leads to an expensive rate court process. Other applicants have also "applied for a license—claiming the shelter of the Consent Decree's guarantee of a right to perform ASCAP members' music while an application is pending—while simultaneously disclaiming the need for such a license and refusing to provide the information necessary for ASCAP to formulate a fee proposal." *Id.*

69 *Id.*

70 *Id.*

> PRO's catalog of works for an indefinite period without paying.[71]

Consequently, the songwriter and publisher members are denied the market value of their compositions—they receive instead what may only be a thin slice of the total potential revenue. Because the rate court is not allowed to use all relevant evidence to establish the license fee or rate (for example, the rate for the public performance of a *sound recording*, determined by a willing buyer and willing seller, is relevant evidence that the court is not permitted to use),[72] it is unlikely that the court can find a fee or rate that reflects the market value.

Because of the consent decrees, fees or rates determined by the rate courts stray significantly from those privately negotiated between a willing buyer and willing seller; the consent decrees thus deny creators fair compensation for the use of their work and "[harm] the very songwriters [the consent decrees] were designed to protect."[73] According to entertainment lawyer Dina LaPolt's comment for the Music Licensing Study, because rate courts are not allowed to use "relevant market data as evidence when setting rates[,] . . . the compulsory royalty rates for streaming musical compositions is one twelfth of the royalty rates paid to record labels for the same exact uses."[74] Unlike ASCAP and BMI, SoundExchange, a digital performance rights organization for sound recordings,[75] is allowed to negotiate with the licensee on a rate that best reflects the market value of sound recordings, which the Copyright Royalty Board may adopt and implement for other similarly situated cases.[76] To be able to negotiate a rate creates significantly different results for SoundExchange, even though it provides, with regard to digital performance rights, essentially the same services as ASCAP and BMI.[77]

PROs under the consent decrees will also need to account for the high costs and time lost due to the rate court procedure,[78]

---

71 U.S. COPYRIGHT OFFICE, COPYRIGHT AND THE MUSIC MARKETPLACE: A REPORT OF THE REGISTER OF COPYRIGHTS (Library of Congress, 2015), http://copyright.gov/docs/musiclicensing-study/copyright-and-the-music-marketplace.pdf.

72 Songwriter Equity Act of 2014, *supra* note 66.

73 LaPolt, *supra* note 63.

74 *Id.*

75 *About*, SOUNDEXCHANGE, http://www.soundexchange.com/about/ (last visited Feb. 14, 2015).

76 *Id.*

77 *Id.*

78 ASCAP, *supra* note 67.

which ultimately counteracts the court-established rate. Moreover, as explained by LaPolt in her comment, rate courts produce inconsistent results that confuse songwriters and publishers, further adding to the inefficiency created by consent decrees: "[H]aving separate rate courts for both ASCAP and BMI is creating even more confusion among songwriters and publishers. Nothing obligates the rate courts to reach similar results on rate-setting or other issues. This could lead to vastly different treatment of two songwriters of the exact same composition if those writers are affiliated with different PROs."[79] In May 2015, BMI successfully obtained a higher rate from Pandora—the rate court ruled that Pandora should pay 2.5 percent of its revenue to BMI, which was significantly higher than the 1.85 percent that another rate court gave ASCAP.[80] Both of these rates apply to Pandora with regard to performing rights licenses—however, because of the different rate court judges, there are now two distinct rates. As predicted by LaPolt, two songwriters—one of whom is affiliated with ASCAP and the other with BMI—will now receive different payments with respect to the same song.

Because of the compulsory license, ASCAP and BMI—together representing over ninety percent of the U.S. market share for performing rights[81]—are unable to collect royalties that fully compensate rights holders for their works. The consent decrees therefore greatly burden ASCAP, BMI, and their members because they leave the PROs with two bad choices: (1) license their repertoire and collect royalties for songwriters and publishers at a substandard rate due to the interim license, or (2) receive a potentially higher, yet still substandard (as evidence reflecting the fair market value cannot be used) rate after going through a time-consuming and costly rate court proceeding.

ii. The Inefficiency of the Compulsory Mechanical License

Similar to consent decrees, the compulsory mechanical license prevents rights holders from capturing the true value of their song compositions. As previously mentioned in Section II, the CRB is in charge of setting the statutory rate. However, only one judge

---

79 LaPolt, *supra* note 63.

80 Ed Christman, *BMI Wins in Rate Court Battle with Pandora*, BILLBOARD (May 14, 2015, 8:30 PM), http://www.billboard.com/articles/business/6568286/bmi-wins-court-battle-pandora.

81 Dodson, *supra* note 45; *see About ASCAP*, ASCAP, http://www.ascap.com/about/ (last visited Feb. 14, 2015) ("[ASCAP is] a membership association of more than 540,000 US composers, songwriters, lyricists and music publishers of every kind of music.").

out of the three is required to have "significant knowledge of copyright law."[82] Additionally, there is no requirement to consider evidence of the market value of mechanical rates.[83] Because the Copyright Act does not require these judges to have expertise in the music industry, the CRB is not in the best position to determine the fate of hundreds of thousands of songwriters, publishers, copyright holders, and music users. A statutory rate of 9.1 cents that has not changed since 2006[84] does not account for inflation, technological advances (for example, music streaming services),[85] the surge in popularity of television musicals,[86] and the increase of YouTube covers, which artists depend on as another source of income.[87] These factors drastically increased the demand of mechanical licenses throughout the years, which, in a competitive market, would drive the rate up. However, the rate stays stagnant, depriving songwriters and copyright holders the real value of their compositions.

Even though a licensor and licensee may negotiate privately on the mechanical rate,[88] the rate will never exceed 9.1 cents because of the price ceiling imposed by the government. While the statutory rate initially "facilitated the availability to the listening public," the "evolution of technology and business practices has eroded the effectiveness of [Section 115 of the Copyright Act]."[89] According to Marybeth Peters, the former Register of Copyrights, "the use of the Section 115 compulsory license has steadily declined to an almost non-existent level. It primarily serves today as merely a ceiling for the royalty rate in privately negotiated licenses."[90] For example, the Harry Fox Agency ("HFA") issues

---

82 17 U.S.C. § 802(a) (2011).

83 *See* Christman, *supra* note 23.

84 *What are Mechanical Royalty Rates?*, *supra* note 20.

85 Steve Guttenberg, *Watch Out, Spotify, Tidal is Upping the Ante for Streaming-Music Sound Quality*, CNET (Jan. 10, 2015, 7:10 AM), http://www.cnet.com/news/watch-out-spotify-tidal-is-upping-the-ante-for-streaming-music-sound-quality/.

86 Craig McLean, *Glee: the making of a musical phenomenon*, TELEGRAPH (Jan. 24, 2011, 9:00 AM), http://www.telegraph.co.uk/culture/8271318/Glee-the-making-of-a-musical-phenomenon.html.

87 Noah Nelson, *Covering Pop Hits on You Tube is Starting to Pay*, NPR (May 13, 2013, 5:00 AM), http://www.npr.org/blogs/therecord/2013/05/13/182880665/covering-pop-hits-on-youtube-is-starting-to-pay.

88 17 U.S.C. § 115(c)(E)(i) (2011) ("License agreements voluntarily negotiated at any time between one or more copyright owners of nondramatic musical works and one or more persons entitled to obtain a compulsory license under subsection (a)(1) shall be given effect in lieu of any determination by the Librarian of Congress and Copyright Royalty Judges.").

