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Oh Mercy: How on-Demand Interactive Streaming Services Navigate the Digital Music Rights Licensing Landscape

**OH MERCY: HOW ON-DEMAND INTERACTIVE STREAMING SERVICES NAVIGATE THE
DIGITAL MUSIC RIGHTS LICENSING LANDSCAPE**

By: Rick Marshall¹

INTRODUCTION

On March 14, 2012, Billboard shook up the music industry by announcing it had modified its “Hot 100” formula to account for online, on-demand streaming.² It also unveiled its new “On-Demand Songs Chart” for rating a song’s popularity based on the number of times consumers accessed it digitally.³ These announcements marked a significant milestone in the evolution of online music distribution into a legitimate business. As Bill Wilson, Vice President of Business Development and Digital Strategy at the National Association of Recording Merchandisers, put it: “The last year has seen an explosion of both subscribers and traffic to music subscription services, and the business is now contributing meaningfully to the music industry’s growing digital music revenues.”⁴ He added, “The new Billboard chart is the definitive endorsement of the importance of the music subscription market . . . its influence can only become more important in the future.”⁵

Many view the music industry’s transition to an online distribution-based business model as having been inevitable since Napster first made consumers aware of the ease with which they

¹ Rick Marshall recently received an LL.M. degree in Intellectual Property, Copyright, & Digital Copyright law & policy from The George Washington University Law School. You can contact him at: Rick.G.Marshall@gmail.com.

² See Billboard Staff, *Hot 100 Impacted by New On-Demand Songs Chart*, BILLBOARD, <http://www.billboard.com/news/hot-100-impacted-by-new-on-demand-songs-1006453952.story#/news/hot-100-impacted-by-new-on-demand-songs-1006453952.story> (last visited Nov. 4, 2012).

³ *Id.*

⁴ *Id.*

⁵ *Id.*

could access vast amounts of music online.⁶ Others insist the average listener's growing familiarity with online music download services,⁷ combined with the recent integration of on-demand interactive streaming services into social networking platforms,⁸ resulted in Billboard recognizing the need to amend its coronation process.⁹ Regardless of what caused this paradigm shift, two things are clear: online music distribution is here to stay and on-demand streaming audio is the "state of the art."

In recent years, a plethora of on-demand services began offering users the ability to stream an exhaustive catalog of songs.¹⁰ These services are all vying to become the "celestial jukebox" of choice for the rapidly growing segment of music consumers who prefer listening to unlimited music via on-demand interactive streams, rather than paying for individual records or downloads.¹¹ This article endeavors to explain how on-demand streaming services are able to navigate the modern music licensing landscape and deliver music to their ever-growing pools of subscribers.

Section I describes the difference between on-demand streaming services and other types of streaming services, then briefly discusses the history of the law pertaining to streaming technology. Section II identifies the specific rights that an on-demand streaming service implicates each time it streams a song to a user's computer or device. Section III uses a contemporary example to demonstrate exactly how an on-demand interactive service must go about securing the licenses necessary to stream a song without infringing the rights copyright

⁶ Steven Levy, *Steven Levy on Facebook, Spotify and the Future of Music*, WIRED, http://www.wired.com/magazine/2011/10/ff_music/all/1 (last visited Nov. 4, 2012).

⁷ See, e.g., iTunes.

⁸ See, e.g., Facebook.

⁹ *Id.*

¹⁰ See, e.g., Spotify, MOG, Earbits, iHeartRadio, Turntable, and Rhapsody.

¹¹ See Adam Fisher, *50 Best Websites of 2009*, TIME MAGAZINE, http://www.time.com/time/specials/packages/article/0,28804,1918031_1918016_1917959,00.html (last visited Nov. 11, 2012) (stating "[t]he holy grail of online music is what's known as a 'celestial jukebox': an archive of every album in the world, there just for the listening.").

holders have to their respective works. Finally, Section IV highlights some obstacles on-demand services face under the modern music licensing regime and suggests methods for simplifying the licensing process.

I. AN INTRODUCTION TO ON-DEMAND INTERACTIVE STREAMING SERVICES

A. On-Demand Interactive Streaming Defined

In simplest terms, streaming is a method of delivering and playing back data over the internet. Prior to the advent of streaming technology, a user who wished to access an audio file online had to download the entire file from a foreign location before it would play on their computer.¹² Streaming technology abbreviates this process by linking the user's computer with a "server" and allowing the user to listen to each piece of the audio file in succession as the server transmits a temporary copy of it to his or her computer.¹³ On-demand interactive streaming technology allows a user to listen to a specific audio file by logging on to a website or service, locating the file, and initiating a transmission process that results in the performance of that specific file.¹⁴ By contrast, non-interactive streaming technology allows a user to listen to a pre-programmed series of audio files, giving the user little or no control over the specific audio files a website or service transmits to his or her computer.¹⁵

Streaming technology took its first major step towards becoming the dominant means of audio file transmission in 1994, when the Rolling Stones partnered with a streaming service named MBone, which allowed users to access a non-interactive stream of live audio and video

¹² AL KOHN & BOB KOHN, KOHN ON MUSIC LICENSING 51 (4th ed. 2010) [hereinafter KOHN].

¹³ See *infra* Section II.

¹⁴ See W. Jonathan Cardi, *Uber-Middleman: Reshaping the Broken Landscape of Music Copyright*, 92 IOWA L. REV. 835, 850 (2007); see also Jay Anderson, *Stream Capture: Returning Control of Digital Music to the Users*, 25 HARV. J. L. & TECH. 159 (2011).

¹⁵ *Id.*

from one of its Voodoo Lounge Tour concerts.¹⁶ After the success of the MBone/Rolling Stones collaboration, several new streaming services began developing and introducing new versions of streaming software.¹⁷ In the decade and a half that followed, increases in internet connection bandwidth and other advances in compression technology led to the development of technology that made on-demand interactive streaming the preferred method for accessing music online.¹⁸

B. The Law Governing On-Demand, Interactive Streaming Services

In the mid-1990s, those entities in the record industry that traded in the large-scale creation and distribution of sound recordings¹⁹ faced the proliferation of new digital technologies capable of eroding their ability to control the physical phonorecord distribution market.²⁰ In an attempt to curb any copyright infringement the new technologies could facilitate, the entities lobbied for Congress to implement law that limited free access to digital audio transmissions and enabled them to offset infringement losses by recovering per-transmission royalties.²¹ Congress responded to their concerns by enacting the Digital Performance Right in Sound Recordings Act of 1995 (“DPRA”).²²

The DPRA created a new limited public performance right in sound recordings.²³ Specifically, it added the right to “perform the copyrighted work publicly by means of a digital

¹⁶ See Peter H. Lewis, *Peering Out a 'Real Time' Window*, THE NEW YORK TIMES (Feb. 8, 1995), <http://www.nytimes.com/1995/02/08/business/business-technology-peering-out-a-real-time-window.html?pagewanted=all&src=pm>; see also Anderson, *supra* note 13, at 165.

¹⁷ See also Anderson, *supra* note 13, at 165-66.

¹⁸ See Shervin Shirmohammadi & Jauvane C. de Oliveira, *Audio Streaming - Introduction, Audio Compression, Dissemination over the Network, Real-time Transport Protocol (RTP)*, ONLINE ENCYCLOPEDIA, <http://encyclopedia.jrank.org/articles/pages/6671/Audio-Streaming.html> (last visited Nov. 8, 2012); see also Anderson, *supra* note 13, at 165-66.

¹⁹ See, e.g., Recording Industry Association of America (“RIAA”) and the Digital Media Association (“DiMA”).

²⁰ See KOHN, *supra* note 11, at 1468 (explaining the role the RIAA and the DiMA played in Congress’ decision to create a digital performance right in sound recordings).

²¹ *Id.*

²² The Digital Performance Right in Sound Recordings Act of 1995 [hereinafter DPRA], Pub. L. No. 104-39, 109 Stat. 336 (1995).

²³ *Id.*

audio transmission” to the list of exclusive rights already afforded copyright owners under Section 106 of the Copyright Act.²⁴ The DPRA also distinguished between interactive and non-interactive streaming services and outlined the ways those services could go about obtaining the right to digitally transmit sound recordings from copyright holders.²⁵ Importantly, the DPRA made it significantly more difficult (and potentially more expensive) for interactive services to obtain digital transmission rights than it did for non-interactive services and non-subscription non-interactive services to do the same.²⁶

In the year after Congress enacted the DPRA, digital transmission software designers began introducing service models that blurred the line between the traditional concepts of interactive and non-interactive streaming.²⁷ As a result, hundreds of new streaming services began operating under the impression that, because they did not explicitly give users the ability to select and stream specific audio files, they could avoid paying the type of royalties copyright holders generally charged interactive services for the right to digitally transmit sound recordings.²⁸

Facing a second wave of pressure from copyright owners, Congress used the 1996 implementation of the Digital Millennium Copyright Act (“DMCA”) as an opportunity to clarify

²⁴ 17 U.S.C. § 106(6) (1995); *see also* 17 U.S.C. § 101 (1995) (stating that to transmit a performance is to “communicate it by any device or process whereby images or sounds are received beyond the place from which they are sent” and defining a digital transmission as a “transmission in whole or in part a digital or other non-analog format”).

²⁵ The act required interactive streaming services to negotiate with copyright holders for a license to exploit the digital transmission right, but gave non-interactive services the option to either negotiate with copyright holders for a license to exploit the digital transmission right or pay a statutorily determined royalty rate based on the number of times they digitally transmitted a protected sound recording. *See* Cardi, *supra* note 13, at 850-51; *see also* Skyla Mitchell, *Reforming Section 115: Escape from the Byzantine World of Mechanical Licensing*, 24 CARDOZO ARTS & ENT. L.J. 1239, 1255-58 (2007).

²⁶ *See* Cardi, *supra* note 13, at 850-51; Mitchell, *supra* note 24, at 1256-58.

²⁷ For example, some services offered archives of pre-recorded programs that users could move backwards and forward through. Other services allowed users to create personalized transmissions by highlighting and rating particular artists. *See* Steven M. Marks, *Entering the Sound Recording Performance Right Labyrinth: Defining Interactive Services and the Broadcast Exemption*, 20 LOY. L.A. ENT. L. REV. 309, 309 (2000).

²⁸ *See* KOHN, *supra* note 11, at 1468.

the definition of interactive streaming.²⁹ Under the DMCA, the current definition of interactive streaming service includes both those services that transmit a “specially created” stream of pre-programmed audio files based on a user’s preferences, and those on-demand services that transmit specific audio files (or specific groups of audio files) at a user’s request.³⁰ The remainder of this paper focuses on on-demand interactive services and identifies how they have exploited streaming technology in their bid to become modern-day “celestial jukeboxes.”

II. “LICENSE TO KILL” – THE RIGHTS ON-DEMAND INTERACTIVE SERVICES IMPLICATE

Each time a user streams a recorded performance of a song on an on-demand interactive streaming service, the user is accessing the two separately copyrightable components of the song: the sound recording and the underlying musical composition. In order for a streaming service to transmit and play the song on the user’s chosen multimedia device, the service must implicate the performance right and the mechanical rights of both the sound recording and the underlying musical composition.³¹ This section examines the aspects of the recorded performance, the rights the streaming transmission implicates, who owns these rights, and where a streaming service must go to acquire licenses to utilize a recorded performance without infringing them.

²⁹ See KOHN, *supra* note 11, at 1473 (“The RIAA Pulls a Fast One”).

³⁰ 17 U.S.C. § 114(j)(7) (2011):

An “interactive service” is one that enables a member of the public to receive a transmission of a program specially created for the recipient, or on request, a transmission of a particular sound recording, whether or not as part of a program, which is selected by or on behalf of the recipient. The ability of individuals to request that particular sound recordings be performed for reception by the public at large, or in the case of a subscription service, by all subscribers of the service, does not make a service interactive, if the programming on each channel of the service does not substantially consist of sound recordings that are performed within 1 hour of the request or at a time designated by either the transmitting entity or the individual making such request. If an entity offers both interactive and noninteractive services (either concurrently or at different times), the noninteractive component shall not be treated as part of an interactive service.

As the above definition indicates, there are exceptions pertaining to both of these categories. See Lydia Pallas Loren, *Untangling the Web of Music Copyrights*, 53 CASE W. RES. L. REV. 673, 680 (2003) (explaining these exceptions and discussing the types of services that qualify as interactive under this definition).

³¹ See generally *infra* “Licensing Basics.”

A. Licensing Basics

There are two basic distinctions that are critical to understanding what rights on-demand, streaming services implicate when they transmit a song. The first is the distinction between a musical composition and a sound recording. The second is the distinction between performance rights and mechanical rights.

1. *Musical Compositions vs. Sound Recordings*

Every song a user is capable of accessing on an interactive streaming service contains two separate and distinct copyrightable components: a sound recording and an underlying musical composition.³²

Musical compositions are the works of songwriters.³³ They consist of the music songwriters compose and fix in tangible mediums of expression, including any accompanying lyrics.³⁴ Typically, a songwriter will fix her musical composition by either transcribing a notated copy of the music (e.g. sheet music, lyric sheets, guitar tabs) or embedding it in a phonorecord (e.g. LPs, Audio-Cassette tapes, CDs, or other quasi-tangible digital files).³⁵ Once a musical composition is fixed, the songwriter is generally considered to be its author.³⁶ The U.S. first recognized the songwriters' right to protect their copyrights in musical compositions in the 1909 Copyright Act.³⁷

³² See KOHN, *supra* note 11, at 1465.

³³ There are many names for those who create and contribute to musical compositions. For the sake of clarity, the author has decided to use "songwriter" as a generic term for those generally considered the authors of musical compositions.

³⁴ For a musical composition to be eligible for copyright protection, it must be an "original work of authorship fixed in any tangible medium of expression." 17 U.S.C. § 102(a) (2011).