89 *Statement of MaryBeth Peters*, *supra* note 57.

90 *Id.*

mechanical licenses on behalf of songwriters and publishers.[91] Although the licenses HFA issues are not the compulsory licenses established in the Copyright Act,[92] the rate used for the mechanical license is the same as the statutory rate,[93] since licensees can easily obtain the compulsory license if mechanical licenses with rates higher than 9.1 cents are offered instead.

Moreover, a licensee may use the compulsory license as a vehicle to privately negotiate for a lower rate: "[the] current rate-setting system risks the possibility of an even lower royalty rate, which would severely harm American songwriters. Recording companies and online retailers have tried to exploit this in the past, such as in 2008, when Apple argued for a four cent rate for digital downloads."[94] This exploitation is exemplified in the standard recording agreement between record labels and singer-songwriters. Because of the statutory rate, most record labels successfully negotiate to pay mechanical royalties at a lower rate to recording artists who own or co-own the music compositions.[95] The common practice is for record labels to instill a controlled composition clause into the recording agreement, which generally provides that the record label pay at a "75% rate (specifically, 6.82¢, which is three-quarters of the 9.1¢ full statutory rate) for all controlled compositions [or, in other words, compositions owned by the recording artist]."[96] Due to new artists' lack of leverage and bargaining power, the controlled composition clause provides no room for negotiation—the artists have to take it as it is or leave it.[97] As the controlled composition clause in artist agreements further reduces the already low mechanical rate for songwriters, "[m]any recording artists and songwriters universally condemn the controlled composition clause [because] its application, in almost all instances significantly lowers the economic benefit to the singer/songwriter."[98]

---

91 *What Does HFA Do?*, HFA, https://www.harryfox.com/publishers/what_does_hfa_do.html (last visited Feb. 14, 2015).

92 17 U.S.C. § 115.

93 *What are Mechanical Royalty Rates?*, *supra* note 20.

94 LaPolt, *supra* note 63.

95 *Controlled Composition Clauses*, ASCAP, http://www.ascap.com/music-career/articles-advice/music-money/money-clauses.aspx (last visited Feb. 14, 2015).

96 *Id.*

97 Jay Rosenthal, *The Recording Artist/Songwriter Dilemma: The Controlled Composition Clause—Enough Already!*, 73 LANDSLIDE 4 (2011).

98 *Id*.

2. Compulsory Licenses Create Inequity

In addition to inefficiency, another reason why compulsory licenses should not be used in the music industry is that they rob songwriters and publishers of the control over their works. Mechanical and performing rights are two of the most important rights in the music industry because they protect song composers and lyricists, who make up the foundation of the industry. Without song composers and lyricists, the industry would be completely void of music to record, distribute, and perform.

Wisely stated by Alfred Schweitzer and quoted by Justice Arabian in the famous case *Nahrstedt v. Lakeside Village Condo. Ass'n., Inc.*, "[t]here are two means of refuge from the misery of life: music and cats."[99] It is therefore crucial that songwriters have the incentive to compose music. As music compositions are "nonrivalrous" goods, where "[o]ne party's use of the good does not interfere with another party's use," copyright law necessarily gives "incentives to creators and publishers and thereby prevents underproduction of creative works."[100] While copyright law aims to incentivize creators to produce creative works, compulsory licenses diminish a songwriter's incentive to compose by taking away her control over how she wants her compositions to be used.

According to LaPolt and Aerosmith's Steven Tyler in their comment paper against compulsory licenses (the comment was signed by a group of artists in support of their opinion), "in [their] experience, approvals are paramount to anything else on an artist's agenda during negotiations—the money is always secondary. If an artist or songwriter does not want his or her music used in a certain way, no amount of money will change his or her mind."[101] Without having the ability to deny a party from using their compositions, creators cannot prevent licensees from exploiting their works to promote negative messages. As a result of the unconsented exploitation, the value of the compositions may decrease.

Aptly put in words by David Newhoff from the website *The Illusion of More*, "if the artist creates from a place that is deeply personal or politically motivated, it is easy to see—indeed we have

---

99 Nahrstedt v. Lakeside Village Condo. Ass'n., Inc., 8 Cal.4th 361 (1994).

100 JULIE E. COHEN & LYDIA P. LOREN, COPYRIGHT IN A GLOBAL INFORMATION ECONOMY 6 (Vicki Been et al. eds., Aspen Publishers 3d ed. 2010).

101 Dina LaPolt & Steven Tyler, *RE: Request for Comments on Department of Commerce's Green Paper on Copyright Policy, Creativity, and Innovation in the Digital Economy*, U.S. PAT. & TRADEMARK OFFICE (Feb. 10, 2014), http://www.uspto.gov/ip/global/copyrights/lapolt_and_tyler_comment_paper_02-10-14.pdf.

seen—how a *permissionless* environment invites degradation that is a disservice to cultural diversity."[102] For example, "[a] black artist writing about black issues could not stop a racist hate group from appropriating his music as long as they paid the license. A politician who opposes everything an artist ever stood for could turn that artist's work into his campaign soundtrack."[103] While LaPolt and Newhoff both refer to compulsory licenses in the context of derivative works, their comments and opinions apply to compulsory licenses for mechanical rights. Compulsory mechanical licenses prevent songwriters and publishers from denying a licensee the right to record their compositions, which may be used in contexts or in furtherance of messages that contrast what the creators intend the original compositions to convey. Not having control over their original compositions is therefore a major deterrent for songwriters from creating new works.[104]

3. The Songwriter Equity Act

As an alternative to eliminating the compulsory license, the Songwriter Equity Act ("SEA"), introduced in February 2014, aims to create a statutory rate that reflects the fair market value.[105] While the SEA tackles the issue of substandard rates, there are multiple issues left unaddressed, such as the limit on one's control over his creative work and, arguably, the CRB's inability to quickly enact a rate that reflects the constantly changing market rate.

Similar to performance royalty rates for commercial radio,[106] the market rate for mechanical licenses may fluctuate frequently. Analytic services, such as Nielsen's Soundscan[107] and Next Big Sound,[108] show us that the preferences of music consumers and listeners vary daily. Depending on the type of exposure a song re-

---

102 Newhoff, *supra* note 59.

103 *Id.*

104 LaPolt & Tyler, *supra* note 101 (LaPolt stated in her comment that requiring compulsory licenses for derivative works would deter artists from releasing their works: "Steven and the other artists who have expressed support for our comments have stated that they probably would have withheld some of their work if they knew that one day they would be required to give up their right to approve derivative uses.").

105 Songwriter Equity Act of 2014, *supra* note 66.

106 *Royalty Policy Manual*, BMI (Sep. 18, 2015), http://www.bmi.com/creators/royalty_print.

107 *Music Sales Measurement*, NIELSEN, http://www.nielsen.com/content/corporate/us/en/solutions/measurement/music-sales-measurement.html (last visited Jan. 7, 2015) (service that tracks music sales, radio play, consumer behavior, etc.).