³⁵ See Jessica Wang, *A Brave New Step: Why the Music Industry Should Follow the Hulu Model*, 51 IDEA 511, 517-18 (2011).

³⁶ The author says "generally" because a record label or music publishing company can also be considered the author of a sound recording where that sound recording was created for them as a work made for hire. See KOHN, *supra* note 11, at 136-138.

³⁷ See KOHN, *supra* note 11, at 7.

Sound recordings are the works of artists.³⁸ Artists create sound recordings by performing specific renditions of musical compositions, recording those performances, and fixing them within phonorecords.³⁹ Typically, the author of a sound recording is either the artist who performed a specific rendition of a musical composition intending it be recorded and fixed within a phonorecord or the producer who processed various aspects of the artist's performance and fixed a master version of the performance within a phonorecord.⁴⁰ The U.S. did not recognize the artists' right to protect digital transmissions of their sound recordings until it enacted the DPRA in 1995.⁴¹

When an interactive streaming service hosts a song, it is granting its users access to both that song's sound recording and its underlying musical composition.⁴² Thus, each time a user streams a song from a streaming service, the service implicates both the songwriter's right to control the digital transmission of his musical composition⁴³ and the artist's right to control the digital transmission of his sound recording.⁴⁴

2. The Performance Right vs. The Mechanical Rights

Every song a user is capable of accessing on an interactive streaming service also contains two separate and distinct sets of exclusive rights: performance rights and mechanical rights.

In a digital context, a song is publically "performed" whenever it is digitally transmitted to the public "by means of any device or process, whether the members of the public capable of

³⁸ Again, this is a term the author is using for clarity. There are numerous ways individuals can go about creating sound recordings. Since this paper's focus is on interactive services that primarily stream songs, the author uses the term "artists" to refer to those who generally play and record songs.

³⁹ See 17 U.S.C. § 114 (2011).

⁴⁰ *Id.*

⁴¹ See DPRA, *supra* note 21.

⁴² *Id.*

⁴³ 17 U.S.C. § 115 (2011).

⁴⁴ 17 U.S.C. § 114 (2011).

receiving [the song] receive it in the same place or in separate places and at the same time or different times.”⁴⁵ The performance right attaches to both the sound recording and the underlying musical composition.⁴⁶ Thus, any digital performance of a song implicates both the songwriter’s exclusive right to control the public performance of his musical composition and the artist’s exclusive right to control the public performance of his recorded rendition of said composition.

The mechanical rights include the rights to reproduce and distribute a song.⁴⁷ Reproduction and distribution occur whenever a copy of a song is made and delivered to a user or listener.⁴⁸ Historically, the mechanical rights were implicated when a recording company embedded a sound recording within an LP, CD, or other playable medium and sold it to the public.⁴⁹ In the digital context, the rights of reproduction and distribution are implicated whenever a user’s activity causes a copy of a song to be stored on her computer or other multi-media device.⁵⁰ Like the public performance right, songwriters and performers have exclusive control over the reproduction and distribution of their respective works.⁵¹ Thus, any reproduction and distribution of a song implicates both the artist’s mechanical rights in the sound recording and the songwriter’s mechanical rights in the underlying musical composition.

B. The Specific Rights On-Demand Interactive Services Implicate

As noted, both the sound recording and the musical composition have their own separate and distinct performance and mechanical rights. In other words, the songwriter who owns the copyright in the musical composition of a song has the exclusive rights to control both the public

⁴⁵ The performance right, for this paper’s purposes, is the right to perform a song publicly. To perform a song means to recite, render, play, dance, or act it, either directly or by means of any device or process. 17 U.S.C. § 101 (2011).

⁴⁶ 17 U.S.C §§ 106(4), (6) (2011).

⁴⁷ See KOHN, *supra* note 11, at 7, 720.

⁴⁸ *Id.*

⁴⁹ *Id.*

⁵⁰ See KOHN, *supra* note 11, at 753-64.

⁵¹ 17 U.S.C. §§ 106(1), (3) (2011).

performance of his musical composition and the reproduction and distribution of his musical composition; just as the artist who owns the copyright in a sound recording of a specific fixed rendition of a song has the exclusive right to control both the public performance of her sound recording and the reproduction and distribution of her sound recording. To fully realize how on-demand interactive streaming services implicate these rights, it is necessary to understand the basic technical operations of modern streaming technology.

An on-demand interactive streaming service operates by obtaining “source copies” of all the songs it wishes to make available to its users and storing them on a master server. Each time a user requests to stream a particular song from the service, the service accesses the “source copy” of that song and creates a second, “cached copy” of it on its server. The service then divides the “cached copy” into small, separate fragments of information and begins transmitting the fragments directly to the multimedia device the user used to request access to the song. The user’s device collects the fragments, orders them in its temporary memory, and begins reconstructing the song on a “buffer.” Once the device “buffers” the first several seconds of the song, the user is able to play and listen to them on the device. In most cases, after the user plays a particular song fragment, the device erases that fragment from its memory and replaces it in the “buffer” with the next unperformed portion of the song.⁵² This process repeats until the user has played or “streamed” the entire song. When the stream ends, the “buffer” is empty and the device’s temporary memory has purged all traces of the song. If the user wishes to replay the song, she must initiate a new stream, in which case this process repeats.⁵³

⁵² Spotify’s subscription service, for example, offers users offline streaming. To do this, the service allows devices to store certain song files in their memories for up to thirty days. If the user does not log on to Spotify and/or renew her subscription before thirty days pass from the date Spotify transmits the songs to her computer, the song files delete themselves. See *Offline Mode*, Spotify, <http://www.spotify.com/us/about/features/offline-mode/> (last visited Apr. 4, 2012).

⁵³ For a more technical explanation of streaming process, see *Cardi*, *supra* note 13, at 860-61.

In theory, each time a user streams a song from an on-demand interactive streaming service, that service is technically reproducing a copy of the song, distributing it (via a digital transmission) to the user's device, and permitting the user to perform it.⁵⁴ What this means, in licensing terms, is that in order for an on-demand streaming service to legally stream a song to a user's device, it must secure licenses to exploit the following four rights: (1) the artist's right to perform the sound recording; (2) the artist's right to reproduce and distribute the sound recording; (3) the songwriter's right to perform the musical composition; and (4) the songwriter's right to reproduce and distribute the musical composition.⁵⁵ The following subsections describe each of these rights and explain how streaming services must go about accessing licenses.

1. The Right to Publicly Perform a Sound Recording

The artist or producer that copyright law considers the author of a sound recording has the exclusive right to perform that specific rendition of a musical composition publicly.⁵⁶ As noted, an interactive streaming service implicates this right each time it digitally transmits a song to a user's device.⁵⁷ As a result of the DMCA amendments to the Copyright Act, whenever an interactive service streams a song, any featured artist, non-featured vocalists, and musicians responsible for the specific rendition of that song's underlying musical composition are entitled to public performance royalties.⁵⁸ Accordingly, before an interactive streaming service can

⁵⁴ *Id.*

⁵⁵ Daniel S. Park, Jennifer Lynch, and Jennifer Urban, *Streamlining Music Licensing to Facilitate Digital Music Delivery*, prepared on behalf of Public Knowledge, www.publicknowledge.org/files/docs/crastreamingmusiclicensing.pdf (last visited Apr. 6, 2012) [hereinafter Public Knowledge Report].

⁵⁶ See generally 17 U.S.C. § 114 (2011).

⁵⁷ *Id.*

⁵⁸ See Caroline Herman, *Internet Money Music Madness: Money Due or Money Die?*, http://www.americanbar.org/content/dam/aba/migrated/2011_build/entertainment_sports/internetmusicmadnessmoney.authcheckdam.pdf (last visited Apr. 6, 2012).

legally allow users to stream a particular rendition of a song from its server, it must obtain a license to perform that song from the appropriate entity or entities.

Unlike with certain non-interactive services, there is no compulsory performance rights license for the types of interactive transmissions on-demand services offer.⁵⁹ This means that in order to allow users to stream a specific rendition of a song, the service must negotiate directly with the rights holder.⁶⁰

2. The Rights to Reproduce and Distribute a Sound Recording

The artist or producer that copyright law considers the author of a sound recording also has the exclusive rights to reproduce and distribute that specific rendition of a musical composition.⁶¹ As noted, depending on the nature of the interactive stream a service offers, the service potentially implicates these rights each time that, while in the course of digitally transmitting the sound recording to the user, it reproduces the song and distributes a temporary copy of it to the user's device.⁶²

Like the right to publicly perform a sound recording, a sound recording's mechanical rights are enjoyed by the artist, record label, or other entity that owns the master copy of that specific recording. On-demand streaming services that wish to allow users with access to a particular sound recording must negotiate directly with the owner of the sound recording for the rights to reproduce and distribute it via a streaming transmission.⁶³

⁵⁹ Non-interactive webcasts (Pandora), simulcast radio, satellite radio (XM, Sirius), digital cable & direct satellite TV (Music Choice, Muzak, DMX/CAPstar) can get compulsory licenses if certain specific criteria are met, usually involving limitations on the number of times a particular artist may be streamed or webcasted. A non-profit performance rights organization named SoundExchange collects statutory royalties related to these compulsory licenses and distributes them to rights holders. See Herman, *supra* note 57, at 2; see also 17 U.S.C. § 114 (2011).

⁶⁰ See Wang, *supra* note 34, at 715.

⁶¹ 17 U.S.C. §§ 106(1), (3) (2011); see also Mitchell, *supra* note 24, at 1252-53.

⁶² See generally 17 U.S.C. § 114 (2011).

⁶³ Wang, *supra* note 34, at 518; see also Joshua Keesan, *Let it Be? The Challenges of Using Old Definitions for Online Music Practices*, 23 BERKELEY TECH. L.J. 353, 355 (2008).

3. *The Right to Publicly Perform a Musical Composition*

The songwriter who owns the copyright in a musical composition has the exclusive right to control the performances of the musical composition.⁶⁴ An interactive streaming service implicates this right each time it sends a digital transmission of a song that contains an author's musical composition to a user's device.⁶⁵ One way an on-demand service can acquire a license to perform a musical composition is by negotiating directly with the songwriter or publisher who owns that composition.⁶⁶ The more common way, however, is for the service to utilize a Performance Rights Organization ("PRO").⁶⁷

In most cases, songwriters register their musical compositions with a PRO, and authorize it to issue licenses and collect royalties on their behalf.⁶⁸ In the U.S., three major PROs have acquired the authority to administer the performance rights for an overwhelming majority of musical compositions.⁶⁹ On-demand streaming services can go to these PROs and negotiate a royalty rate for performing any musical composition the PROs administer.⁷⁰ Historically, the PROs have been willing to issue "blanket" licenses, which give services the right to perform all of the works in the PRO's catalog for a single, all-encompassing fee.⁷¹

⁶⁴ 17 U.S.C. § 106(4) (2011).

⁶⁵ See Keesan, *supra* note 62, at 354.

⁶⁶ *Id.*

⁶⁷ Herman, *supra* note 57, at 2.

⁶⁸ The Copyright Act refers to PROs as PRSs (despite their being more commonly known as PROs); see 7 U.S.C. § 101 (2011) (defining PRS); see also 17 U.S.C. § 114 (2011) (listing properties of a PRS).

⁶⁹ Public Knowledge Report, *supra* note 54, at 3 (The big three include: The American Society of Composers, Authors, and Publishers ("ASCAP"); Broadcast Music, Inc. ("BMI"); and The Society of European Stage Authors & Composers ("SESAC")).

⁷⁰ Herman, *supra* note 57, at 2.

⁷¹ *Id.*

4. The Rights to Reproduce and Distribute the Musical Composition

The songwriter who owns the copyright in a musical composition also has exclusive control over the reproduction and distribution of the musical composition.⁷² These are the rights an interactive streaming service implicates when it, in the course of streaming a song, reproduces a digital copy of a rendition of a songwriter's musical composition and temporarily distributes it on a user's device.⁷³ Like the performance right in musical compositions, these rights are typically held by songwriters and music publishers.⁷⁴ Unlike the performance right in musical compositions, which are mostly licensed through PROs, the mechanical rights necessary to stream a musical composition are not centrally administered.⁷⁵

Under U.S. law, there are three ways on-demand services can obtain a license to exploit a musical composition's mechanical rights.⁷⁶ First, as with each of the other rights discussed in this section, the service can negotiate directly with the rights holder for a voluntary license.⁷⁷ The rights holder, as per the norm, is free to set his own fee.⁷⁸ Second, the service can apply for a compulsory mechanical rights license.⁷⁹ According to Section 115 of the Copyright Act, copyright holders are required to issue mechanical rights licenses to any entity who wants to distribute their musical compositions to the public for private use.⁸⁰ To obtain this type of compulsory license, an on-demand service would have to comply with a series of pre-conditions

⁷² KOHN, *supra* note 11, at 753-764.

⁷³ *Id.* at 729.

⁷⁴ See, e.g., Jonah M. Knobler, *Performance Rights in Music Downloads: United States v. ASCAP and Beyond*, 11 No. 12 J. INTERNET. L. 1, 11-12 (2008).

⁷⁵ Public Knowledge Report, *supra* note 54, at 3.

⁷⁶ *Id.*

⁷⁷ *Id.*

⁷⁸ *Id.* at 8.

⁷⁹ *Id.* at 9.