108 NEXT BIG SOUND, https://www.nextbigsound.com (last visited Jan. 7, 2015) (service that "analyzes social, sales, and marketing signals" by taking into account the artists and songs trending on social media websites, such as Facebook, Twitter, YouTube, and SoundCloud).

ceives (for example, a placement on a popular television show), the popularity of a song may increase exponentially within one day.[109] To determine the market value for mechanical licenses, the CRB by itself would have to consider many different factors, such as the performance of the song, popularity of the songwriter, usages of the song, different music genres, and listeners' reactions to the song. To account for all those factors would make the rate setting process lengthy and inefficient. Moreover, a rate that the CRB comes up with one day may not reflect the market value rate the next day. While the requirement to consider other evidence would be a step up from the current rate setting procedure, relying solely on one entity to make changes to the rates would not eliminate the issue of finding a rate that reflects the fair market value.

4. The U.S. Copyright Office's Approach on Cover Recordings

The U.S. Copyright Office sympathizes with songwriters who do not have control over their song compositions.[110] In its report "Copyright and the Music Marketplace" from February 2015, the Copyright Office recommends giving copyright owners the choice to refuse licensing their content to online users: "the dissemination of such recordings for interactive new media uses, as well as in the form of downloads, would be subject to the publishers' ability to opt out of the compulsory regime."[111] However, "those who seek to re-record songs could still obtain a license to do so, including in physical formats."[112] Giving copyright owners the freedom to deny license requests with regard to online interactive services and downloads is an improvement, but the compulsory nature of mechanical licenses still applies to many other aspects of the music industry, such as "physical compact discs, broadcast radio and live concerts."[113] Essentially, the approach is wishy-washy (sometimes

---

109 Liv Buli, *Do TV Show Music Placements Lead to Greater Artist Awareness?*, HYPEBOT.COM (Jan. 10, 2013), http://www.hypebot.com/hypebot/2013/01/do-tv-show-music-placements-lead-to-greater-artist-awareness.html ("Golden State, a much smaller band in terms of fan base and consumption, with only 1500 Twitter followers and close to 350,000 video views on YouTube, featured on a season finale episode of Gossip Girl in May, and what constitutes a significant spike in their numbers immediately follows.").

110 U.S. COPYRIGHT OFFICE, *supra* note 71 ("While some artist songwriters may view imitation as flattery, others do not appreciate that they are unable to prevent the re-recording of their songs by others. Many music creators seek more control over their works.").

111 *Id.*

112 *Id.*

113 Eriq Gardner, *Why Taylor Swift May Soon Be Able to Stop Cover Songs on Spotify Too*, THE HOLLYWOOD REPORTER (Feb. 5, 2015, 5:16 PM), http://www.hollywoodreporter.com/thr-esq/why-taylor-swift-may-soon-770698.

it is compulsory, sometimes it is not) and it creates uncertainty—the licensee has to keep track of what can or cannot be distributed online while everything offline can be distributed, which further complicates the already complex music licensing system. Completely eliminating the compulsory license gives licensees the confidence to look for and use song compositions that have been cleared.

B. *Free Market Negotiation*

1. Why Free Market Negotiation is the Better Approach

Together, the substandard statutory mechanical rate, the cumbersome and ineffective rate court process, and the rights holders' lack of control over their works may reduce a creator's incentive to compose and make his or her work available to the public. Consequently, the number of available works will decrease and competition will go down, resulting in lower quality works and a shrinking music industry. According to Josh Herr of the *Fiscal Times*, third quarter music sales in 2014 are disappointing:

> Not a single artist's album has reached platinum status in 2014. The *Frozen* soundtrack [a 2013 release] is the only album to have crossed the million mark . . . Aside from that success, 2014 has been so bad that the two top-selling records are carryovers released late last year, one from Beyonce and the other from Kiwi songstress Lorde. Both have sold in the 750,000 range, well short of platinum status.[114]

The lack of artists coming out with top-selling records makes it easier for other artists to "score their first No. 1 albums this year," which according to Herr is "not due to the quality of the work or the strength of sales but simply as the result of a lack of meaningful competition."[115] Compulsory licenses, as deterrents to songwriters' motivation to create, therefore contribute to the lack of competition in the music industry today.

Due to the increase of music platforms,[116] today's competitive music environment calls for a different approach. To ensure the music industry grows and flourishes in a fair environment, free

---

114 Josh Herr, *Startling Proof that the Music Industry is Doomed*, THE FISCAL TIMES (Oct. 20, 2014), http://www.thefiscaltimes.com/2014/10/20/Latest-Startling-Proof-Music-Industry-Doomed.

115 *Id.*

116 Physical albums, radio, digital downloads, and non-interactive and interactive online streaming are examples of music platforms.

market negotiation must replace compulsory licenses. During the congressional hearing on June 25, 2014, multiple members of Congress admitted that the government had no place in determining what was best for the music industry.[117] Rep. Doug Collins summarized the futile effect the government's past efforts had on music licensing, which had left both licensors and licensees unsatisfied: "one bad business model 5 years ago could now be the bad business model today . . . you don't need Congress to come in and prop up either one of you."[118] Instead of asking the government to intervene whenever a problem arises, Rep. Collins suggested solving the problem with a "holistic approach" that would involve the participation of everyone affected by music licensing.[119]

Similarly, Rep. Cedric Richmond emphasized the importance of music licensors and licensees working together, instead of looking to the government for help: "[If Congress solves] this problem, nobody is going to like it and it is probably going to be wrong [because] we are not the subject matter experts on it . . . [Nobody] has a better ballgame position [than the music licensees and licensors]."[120] Because of their lack of expertise in the music industry, the government, the CRB, and the rate court judges should not be in the position to determine what is best for hundreds of thousands of music professionals.

i. Free Market Negotiation Expands and Enhances the Music Industry

Free market negotiation should replace compulsory licenses because music industry professionals, due to their knowledge and expertise, are more capable than the government or rate court judges of determining what best benefits the industry. As implied during the congressional hearing, licensees and licensors need to work together to negotiate a rate that accurately reflects the interests of both parties, which ultimately minimizes unnecessary costs. Because of the statutory rate and expensive rate court procedures, income that can be utilized to benefit and expand the music industry gets buried in the arbitrary price ceiling and litigation costs.[121]

---

117 *Music Licensing Under Title 17 (Part I & II): Hearing Before the Subcomm. on Courts, Intellectual Property, and the Internet of the Comm. on the Judiciary*, 113th Cong. (2014), http://judiciary.house.gov/_cache/files/6e799edc-1cb8-4365-a9bb-e48c32b91353/113-105-88240.pdf.

118 *Id.* at 396.

119 *Id.*

120 *Id.* at 398.