⁸⁰ 17 U.S.C. § 115 (2010).

and pay the statutory royalty rate set by an appointed Copyright Royalty Board (“CRB”).⁸¹ Potential licensees tend to avoid compulsory licenses, due to the cumbersome administrative process and the fact that the ceiling on CRB created rates is significantly higher than most privately negotiated rates.⁸² Third, the service can negotiate for a mechanical rights license with the Harry Fox Agency (“HFA”). The National Music Publishers’ Association created the HFA to administer mechanical rights and collect royalties on behalf of songwriters and other musical composition owners.⁸³ However, despite being the primary licensing organization for the mechanical rights to musical compositions, the HFA’s catalog does not cover the entire musical composition market.⁸⁴

III. “SAVED” – HOW TO OBTAIN THESE RIGHTS IN PRACTICE

The previous section dissected the digital transmission and outlined the various rights implicated whenever an on-demand service endeavors to stream a song. This section demonstrates how complicated the rights licensing process is by taking a contemporary song and tracking exactly how an on-demand service would go about acquiring the rights to stream it.

⁸¹ See *id.* § 115(a) (2010); see also DONALD S. PASSMAN, ALL YOU NEED TO KNOW ABOUT THE MUSIC BUSINESS, 209 (7th ed. 2009) (characterizing the preconditions as follows: (1) that the song is a non-dramatic musical work; (2) that it has been previously recorded; (3) that the previous recording has been distributed publicly in phonorecords; (4) that the new record does not change the fundamental character of the song; (5) that the new recording is used only in phonorecords).

⁸² PASSMAN, *supra* note 80, at 213.

⁸³ *General Information and FAQ*, THE HARRY FOX AGENCY, <http://www.harryfox.com/public/FAQ.jsp> (last visited Nov. 4, 2012).

⁸⁴ Public Knowledge report, *supra* note 54, at 3 (past estimates have put the HFA’s catalog at about sixty-five percent of all available works); see also Section 115 of the Copyright Act: In Need of an Update? Hearing Before the Subcomm. on Courts, the Internet, and Intellectual Property of the H. Comm. on the Judiciary, 108th Cong. 2 (2004) (statement of Jonathan Potter, Executive Director, Digital Media Ass’n), <http://judiciary.house.gov/legacy/potter031104.htm> (last visited April 6, 2012). However, the various press releases on the HFA website seem to indicate the service is growing. See generally *HFA News*, THE HARRY FOX AGENCY, <http://www.harryfox.com/public/PressArea.jsp> (last visited April 6, 2012).

A. Make You Feel My Love

Adele Adkins saved Bob Dylan. On October 27, 2008, the English singer released her now famous cover of Dylan's classic, *Make You Feel My Love*. Years later, around the time Adele released her Grammy Award winning album "21," she was asked to comment on whether or not she had discussed her version of the song with Dylan.⁸⁵ She joked, "It's his second favorite version, after his own. Someone told me the other day that I had killed Bob Dylan with *Make You Feel My Love*. I actually think I've saved him."⁸⁶

Dylan fans, though generally congenial, are notoriously protective of the self-proclaimed "song and dance man" and his legacy,⁸⁷ so it is believable that someone would be foolish enough to suggest that she "killed" Mr. Zimmerman. What is questionable, however, is that Adele actually believed she saved the troubadour. In fact, a follow-up quote from the same interview seemingly clears this up. As Adele explains, "He's going to get about 1 million [euros] out of that song. He's going to get a big pay check at the end of the year. I reckon with the amount it's been played on the radio, it's worth a lot to him. Maybe he'll buy me a watch or something."⁸⁸

The discussion in this paper concerns the latter part of her statement: the fact that Dylan received a "big pay check" as a result of Adele "covering" a song he wrote for his 1997 masterpiece *Time Out of Mind*. As Section I indicates, songwriters have the right to license their musical compositions. Dylan authored the musical composition of *Make You Feel My Love*; therefore, each time the sound recording of Adele "covering" the composition is played, performed, downloaded, copied, or streamed, his rights are implicated alongside the rights of

⁸⁵ *Adele 'Saved' Bob Dylan?*, CONTACTMUSIC.COM, http://www.contactmusic.com/news/adele-saved-bob-dylan_1195248 (last visited Nov. 10, 2012).

⁸⁶ *Id.*

⁸⁷ I feel qualified to make this statement as I have seen Bob in concert twenty plus times over the past two decades.

⁸⁸ See *Adele 'Saved' Bob Dylan?*, *supra* note 85.

those involved in recording and producing the Adele version. The royalties Dylan made from licensing those rights are what earned him his “big pay check.”

B. Acquiring the Rights to Stream *Make You Feel My Love*

To stream Adele’s version of *Make You Feel My Love*, an on-demand service must acquire licenses to infringe the following four rights: (1) Adele’s (or the owner of the master copy’s) right to perform the sound recording; (2) Adele’s (or the owner of the master copy’s) right to reproduce and distribute the sound recording; (3) Dylan’s right to perform his musical composition; and (4) Dylan’s right to reproduce and distribute his musical composition.

1. *The Rights to the Sound Recording of Adele’s Performance*

The two licenses that an interactive service must acquire in order to stream the sound recording of Adele performing Dylan’s composition are the easiest of the four licenses to come by. Adele’s version of *Make You Feel My Love* appeared on her 2008 album “19.”⁸⁹ Adele, a pianist, and an arrangement of strings players performed the song, Jim Abbiss produced the master copy on behalf of XL Recordings (a British record label), and XL Recordings distributed the song worldwide.⁹⁰ As is customary, XL Recordings contracted with Adele and her accompanying musicians for the right to perform, reproduce, and distribute their version of the song.⁹¹ Thus, in order to legally stream the sound recording containing the song, an on-demand service will have to contact XL Recordings and negotiate royalty rates for licenses to both perform the song via a digital transmission and to reproduce and distribute the song. Generally,

⁸⁹ ALBUM LINER NOTES, <http://aln3.albumlinernotes.com/19.html> (last visited Nov. 6, 2012).

⁹⁰ *Id.*

⁹¹ *See generally* XL RECORDINGS, <http://www.xlrecordings.com/adele> (last visited Apr. 6, 2012).

record labels like XL Recordings make their sound recordings readily available for those who seek to license them.⁹²

2. The Right to Publicly Perform Dylan's Musical Composition

The first of the two licenses an on-demand service must acquire in order to stream Dylan's musical composition is a license for the right to perform (via a digital transmission) the composition. This right is also relatively easy to obtain.⁹³ As noted, the rights to the musical work, unlike those of a sound recording, are typically owned by songwriters.⁹⁴ The songwriters will often assign their rights in a musical composition to a music publisher.⁹⁵ The music publisher, in turn, hires a PRO and authorizes it to administer said rights.⁹⁶ The PRO then negotiates royalty rates with those who wish to license the performance right, collects royalties from licensees for all subsequent performances, and pays the royalties to the publisher.⁹⁷ Finally, the publisher pays the songwriter.⁹⁸

Regarding *Make You Feel My Love*, Dylan is credited as the song's sole writer and composer.⁹⁹ Dylan, as is his custom, assigned his right to collect royalties for subsequent uses of the song to the publisher, Special Rider Music.¹⁰⁰ Special Rider Music has authorized the SESAC to administer the song's performance rights.¹⁰¹ Thus, in order to obtain a license to

⁹² *Id.*

⁹³ See Keesan, *supra* note 62, at 354.

⁹⁴ See *supra* Section II.B.3.

⁹⁵ See Keesan, *supra* note 62, at 354.

⁹⁶ *Id.*

⁹⁷ *Id.*

⁹⁸ *Id.*

⁹⁹ *Make You Feel My Love*, WIKIPEDIA, http://en.wikipedia.org/wiki/Make_You_Feel_My_Love (last visited Nov. 4, 2012).

¹⁰⁰ See *Repertory*, SESAC, <http://www.sesac.com/Repertory/PublisherSearch.aspx?affilNum=90703&songNum=535547> (last visited Apr. 6, 2012).

¹⁰¹ *Id.* at <http://www.sesac.com/Repertory/SongSearch.aspx> (entering the title *Make You Feel My Love* into the search engine).

perform the song, an on-demand service will have to either negotiate a royalty rate with the SESAC for an individual license or acquire one as part of a blanket deal.

Being one of the three major PROs, the SESAC is easy to locate and their inventory is online and searchable.¹⁰² Other than pricing, there are no foreseeable bars to obtaining a license to perform this particular musical composition.¹⁰³ In fact, the motto SESAC lists on its licensing page reads: “It’s Our Job To Make Your Job Easier.”¹⁰⁴

3. The Rights to Reproduce and Distribute Dylan’s Musical Composition

The second of the two licenses an on-demand service must acquire in order to stream Dylan’s musical composition is a license for the rights to reproduce and distribute the composition. This license is considered by many to be the most difficult to obtain.¹⁰⁵ As noted, these rights are typically held by songwriters or the music publishers they hire to administer them.¹⁰⁶ In some cases, songwriters and publishers will hire the HFA to further administer these rights.¹⁰⁷ However, unlike the performance right, there is no short list of organizations that cover all or nearly all musical compositions. If the HFA does not have a particular song listed in its database, the service seeking to stream that song will have to identify the songwriter or publisher and research exactly how that particular entity manages its mechanical rights.¹⁰⁸

Regarding *Make You Feel My Love*, Dylan has tasked Special Rider Music with administering the right to reproduce and distribute his composition.¹⁰⁹ Special Rider, however, has not assigned the ability to administer mechanical composition rights to the HFA or any other

¹⁰² *Id.* at <http://www.sesac.com/Repertory/SongSearch.aspx>.

¹⁰³ *See id.* at <http://www.sesac.com/Repertory/PublisherSearch.aspx?affilNum=90703&songNum=535547> (referring awkwardly to Bob Dylan as Robert Dylan).

¹⁰⁴ *Id.* at <http://www.sesac.com/Licensing/obtainlicense.aspx>.

¹⁰⁵ *See* Cardi, *supra* note 13, at 876; *see also* Public Knowledge Report, *supra* note 54, at 7.

¹⁰⁶ *See* Knobler, *supra* note 73.

¹⁰⁷ THE HARRY FOX AGENCY, *supra* note 82.

¹⁰⁸ *See* Cardi, *supra* note 13, at 876; *see also* Public Knowledge Report, *supra* note 54, at 7-8.

¹⁰⁹ *See* BOBDYLAN.COM, <http://www.bobdylan.com/us/songs/make-you-feel-my-love> (last visited Apr. 6, 2012).

rights management organization with a large market presence.¹¹⁰ Thus, those streaming services that seek to use Adele's version of Dylan's composition must first find and then negotiate directly with Special Rider Music for the right to stream the song.¹¹¹ The publisher for an artist as prolific as Dylan is not all that difficult to track down; but, for other, more obscure songs and songwriters, it could prove extremely burdensome.¹¹²

Another way for the service to acquire this right would be to forego a private negotiation with Special Rider Music and obtain a compulsory license. However, as mentioned, this entails an arduous, somewhat unpredictable administrative process.¹¹³

4. The Results

In sum, in order for a streaming service to legally stream *Make You Feel My Love*, it must negotiate four different licenses (1-4 above), with three different entities (XL Recordings, the SESAC, Special Rider Music), and agree to pay at least two separate royalty rates (a rate or rates for using the sound recording and a rate or rates for using the musical composition) to the various owners of the rights implicated.

¹¹⁰ See *Songfile*, HFA, <http://www.harryfox.com/songfile/public/publicsearchresults.do?forward=drilldown&index=0> (last visited Apr. 6, 2012).

¹¹¹ See, e.g., *Licensing*, SESAC, <http://www.sesac.com/Licensing/mechanical.aspx> (last visited Apr. 6, 2012) (showing that some PROs, like the SESAC, offer to do this service for a fee).

¹¹² See Public Knowledge Report, *supra* note 54, at 8.

¹¹³ Whether or not the compulsory license is an option depends largely on the size of the streaming service and the amount of resources they can dedicate to circumventing red tape; see also Public Knowledge's comments on the feasibility of the section 115 compulsory license:

[A]lthough § 115 allows users to proceed without rights-holders' approval, it still requires licensees to locate copyright owners to serve them advance notice. It also imposes cumbersome accounting burdens on licensees, such as needing to send monthly statements of use and royalty checks. And even though users of the § 115 compulsory mechanical license could file with the Copyright Office if unable to find the names and addresses of copyright owners, they would be required to pay a significant administrative filing fee per composition. For large-scale digital music distribution, paying such fees for every individual work makes compulsory licensing prohibitively expensive.

Public Knowledge Report, *supra* note 54, at 9 (internal citations omitted).

IV. “TANGLED UP IN BLUE” – PROBLEMS AND SUGGESTED SOLUTIONS

As the previous section makes clear, on-demand services have the most difficulty acquiring the rights to reproduce and distribute songs. This section highlights two common barriers to obtaining such rights and discusses potential solutions to them.

A. The Problems On-Demand, Interactive Streaming Services Face

Two issues that frequently arise when contemplating the mechanical rights as they relate to on-demand services are: (1) whether, in the technical sense, it is necessary for such services to obtain licenses to reproduce and distribute songs via a streaming transmission; and (2) whether it is good policy to permit copyright holders to “double dip” by requiring dual compensation for what amounts to the single performance of a song. The following sub-sections discuss each issue in turn.

1. The Necessity of Mechanical Rights in Streaming Transmissions

Streaming services and mechanical rights holders disagree over whether or not it is legally necessary for on-demand services to acquire licenses to reproduce and distribute songs via a stream; or, in more technical terms, whether the incidental copies created to facilitate the digital performance of a song qualify as reproductions for licensing purposes.¹¹⁴

As noted, a streaming service facilitates the performance of a song on a user’s device by transmitting fragments of a “cache copy” of that song into the device’s short term memory and permitting the device to play them via a buffering system.¹¹⁵ The cache copy fragments remain

¹¹⁴ See Public Knowledge Report *supra* note 54.