121 *Statement of MaryBeth Peters*, *supra* note 57 ("The increased transactional costs (e.g., arguably duplicative demands for royalties and the delays necessitated by negotiating with multi-

Marybeth Peters specified in her 2005 Statement on Music Licensing Reform that the statutory rate "placed artificial limits on the free marketplace," and that "[v]irtually all other countries which at one time provided a compulsory license for reproduction and distribution of phonorecords of nondramatic musical works have eliminated that provision in favor of private negotiations and collective licensing administration."[122] Basic economic principles tell us that government-imposed price ceilings create shortages of goods.[123] While a song composition is not a tangible good that is limited in quantity, the price ceiling nevertheless harms the market for song compositions and creates a shortage in quality music. The statutory rate of 9.1 cents incentivizes music users to obtain only the licenses for popular songs, which, in a fair and competitive market, would be greater than 9.1 cents. This practice compromises the true value of popular song compositions, and, at the same time, takes away the opportunities for lesser-known songs to be used, which account for more than ninety percent of the music industry.[124]

Likewise, costs arising from compulsory performing rights licenses harm the music industry. As ASCAP and BMI are the two biggest performing rights organizations in the United States, any decision made by the rate court judges directly affects the majority of the songwriters.[125] Because the consent decrees compel the issuance of licenses upon request, the PROs need to provide interim licenses to their licensees if both parties cannot settle on a rate. If the interim license is assumed to be more favorable to the licensees, they may delay providing the PRO with adequate information on the music's use, thus making it impossible for the PRO to determine a rate that reflects the market value of the song compositions.[126] The compulsory nature of the license and the costly and

---

ple licensors) also inhibit the music industry's ability to combat piracy. Legal music services can combat piracy only if they can offer what the "pirates" offer. I believe that the majority of consumers would choose to use a legal service if it could offer a comparable product.").

122 *Id.*

123 LIBBY RITTENBERG & TIMOTHY TREGARTHEN, ECONOMICS 93 (Worth Publishers, 2d ed. 1999), https://books.google.com/books?id=HveHgrID5GYC&printsec=frontcover#v=onepage&q&f=false ("A price ceiling that is set below the equilibrium price creates a shortage that will persist.").

124 Derek Thompson, *The Shazam Effect*, THE ATLANTIC (Dec. 2014), http://www.theatlantic.com/magazine/archive/2014/12/the-shazam-effect/382237/?single_page=true ("The top 1 percent of bands and solo artists now earn 77 percent of all revenue from recorded music, media researchers report.").

125 ASCAP, *supra* note 81.

126 *Antitrust Consent Decree Review*, *supra* note 11.

time consuming rate court process therefore put music licensees in an advantageous position where they can almost always obtain licenses at a discounted rate.[127]

While individual songwriters and publishers are not subject to the compulsory licenses imposed by the DOJ,[128] the majority of copyright holders choose to be members of the two PROs because of the convenience and efficiency of having collection agencies manage their rights. Due to the myriad of performing rights licenses issued in the United States (for example, licenses for music played and performed on the radio and television, in restaurants and bars, at concert venues, etc.), it is nearly impossible for individual rights holders to collect royalties by themselves. Performing rights organizations such as ASCAP and BMI are therefore indispensable to the music industry because they ensure (1) efficient royalty collection for rights holders and (2) seamless transactions between licensees and licensors within and outside the music industry.

Without sufficient revenue to support their work, songwriters would not have the means or incentive to create—the industry could shrink to the point where pop music is the only genre that has adequate support to survive, thus depriving the public of other categories of quality music. In fact, the current music industry evidences such effect, where pop music—specifically, the top ten best-selling tracks—increasingly dominates radio airplay: "[t]op 40 stations last year played the 10 biggest songs almost twice as much as they did a decade ago."[129] As a result, while the "advent of do-it-yourself artists in the digital age may have grown music's long tail, [its] fat head keeps getting fatter."[130] Popularity, however does not indicate quality:

> [Research shows that pop music is] growing increasingly bland, loud, and predictable, recycling the same few chord progressions over and over. The study, which looked at 464,411 popular recordings around the world between 1955 and 2010, found that the most played music of the new millennium demonstrates "less variety in pitch transitions" than that of any preceding decade.[131]

---

127 ASCAP, *supra* note 67.

128 *Notice*, *supra* note 6.

129 Thompson, *supra* note 124 ("[The] 10 best-selling tracks command 82 percent more of the market than they did a decade ago.").

130 *Id.*

131 *Id.*; *see* Lenika Cruz, *In Music, Uniformity Sells*, THE ATLANTIC (Jan. 4, 2015, 8:20 AM), http://www.theatlantic.com/entertainment/archive/2015/01/in-music-uniformity-sells/384181/?cu-

Because the music industry's "fat head keeps getting fatter,"[132] the revenue does not make its way to other talented songwriters and, instead, stays concentrated in the group of "increasingly bland" pop music.[133]

Fair market negotiation weakens the monopoly that top-selling song compositions have over the market for music licenses. If the privately negotiated rate for a popular song is too high, the music user will be compelled to license a less popular song at a lower rate, thereby distributing the income to other copyright holders. Similarly, if popular songwriters and publishers can refuse to license their song compositions, music users will try to obtain licenses for other, lesser-known copyrighted works. This expands the music industry—different types of music will be involved and songwriters will have more incentive to create, which will prevent the music industry from experiencing a shortage in diverse and quality music.

2. Potential Issues with Free Market Negotiation

i. Free Market Negotiation May Limit the Public's Access to Music and May Burden Online Music Services

One issue stemming from eliminating compulsory licenses is that the public's access to music might be limited because paying a potentially higher rate makes it difficult for current music services, such as Pandora, to survive.[134] Rep. Collins countered that argument in the congressional hearing on June 25: "[There is a lot of businesses in this country who go out of business because they can't afford their cost. That is an issue we have to deal with on both the broadcaster side and the digital side. The performers and the copyright holders are in the middle."[135] A songwriter's right to receive income at a fair market rate should not be abrogated just because licensees want to cut down their costs.

Another potential issue with the elimination of compulsory licenses is that copyright holders may choose not to license their works. While a songwriter or publisher has the right not to license

---

rator=MusicREDEF ("[T]he success of a song or album *has little to do with its complexity or quality*, and more to do with social influence, or what *other* people seem to enjoy listening to.").

132 Thompson, *supra* note 124.

133 *Id.*

134 Glenn Peoples, *Industry Argues Its Worth to Congress (and Itself) in Second Round of Testimony*, BILLBOARD (Jun. 25, 2014, 4:38 PM), http://www.billboard.com/biz/articles/news/legal-and-management/6133928/industry-argues-its-worth-to-congress-and-itself-in.

135 *Music Licensing Under Title 17*, *supra* note 117.

in the absence of compulsory licenses, she should know that it is to her advantage to make her music available. The value of a song composition decreases if it becomes irrelevant to today's music listeners: "If an artist's song should fall into disuse, the value of the copyright will decline over time, along with the number of people who may still remember it."[136] To maximize a composition's value, its owner has the incentive to issue licenses in order to gain exposure for the copyrighted work. For example, songwriters will want other recording artists to cover their works because this will help expose their music to the public. Getting rid of the compulsory license therefore will not stop songwriters from licensing their song compositions—it simply eliminates the price ceiling and accords to copyright holders a rate that reflects the market value.

Additionally, a copyright holder's refusal to license his or her work will not harm the music industry—it may in fact help the industry by forcing songwriters to create original works or cover songs that are lesser known, which will open up opportunities for other artists. A study shows that consumers and record labels are more likely to prefer popular music, not because of its quality, but merely because of the song ratings.[137] This creates a downward spiraling cycle, where the same type of music is being recycled and produced, thus blocking the market entrance for new and arguably higher quality music. This puts music listeners at a disadvantage because they don't know what they are missing. Additionally, the lack of competition will lead to lower quality music.