¹¹⁵ See Card, *supra* note 13, at 860–61.

on the device for variable durations of time, depending on the nature of the service.¹¹⁶ In most cases, particularly with those services that offer free or non-subscription streaming, the fragments simultaneously delete from the buffer and the memory as the song plays.¹¹⁷

The agencies that songwriters and publishers task with administering mechanical rights have attempted to cash in on the lack of clarity in the law governing digital transmissions by demanding reproduction royalties for each time an on-demand service creates a “cache copy” on its server and reproduces fragments of that cache copy within the user’s device’s short term memory.¹¹⁸ These agencies equate the streaming transmission process with that of the digital download process, which reproduces a full digital copy of a song and delivers it permanently into a device’s memory, as opposed to that of the webcast transmission, which reproduces a transient or ephemeral copy that lasts only as long as it takes the song to finish playing.¹¹⁹

Although there is no clear rule as to whether it is necessary for an interactive streaming service to obtain mechanical rights licenses to transmit musical compositions, the copyright office and other leading contributors in the field have put forth two persuasive arguments against such a practice.

First, some argue that the portions of the song transmitted to a device’s short term memory are not fixed for “a period of more than transitory duration” and, therefore, should not

¹¹⁶ *Id.*

¹¹⁷ *Id.*

¹¹⁸ Most notably the HFA. *See generally* Music Licensing Reform: Hearing Before the Subcomm. on Courts, the Internet, and Intellectual Prop. of the H. Comm. on the Judiciary, 109th Cong. 15 (July 12, 2005) (statement of Marybeth Peters, Register of Copyrights, U.S. Copyright Office), <http://www.copyright.gov/docs/regstat071205.html> (last visited Apr. 6, 2012) [hereinafter Licensing Reform Statement].

¹¹⁹ The HFA’s demands for streaming services to pay mechanical royalties are consistent with the demands they make of download services but inconsistent with the demands they make of conventional broadcasts for use of ephemeral copies of songs. *See* Cardì, *supra* note 13, at 862; *see also* KOHN, *supra* note 11, at 1477 (“The Ephemeral Copy Solved”).

implicate the reproduction right.¹²⁰ Thus, as the argument goes, because the cache copies are transient and exist only to enable digital music performances, on-demand streaming services should not be required to compensate songwriters and artists for using them.¹²¹

Indeed, in her 2005 report to Congress, Marybeth Peters, then Register of Copyrights, emphasized the futility of requiring streaming services to obtain mechanical licenses by explaining how such services derive value from a stream:

The economic value of licensed streaming is in the public performances of the musical work and the sound recording, both of which are paid for. The buffer copies have no independent economic significance. They are made solely to enable the performance of these works. The uncertainty of the present law potentially allows those who administer the reproduction right in musical works to prevent webcasting from taking place - to the detriment of other copyright owners, webcasters and consumers alike - or to extract an additional payment that is not justified by the economic value of the copies at issue. Congressional action is desirable to remove the uncertainty and to allow the activity that Congress sought to encourage through the adoption of the section 114 webcasting compulsory license to take place.¹²²

She later went so far as to recommend Congress remedy this situation as follows:

We recommend that Congress enact legislation amending the Copyright Act to preclude any liability arising from the assertion of a copyright owner's reproduction right with respect to temporary buffer copies that are incidental to a licensed digital transmission of a public performance of a sound recording and any underlying musical work.¹²³

¹²⁰ *See id.*

¹²¹ *See id.*

¹²² *See* U.S. COPYRIGHT OFFICE, DMCA SECTION 104 REPORT 140-41 (2001) [hereinafter DMCA Report]; *see also* Public Knowledge Report, *supra* note 54, at 4.

¹²³ DMCA Report, *supra* note 121.

Unfortunately, Congress' reluctance to clarify whether the transmission of a temporary "buffer" copy implicates the mechanical rights has left the issue to the courts, which have yet to deliver a clear precedential standard.¹²⁴

The HFA and other similar organizations have made it clear that they believe streaming transmissions implicate a song's mechanical rights.¹²⁵ They have also made it clear that they intend to collect compensation from on-demand interactive services for these rights.¹²⁶ The lack of a precedent, combined with the on-demand services' implicit need to acquire large catalogs of songs, puts the services in the weaker position when negotiating with large rights management agencies. As a result, they are often required to pay for the mechanical rights with little consideration given to the fact that the "real product they are offering" is a performance.¹²⁷

Second, there are arguments that the fair use doctrine supports the notion that streaming services need not secure mechanical licenses prior to transmitting cache copies into a device's buffers.¹²⁸ Indeed, an application of the fair use doctrine¹²⁹ seems to lean in favor of the cache copy transmissions and temporary buffer reproductions being fair, incidental uses required for the transmission of already paid for commodities.¹³⁰

¹²⁴ See Public Knowledge Report, *supra* note 54, at 16; see also *MAI Sys. Corp. v. Peak Computer, Inc.*, 991 F.2d 511, 518–20 (9th Cir. 1993) (holding temporary RAM copies in a computer are reproductions that can infringe a copyright); but see *Cartoon Network LP, LLLP v. CSC Holdings, Inc.*, 536 F.3d 121, 127 (2d Cir. 2008) (holding buffer copies, if sufficiently transient, are not fixed enough to be considered reproductions).

¹²⁵ "RIAA and the Harry Fox Agency have reached an agreement that buffer copies and server copies made for purposes of or in the course of the streaming of performances are included within the scope of the section 115 compulsory license." See Licensing Reform Statement, *supra* note 117.

¹²⁶ *Id.*

¹²⁷ *Id.*

¹²⁸ See DMCA Report, *supra* note 121, at 140-41.

¹²⁹ 17 U.S.C. § 107 (2011).

¹³⁰ The following is an excerpt from Public Knowledge's thorough application of the fair use doctrine as it applies to the rights to reproduce cache copies and distribute them via a streaming transmission:

On balance, the four fair use factors—particularly the first—weigh in favor of fair use.⁹⁶ Buffer copies in a digital performance do not supersede the use of the underlying copyrighted musical work;⁹⁷ instead they serve a transformative purpose and an entirely different function from the original: buffer copies transform the aesthetic or entertainment aspects of a musical work into temporary bits of data readable only by computers for the purpose of moving that data.⁹⁸ As buffer copies have no value outside of their ability to enable streaming, they have no effect on the

The flaw in streaming services relying on fair use as a way to avoid compensating artists and musicians for mechanical rights is that the results of cases where entities rely on fair use as a defense tend to vary.¹³¹ It would be difficult to base a business model on such inconsistency. Additionally, short of a statutory declaration that cache copies are not reproductions, it is not unrealistic to presume that those who hold both the performance and mechanical rights to a song would use their position at the negotiation table to blackball any service that denied them royalties claiming fair use.

2. *Double Dipping*

“Double dipping” is the phrase proponents of streaming services use to describe the process by which separate entities get paid double, licensing what essentially amounts to the right to digitally transmit a song.¹³² While the “necessity” argument offers the technical framework for why interactive streaming should not implicate the reproduction right, the argument against double dipping contemplates the policy behind why streaming services should not be required to obtain mechanical rights in order to stream a song.