Collection agencies and blanket licenses address the issues of inefficiency that may arise due to the elimination of compulsory licenses.[138] As members of the collection agencies, copyright owners need not worry about keeping track of where and how their works are being used as the agencies will manage and account for the royalties earned. Licensees also spend less time looking for and negotiating with the rights owners by simply obtaining blanket

---

136 AL KOHN & BOB KOHN. KOHN ON MUSIC LICENSING 1039 (Aspen Publishers, 2d ed. 1996).

137 Thompson, *supra* note 124 (In a study on the influence of song rankings, researchers showed that "popularity can be a self-fulfilling prophecy." According to the study, "participants who saw rankings were more likely to listen to the most-popular tracks.").

138 *Statement of MaryBeth Peters*, *supra* note 57. According to Peters, most countries have substituted the compulsory licensing system with collective administration. In the United States, "[d]omestic performing rights organizations, such as ASCAP, BMI and SESAC, have already proven that collective licensing can and does succeed in this country." Peters urges the United States to embrace "a system of private, collective administration, which would restore the free marketplace as well as bring the United States in line with the global framework in which digital transactions must necessarily operate." *Id.*

licenses that cover a great and diverse selection of music. However, a copyright holder may decide not to assign his or her rights to a collection agency like the Harry Fox Agency or any of the PROs. Therefore, a music licensee needs to negotiate directly with the copyright holder. In that case, several issues regarding fairness and efficiency may surface, which we will discuss below.

ii. Songwriters Lacking Bargaining Power Will not be Able to Negotiate a Rate that Accurately Reflects the Song's Value

The American Association of Independent Music ("A2IM") asserts in its response to the Notice that the compulsory license is the proper mechanism to ensure fairness in music licensing: "The CRB process supports A2IM's belief that each song is created equal and each copyright holder should be compensated equally for each song, and that size of the creator of the song performance or the economic power of the investor in the sound recording should be irrelevant."[139] According to A2IM, consumers and market demand (evidenced, for example, in the number of streams and purchases) should determine the portion of wealth attributed to specific songs, not how powerful a copyright holder is in negotiating a license fee.[140] While A2IM has a valid point on how the license rate should not depend on one's bargaining power, they make the incorrect assumption that compulsory licenses facilitate fairness in music licensing. Compelling copyright holders to license their works at a substandard license rate creates a loss in income for the songwriting and licensing industries. Additionally, due to the existence of blanket licenses and collection agencies, compulsory licenses no longer serve the purpose of promoting efficiency in music licensing—instead, their existence merely abrogates the copyright holders' rights.[141]

In contrast to A2IM's belief, compulsory licenses and statutory rates are arbitrary and do not serve any meaningful purpose other than to create a price ceiling or barrier that denies copyright owners full compensation. Even if independent artists do not have as much leverage as major artists, they still do not receive fair com-

---

[139] A2IM, *Response to Request for Comments: Music Licensing Study Comments by the American Association of Independent Music ("A2IM")*, U.S. COPYRIGHT OFFICE (May 23, 2014), http://copyright.gov/docs/musiclicensingstudy/comments/Docket2014_3/American_Association_of_Independent_Music_MLS_2014.pdf.

[140] *Id.*

[141] *Statement of MaryBeth Peters*, *supra* note 57.

pensation due to the statutory rate. The statutory rate merely shrinks the income of all copyright holders—thus, independent artists are receiving even less than what they would have received if free market negotiation were to replace compulsory licenses. By stating that compensation varies due to consumer demand, A2IM counters its own argument that all music compositions are created equal.[142]

In a competitive environment where the barrier of entry is low or nonexistent, consumer demand determines the value of the song, which will be reflected in the negotiated licensing fee. However, as A2IM suggests, a copyright holder that has great bargaining power can negotiate a higher than market value price, and one lacking leverage is likely to succumb to a license fee that is lower than the market value and even the current statutory rate of 9.1 cents. With the compulsory mechanical license, an independent artist is therefore at least guaranteed the minimal income of 9.1 cents. Eliminating the compulsory license raises the problem that smaller, less popular artists may not have the bargaining power to negotiate license fees that correctly reflect the fair market value of their music.[143]

iii. Negotiation Slows Down the Music Licensing Process

Compulsory licenses force copyright holders to license their material even when they are unsatisfied with the license fee. Additionally, the low statutory rate makes it inexpensive for music users to license song compositions. Compulsory licenses put music licensees at an advantage over licensors; they cut short the time and costs arising from private negotiations. Replacing compulsory licenses with free market negotiation therefore adds back into the music licensing process the time and fee normally associated with unrestricted negotiation.

In a fast flowing music industry, timing is of utmost importance; a lagging negotiation process slows down the entire music industry. In a perfect world, negotiators would be able to reach consensus on the fee quickly with both parties leaving the table satisfied. In reality, factors such as the genre, popularity, use, personal grievances, and the bargaining power of the licensee and licensor may impede the negotiation process, which will have a domino effect on the entire music industry. In a world without

---

142 A2IM, *supra* note 139 ("The only differentiation in pay should be based upon consumer demand for the music, e.g. the number of streams each receives, not the ownership company.").

143 *See infra* Part IV.

compulsory licenses, a composition cannot be performed at a concert or used in a television commercial without the copyright holder's consent. A singer who wants to record and perform a cover of a song for popular television shows, such as *American Idol* or *The Voice*, may not do so until they acquire the necessary licenses.

While this may inconvenience the licensee, the licensor is also harmed because the slow negotiation process limits and slows down the composition's exposure to the listening public. For a songwriter, any opportunity for exposure is crucial as it will help his or her work stay relevant and valuable in the industry.[144] A major label may revoke its offer to record a lesser-known song composition if the time taken away from the negotiation proves to be more costly than the actual license fee itself. Due to the lack of bargaining power, an independent artist may therefore hastily agree to license at a fee far below the song's market value, thus compromising the value of his or her work.

IV. Using Mediation to Promote Efficiency and Fairness

Private negotiation between two parties can be costly and time consuming. It can be a lengthy process that requires legal assistance and traveling. Moreover, a copyright holder without leverage in the music business will have trouble negotiating a license fee that accurately depicts the value of his work in the market.[145] For example, an independent artist with tremendous talent and a loyal fan base, but whose music lacks radio airplay, may have to accept inadequate contractual terms as they are.[146] However, if the compulsory licenses stay intact, all songwriter and copyright holders in the music industry will consistently be held to their disadvantage and never be accorded the true value of their compositions. This has a deleterious effect on the quality of available music and also prevents the music industry from expanding.[147]

Online mediation addresses the problems of fairness and efficiency by helping the licensor and licensee understand each other's interests in a fast and inexpensive manner. In the sections below,

---

144 Kohn & Kohn, *supra* note 136.
145 Rosenthal, *supra* note 97.
146 *Id.*
147 *See supra* Part III.B.

we will explore the relevant types of traditional and online mediation that may prove helpful in the music license marketplace.

A. *Relevant Types of Mediation*

1. Facilitative Mediation

As noted above, eliminating compulsory licenses is necessary to achieve a fair licensing environment. However, direct private negotiation in the absence of compulsory licenses and collection agencies may create problems of inequity and inefficiency. In recent years, music professionals have recognized the value of dispute resolution mechanisms with respect to music licensing.[148] Mediation, especially facilitative mediation, is a dispute resolution mechanism that can greatly assist the licensee and licensor in reaching a satisfactory outcome when negotiation becomes stagnant or unfair.

Compared to other dispute resolution mechanisms (arbitration, for example), facilitative mediation is more flexible due to its "ability to work on many issues at the same time and focus the parties on their relationship concerns."[149] By analogizing to a spider web, Carol Menkel-Meadow describes the deleterious effect arbitration may have on situations that can be more aptly resolved with mediation: "Where a problem was like a 'spider web' in which unraveling one thread of a 'polycentric' problem . . . might destroy the whole web, mediation, with its ability to work on many issues at the same time and focus the parties on their relationship concerns, would be better."[150] Like a spider web, music licensing concerns a multitude of different factors, including the type of music composition, the popularity of the work, the proposed use, the timing, the distinct characteristics of the artist or songwriter, and the relationship between the licensor and licensee. A song composition worth monetarily close to nothing today can, due to a performance on national television, become overnight the most sought

---

148 NSAI, *Comments from Bert Herbison, Executive Director, Nashville Songwriters Association International, on "Music Licensing Study" before the United States Copyright Office, Library of Congress*, U.S. COPYRIGHT OFFICE (Sep. 11, 2014), http://copyright.gov/docs/musiclicensingstudy/comments/Docket2014_3/extension_comments/Nashville_Songwriters_Association_International_NSAI.pdf.

149 Carrie Menkel-Meadow, *Mothers and Fathers of Invention: The Intellectual Founders of ADR*, 16 OHIO ST. J. ON DISP. RESOL. 1, 16 (2000).

150 *Id.* at 16.

after work.[151] Due to the music industry's constant fluctuation, mediation is the appropriate mechanism because it is able to meet the always-changing needs of music professionals.

Consequently, facilitative mediation benefits the music licensing industry by (a) helping the licensor and licensee achieve their respective interests without disadvantaging the other and (b) necessarily preserving the relationship between the two parties.[152] First, instead of directly coming up with a solution, the mediator helps the parties resolve their own issue by highlighting their respective interests. A singer-songwriter with little bargaining power can therefore use this opportunity to make his or her interests known. The record label can also present its own interests. Rather than feeling apprehension from agreeing on terms that are less than ideal, the singer-songwriter or record label will have the opportunity to understand the opposite party's reasoning. The process will ameliorate feelings of negativity, which makes it more likely for the parties to come to an agreement.

In the music industry, licensors and licensees usually enter into exclusive long-term contracts. For example, a typical recording agreement between a record label and a singer-songwriter gives record labels the right to extend the agreement for another term (an agreement might include six option periods, which the record label can exercise at the end of each term).[153] It is therefore crucial that both parties know and are satisfied with what they are agreeing on. It is also equally important for the parties to maintain a good relationship with each other, since the agreement may exist for many years. Mediation is "essentially a private process between a third party facilitator and two parties already in a relationship or trying to make a relationship work."[154] By placing emphasis on preserving the relationship,[155] facilitative mediation helps the licensor and

---

151 Keith Caulfield, *Robyn's 'Dancing' Gets a Big Bump From 'Girls' Golden Globe Wins*, BILLBOARD (Jan. 14, 2013, 8:06 PM),http://www.billboard.com/articles/news/1499662/robyns-dancing-gets-a-big-bump-from-girls-golden-globe-wins ("Label sources indicate that the song's daily sales tripled on [the night of the Golden Globes] from its normal daily average.").

152 John Rymers & Debbie Reinberg, *Contrasting Styles of Mediation: Evaluative, Facilitative and Transformative*, ELDERESOLUTIONS, http://www.cobar.org/repository/Inside_Bar/Elder/10.15.09/CONTRASTING%20TYPES%20OF%20MEDIATION.pdf; (last visited Feb. 14, 2015) *see* Menkel-Meadow, *supra* note 149.

153 Julia Bell & Juan Lopez, *Recording Agreement Explained Part 2: Term and Options*, AVENANT MUSIC AND MEDIA LAW, http://www.avenantlaw.com/recording-agreement2/ (last visited Feb. 14, 2015).

154 Menkel-Meadow, *supra* note 149, at 17.

155 *Id.*; *see* Rymers & Reinberg, *supra* note 152.

licensee achieve an outcome that have both parties leaving the table satisfied and sympathetic of each side's interests.

2. Online Mediation

While facilitative mediation can help the licensor and licensee reach a satisfying outcome and can also preserve their business relationship, it may be inefficient. Because the process "requires skillful planning by the mediator and substantial understanding of the parties' interests"[156] as well as finding a place for the mediation to take place, it can be costly and time consuming. In the music industry, fast and concise transactions are crucial to ensure the seamless flow of business. For example, *The Voice*, a popular television show, showcases live performances of songs that are then distributed to music listeners the very next day via iTunes. The show airs weekly and sometimes two nights in a row.[157] Failing to acquire performing rights licenses for the live television show and mechanical licenses for distribution on iTunes can greatly delay or prevent the show from proceeding. The songwriter benefits from having his or her music performed and exposed on television.[158] Additionally, as technology continues to advance, there is more global demand for licensed music.[159] Promptness and efficiency are therefore indispensable to the industry's growth and welfare.

Online mediation meets the need for efficiency. In contrast to in person or offline mediation, online mediation is cheaper[160] and more readily available:

> An asynchronous ODR process can occur twenty-four hours a day, seven days a week, at the parties' and mediator's convenience. The parties, their attorneys or advocates, and the mediator do not have to travel to a distant location. There is no

---

156 Rymers & Reinberg, *supra* note 152.

157 *The Voice*, NBC, http://www.nbc.com/the-voice/ (last visited Feb. 14, 2015).

158 Caulfield, *supra* note 151.

159 IFPI, DIGITAL MUSIC REPORT 2014: LIGHTING UP NEW MARKETS 5 (IFPI 2014), http://www.ifpi.org/downloads/Digital-Music-Report-2014.pdf ("[D]igital music is moving into a clearly identifiable new phase as record companies, having licensed services across the world, now start to tap the enormous potential of emerging markets . . . Emerging markets have huge potential, and, through digital, the music business is moving to unlock it. Most of these territories are seeing internet and mobile music penetration soaring, with rising demand for handheld devices.").

160 Llewellyn Joseph Gibbons et al., *Cyber-Mediation: Computer-Mediated Communications Medium Massaging the Message*, 32 N.M.L. REV. 27, 43 (2002), http://www.mediate.com/pdf/ODR_CMC_NEW_MEXICO.htm ("In the ecommerce context it may be the only financially feasible option for low dollar value disputes and for individuals who cannot afford to travel long distances (at great expense) to resolve a dispute").

> expense to provide a neutral facility at which to conduct the mediation.[161]

Online mediation can proceed in the comfort of the parties' usual place of business, where every document and information they need is within their reach.[162] Additionally, web-based, online mediation seems to be more successful in helping parties reach an agreement.[163]

i. Automated Mediation

There are three types of online mediation that can assist licensees and licensors in reaching an agreement: automated mediation, crowd-sourced mediation, and traditional mediation utilizing computer technology, such as videoconference, email, and instant message. Automated mediation uses a computer software that helps parties resolve the existing issue themselves. Because of its data of past disputes, an automated mediation system, such as Square Trade,[164] is able to categorize the different types of disputes that generally occur, "which allows it to create forms which the parties fill out and these forms clarify and highlight both what is dividing the parties and what solutions are desired."[165] Similarly, the proposed AutoMed (an automated mediation mechanism for "bilateral negotiations under time constraints") collects the negotiators' preferences, creates a WCP net[166] from the preferences, comes up with a list of all *pareto optimal*[167] agreements from the WCP net, and finally suggests an agreement if both parties are unable to come up with a pareto optimal agreement themselves.[168]

---

161 *Id.* at 42.

162 *Id.*

163 Ethan Katsh, *Bringing Online Dispute Resolution to Virtual Worlds: Creating Processes Through Code*, 49 N.Y.L. SCH. L. REV. 271, 278 (2004), http://www.nylslawreview.com/wp-content/uploads/sites/16/2013/11/49-1.Katsh_.pdf ("Not only do parties seem more willing to negotiate via the Web than via email but the negotiations are more frequently successful.").

164 *Id.* at 278.

165 *Id.*

166 Michal Chalamish & Sarit Kraus, *AutoMed – An Automated Mediator for Bilateral Negotiations Under Time Constraints*, *in* PROCEEDINGS OF THE 6TH INTERNATIONAL JOINT CONFERENCE ON AUTONOMOUS AGENTS AND MULTIAGENT SYSTEMS 1 (AAMAS 2007), http://www.ash-college.ac.il/cs/.upload/staff/michalChalamish/AAMAS07_0294_af32d078.pdf (a weighted consumer preference network, after considering each party's preference, gives a numerical value to each suggested outcome).

167 *Id.* at 2. ("An agreement is *pareto optimal* . . . if there is no other agreement that is better for one negotiator without being worse to its opponent.").

168 *Id.*

In disputes concerning purely monetary matters, blind bidding mechanisms, such as Cybersettle,[169] allow two negotiators to propose their own settlement amounts; the software then creates potentially three rounds of settlement.[170] During the first round, if each party's settlement amount is within thirty percent of the other party's amount, the computer software will declare a settlement amount.[171] If the first amount is not within the thirty percent range, the parties move on to the second or third round.[172]

Despite being cost and time efficient, automated mediation neglects an important value of traditional offline mediation—face-to-face interaction. A mediator has a better grasp during traditional face-to-face mediation in creating an amicable and trusting environment—both parties are more likely to listen to each other's interests and intentions.[173] A significant issue with automated mediation is that it may not be as helpful as offline mediation in facilitating and preserving the ongoing relationship between a licensor and licensee.

ii. Crowdsourced Mediation

Another mechanism for online mediation is crowdsourced mediation, where parties utilize the crowd's judgment to determine an outcome. In contrast to traditional mediation where only one mediator is involved, crowdsourced mediation gathers information and questions from a collective group of people, which arguably leads to more transparency and information.[174] Instead of a single

---

169 Joseph W. Goodman, *The Pros and Cons of Online Dispute Resolution: An Assessment of Cyber-Mediation Websites*, 2 DUKE LAW & TECH. REV. 1, 1-16 (2003), http://scholarship.law.duke.edu/cgi/viewcontent.cgi?article=1073&context=dltr.

170 Robert R. Marquardt, *Settling Disputes Online: Just Another Tool, or are Negotiators, Mediators and Arbitrators Approaching Extinction?*, ADR RESOURCES (last visited Feb. 14, 2015), http://adrr.com/adr4/sdo.htm.

171 *Id.*

172 *Id.*; *see* Katsh, *supra* note 163.

173 Anthony J. Fernandez & Marie E. Masson, *Online Mediations: Advantages and Pitfalls of New and Evolving Technologies and Why We Should Embrace Them*, 81 DEF. COUNS. J. 395, 395-403 ("[The] mediator's perception of emotions from each of the parties during traditional mediation enables her to convey the verbal and non-verbal messages qualified by the parties' attitudes, which is an aspect of the mediation process that cannot be conveyed during fully automated online mediations.").

174 Daniel Dimov & Jaap Van den Herik, *Towards Crowdsourced Online Dispute Resolution, Part 3*, MEDIATE.COM (Jan. 2012), http://www.mediate.com/articles/DimovD3.cfm ("If CODR [Crowdsourced ODR] uses mediation or negotiation, the parties and mediator or facilitator may use information provided by the crowd in order to facilitate the process and reach a decision. For instance, the crowd's opinion may better inform them about their BATNA, which will facilitate the dispute resolution process.").

individual, the crowd acts as mediator to facilitate the negotiation between the two parties.[175] The group can then collectively recommend and/or vote on the best outcome.[176] In order to retain every participant's opinion, it is ideal to have everyone in the crowd ask the negotiating parties questions. However, if the crowd has a great number of people, it may be impractical as the entire process may take an exceedingly long period of time. Instead, the better and more pragmatic approach is to take questions from a smaller group of individuals who best represent the diversity of the bigger group.[177]

With respect to music licensing, the licensor and licensee benefit from crowdsourced mediation. The crowd, due to the consolidation of different knowledge and expertise, can give insight to the history and trends in the music industry, provide a more accurate BATNA,[178] and allow both parties to better understand the position of the other party (for example, the licensor will be less wary in signing a contract if he or she acknowledges that the licensee is suggesting terms that are better than the traditional terms used in the industry). Additionally, because crowdsourced mediation can only take place if the negotiating parties reveal their information to the crowd,[179] the licensor and licensee have incentive not to lie or bluff about their positions—the crowd ultimately acts as a check against the parties. Having a diverse group of people who have great knowledge of the music industry and who also represent the different professions within the industry will minimize bias, thus creating a more fair, informed, and satisfied decision.

While crowdsourced mediation is valuable in that it provides transparency and widens the range of available information, the parties may feel uncomfortable publicizing the information used in their negotiation. Revealing trade secrets and past negotiations can hurt the parties and weaken their bargaining power in future negotiations with other parties. To give the parties more confidence and security in revealing their information, the participants (the crowd) in the crowdsourced mediation should sign non-disclosure agreements. Additionally, clear instructions should be given on what can or cannot be asked by the crowd. Finally, to protect the negotiating parties, specific information—the parties' identities

---

175 *Id.*

176 *What is Ujuj?*, UJUJ, http://www.ujuj.org/whatisujuj.html (last visited Feb. 14, 2015).

177 Dimov & Van den Herik, *supra* note 174.

178 *Id.*

179 *What is Ujuj?*, *supra* note 176.

(if requested not to be exposed), the parties' net worth, and their income statements—should not be revealed. Only the following facts should be taken into consideration: the song composition, genre, use, length, time and date of the use, targeted market, past uses of the works, and type of licensee and licensor. These facts should be sufficient to help the crowd come up with recommendations for the negotiation's outcome.

B. *Proposed Solution: An Escalating Online Mediation System for Music Licensing*

Online mediation is the best mechanism to help music licensors and licensees reach a satisfied agreement in an efficient manner. However, there is not one type of online mediation that caters to all the complex issues arising from music licensing. Different factors—the genre of the song, the popularity of the song, the use, the songwriter, and many more—constantly influence a song composition's monetary worth. To reach a satisfactory outcome, the negotiating parties should have easy access to different types of online mediation at one location.

A Web-based, escalating online mediation system provides multiple stages of mediation.[180] It gives disputing parties the opportunity to utilize the mediation mechanism that is most compatible to the characteristics of their negotiation. Moreover, the Web interface "provides a more structured set of exchanges between the parties than occurs with email . . . [The] use of the Web provides a structure and format that allows parties to participate whenever they wish and with a mediator who may be located anywhere."[181] SquareTrade, for example, offered an escalating two-stage mediation system on the Web for disputes relating mostly to eBay sellers and buyers. In the first stage, which SquareTrade labeled as "Direct Negotiation," parties utilize an online automated resolution tool that "enables parties to articulate, vent, see opportunities for compromise and hopefully achieve self-settlement."[182] If the parties fail to reach an agreement in Direct Negotiation, the mediation process escalates, where the "resolution can be facilitated by a pro-

---

[180] Steve Abernethy, *Building Large-Scale Online Dispute Resolution & Trustmark Systems*, *in* PROCEEDINGS OF THE UNECE FORUM ON ODR (UNECE 2003) 1, 7, http://www.mediate.com/Integrating/docs/Abernethy.pdf.

[181] Katsh, *supra* note 163, at 278–79.

[182] Abernethy, *supra* note 180, at 7.

fessional human third party, primarily deploying traditional mediation, but all online."[183] Having taken on more than 800,000 disputes in over 120 countries,[184] SquareTrade's two tiered mediation system was highly successful. More importantly, it was able to "enhance[ ] trust and reduce[ ] the sense of risk that [was] felt by potential purchasers,"[185] an achievement crucial to improving and expanding the e-commerce universe.

Similar to the ecommerce context, there should also be a Web-based, escalating mediation system to facilitate negotiation or resolve disputes between music licensors and licensees. Instead of solely employing automated and traditional mediation, crowdsourced mediation should also be included. As mentioned previously, crowdsourced mediation benefits the music licensors and licensees. Because of the new technologies and constant fluctuation of trends and preferences, a diverse crowd of music industry professionals can provide great insight, thereby helping both parties—the music licensor and licensee—reach a more informed and satisfied resolution.

By imitating SquareTrade's model, an escalating online mediation system would first—by employing an automated resolution software—allow the parties to settle on a licensing fee by themselves. It would also be helpful to include the blind-bidding mechanism, as demonstrated by Cybersettle,[186] to facilitate negotiations regarding one-time monetary transactions (for example, a small YouTube artist who wants to record a cover song can quickly obtain the license via the blind-bidding mechanism). As the music industry becomes increasingly globalized, licensees and licensors from all over the world will have more opportunities to work together. The most efficient way for parties in different countries to collaborate with each other is to communicate online. Automated mediation therefore meets the need for parties to quickly settle on a license fee without having to travel and negotiate in person.

If automated mediation does not resolve their issue, the parties can choose to employ either online traditional mediation or crowdsourced mediation by paying a small fee. Crowdsourced me-

---

183 *Id.*

184 *Id.* at 2.

185 *Id.*

186 Goodman, *supra* note 169, at 3 (Cybersettle gives three rounds of bidding, thus allowing the initiating party to enter a different settlement offer for each round. Its computer software then contacts the other party, requesting them to enter counteroffers. The software then compares the different offers at each round to determine whether they're within the range of settlement.).

diation gives the parties more transparency and information on the issue, but it invites many people outside the negotiation to participate. While it is more likely that the parties will reach a satisfied outcome due to increased transparency and information, the parties may not want to disclose the details of their negotiation to outside participants. In that case, they can opt for online traditional mediation, where a human mediator can help facilitate the negotiation or resolve the issue.

A major record label or a party that has great bargaining power may not want to join this system. After all, they can use their leverage to compel the other party to sign an agreement that is favorable to them. However, it is to their long-term benefit to utilize this mediation system. Mediation allows the negotiating parties to understand each other's interests and needs,[187] thus minimizing feelings of inferiority and apprehension. As a result, the relationship between the parties is preserved and even strengthened, which encourages future collaborations. Additionally, a major record label or any powerful, well-known music company can boost its image by announcing its use of the online escalating mediation system. By adding their names to the list of users on the system's website, big companies or popular songwriters can promote their willingness to work fairly with potential licensors or licensees, therefore displaying flexibility instead of stone-cold stubbornness. This may give smaller companies, publishers, and songwriters more confidence and enthusiasm to communicate and collaborate with them.

V. Conclusion

The music industry is constantly changing due to new technologies, trends, and consumer preferences. Licenses are necessary for the recording, distribution, and performance of music. However, due to the compulsory licenses imposed by the Copyright Act and the DOJ, songwriters and licensors are compelled to license their music creations at substandard rates, such as at 9.1 cents for mechanical licenses. Because of the statutory rate and the compulsory nature of the mechanical and performing right licenses, music creators and owners are arguably receiving less than the fair market value of their works. Moreover, the creators and owners do

187 Rymers & Reinberg, *supra* note 152.

not have the option to refuse licensing their works, even if the licensees want to use the works for purposes that may diminish the works' value. In light of the technological advances, current economy, and fluctuating preferences of listeners, compulsory licenses have proved to be outdated, inefficient, and unfair.[188]

Numerous music professionals are currently petitioning for the elimination of the compulsory mechanical license and the consent decrees.[189] Ideally, fair market negotiation would allow both licensors and licensees to achieve their needs without abrogating the other party's interests. However, due to issues of leverage and time, private one-on-one negotiation may potentially burden an individual with little bargaining power and impede the music licensing process—this creates a domino effect, thereby slowing down the entire music industry. Royalty collection agencies, such as HFA, ASCAP, and BMI, address these problems through collective licensing and blanket licenses.[190] However, the issues of inefficiency and leverage persist when a copyright owner chooses not to join the collection agencies.

With regard to the abovementioned issues, the negotiating parties should utilize online mediation to reach a satisfactory outcome while preserving their business relationship. Online mediation is beneficial to the music industry because it reduces the time and costs of negotiating in person. However, online mediation comes in different forms, ranging from human facilitative mediation to automated mediation. Due to the constantly changing listeners' preferences, the different genres of music, and the unique characteristics of licensors and licensees, one single type of mediation does not sufficiently address all of the parties' the needs. The music industry should therefore create an escalating mediation system,[191] where the licensor and licensee can easily access the mediation technique that best caters to their needs. My proposed escalating mediation system includes three forms of online mediation: (1) automated, (2) crowdsourced, and (3) traditional. This system will use a Web interface, which has proved to generate successful results.[192]

---

188 *Statement of MaryBeth Peters*, *supra* note 57.

189 *Id.*; *see Notice*, *supra* note 6, at 14741.

190 *Statement of MaryBeth Peters*, *supra* note 57.

191 Abernethy, *supra* note 180.

192 Katsh, *supra* note 163, at 278 ("Not only do parties seem more willing to negotiate via the Web than via email but the negotiations are more frequently successful.").

Giving negotiating parties a one-stop access to all three types of mediation techniques takes into account the myriad factors influencing the license rate that compulsory licenses neglect. It also pushes parties out of the stalemate that regularly occurs when two negotiating parties cannot agree on an outcome. Additionally, for copyright holders or licensors with little bargaining power, the escalating mediation system is a safeguard against unfair contracts of adhesion. Instead of asking for government intervention that may benefit one party and disadvantage another, music licensors and licensees should use an escalating online mediation system in order to reach a more efficient and fair outcome.