For clarity, consider the example from section III. When an on-demand service streams *Make You Feel My Love*, Bob Dylan (via Special Rider Music) is paid twice for each single transmission of his musical composition. Likewise, XL Recordings is paid twice for the performance and reproduction of its recording of Adele’s singing of the song. Yet neither Dylan nor XL Recordings are offering two products. In a practical sense, they are both offering the user the right to listen a single time to their composition and recording, respectively. When the

market for the copyrighted work.⁹⁹ Most importantly, such copies provide a significant social benefit by allowing the quick and easy transmission of digital files.

Public Knowledge Report, *supra* note 54, at 16-17 (internal citations omitted.).

¹³¹ See David Nimmer, *A Modest Proposal to Streamline Fair Use Determinations*, 24 CARDOZO ARTS & ENT. L.J. 11, 16 (2006).

¹³² DMCA Report, *supra* note 121, at 140.

song ends, there is no trace of a digital file reproduced on the user's device and no way of replaying the song without initiating an entirely new stream. Nevertheless, under the current music licensing landscape, two separate negotiations and two separate royalty rates had to have been negotiated before the service could legally stream the song.¹³³

It has already been posited that double dipping royalty demands by organizations such as the HFA have held up negotiations with would-be interactive streaming services.¹³⁴ Some speculate that the rights holders' demands for compensation for the reproduction and performance of musical compositions (in addition to the royalties they pay for the reproduction and performance of sound recordings) make the on-demand streaming business model prohibitively expensive.¹³⁵

B. Possible Solutions

Solutions suggested for simplifying digital rights licensing range from eliminating mechanical rights in digital transmissions to creating a whole new "make available" right for internet based transactions.¹³⁶ This section examines the former Register of Copyright's call for Congress to create "one-stop rights shopping" via Music Rights Organizations ("MROs") and advocates for the creation of a central, searchable digital transmission rights database.

¹³³ The Copyright office has commented on and come out against what has been classified as double dipping:

When a webcaster transmits a public performance of a sound recording of a musical composition, the webcaster must obtain a license from the copyright owner for the public performance of the musical work, typically obtained from a performing rights organization such as ASCAP, BMI or SESAC. At the same time, webcasters find themselves subject to demands from music publishers or their representatives for separate compensation for the reproductions of the musical work that are made in order to enable the transmission of the performance.

See Licensing Reform Statement, *supra* note 117.

¹³⁴ See Card, *supra* note 13, at 866 (suggesting the record labels that own the various rights demands for double compensation stem from their desire to offer their own on-demand streaming services "at a market discount").

¹³⁵ *Id.*

¹³⁶ Giuseppe Mazziotti, *New Licensing Models for Online Music Services in the European Union: From Collective to Customized Management*, 34 COLUM. J.L. & ARTS 757, 760-763 (2011).

1. The Creation of “One-Stop” Digital Rights Licensing Organizations

The Copyright office and several public interest institutes have called for the creation of organizations that would have the sole authority to provide the licenses necessary for downloads, streams, and other digital transmissions.¹³⁷ According to the Copyright Office, these MROs, would be a “one-stop shopping” venue for on-demand song streaming services.¹³⁸ MROs would operate, in theory, much like the current PROs, but with an expanded role. In their comprehensive study on modern digital rights licensing, the public interest institute, Public Knowledge, has gone so far as to draft what the legislation might look like should Congress consider authorizing the creation of such organizations.¹³⁹

Although theoretically possible, it is unlikely the PROs, the HFA, and the other organizations that administer digital transmission rights will cede control of their respective rights markets to allow the services they draw an increasing amount of revenue from to bypass them. Moreover, in the time since the Copyright Office presented its MRO outline to Congress, an ever-increasing number of start-up digital rights management organizations have infiltrated the music industry.¹⁴⁰ These agencies have capitalized on the complexity of the current digital transmissions right licensing landscape by contracting with artist and songwriters to collect all of the digital rights related royalties owed to them. Basically, these organizations operate by contacting the PROs, the HFA, and other global collection organizations on behalf of independent artists and songwriters, informing the organizations that those artists and songwriters want the organizations to administer their digital transmission rights, collecting a royalties checks from each of these organizations, and paying the royalties (minus a service

¹³⁷ See Licensing Reform Statement, *supra* note 117.

¹³⁸ *Id.*

¹³⁹ See Public Knowledge Report, *supra* note 54, at 8-9, 21-27.

¹⁴⁰ See e.g., TuneCore, The Music Bridge, GreenLight, and NaxosLicensing.

charge) to the artists and songwriters.¹⁴¹ These and similar organizations are also likely to resist the creation of MROs.

2. *A Central, Searchable Digital Transmissions Rights Database*

On a micro-scale, one of the hurdles preventing streaming services from obtaining the rights necessary to legally stream songs is the lack of a central distribution agency tasked with administering songwriters' mechanical rights.¹⁴² The HFA is the closest to centralized distribution the music industry has come; however, as noted, the agency has yet to achieve total market coverage.¹⁴³ Moreover, even when a mechanical rights organization is authorized to license the rights to a given musical work, the licensing process has been described as onerous and lacking transparency.¹⁴⁴

Short of creating a government mandated MRO, perhaps a less cumbersome way to simplify digital rights licensing might be to require all those who wish to have their music digitally transmitted to catalog their compositions in a single database. This database should be

¹⁴¹ See e.g., SONGTRUST, <https://www.songtrust.com/> (last visited Nov. 14, 2012).

¹⁴² See Public Knowledge Report, *supra* note 54, at 8-9.

The burden of clearing music licenses affects both large-scale, —celestial jukebox-like music services as well as individual cover artists working on a relatively small scale. But for a digital music delivery service attempting to license the rights to use as many songs as possible, the transaction costs and administrative burden of tracking down rights on a song-by-song or owner-by-owner basis, and then negotiating separately for each set of rights, is simply cost-prohibitive. (internal citations omitted).

¹⁴³ See Public Knowledge Report, *supra* note 54, at 8.

If HFA does not have the rights to a musical work, the licensing process is even more complex. As there are no other organizations that compete with HFA in mechanical rights licensing, licensees must first find and then negotiate with one of the thousands of independent music publishers who may own the rights. And some have noted that about twenty-five percent of copyright owners cannot even be located. (internal citations omitted).

¹⁴⁴ For example, licensees have complained that these organizations (probably at the request of the songwriters who use them) do not require a standard form license, and instead require any potential licensee to submit an application describing its intended use of the license. There is also no time limit for the process and neither the organizations nor the songwriters need explain why they choose to deny request. See Card, *supra* note 13, at 841-45.

centralized and searchable and include a listing indicating precisely where digital transmission services can obtain each of the licenses required to stream a song.

While the HFA has attempted to create a database of this nature, its “Songfile” is neither comprehensive nor entirely accurate.¹⁴⁵ For example, *Make You Feel My Love* is listed in the “Songfile” and has an HFA assigned “song code.”¹⁴⁶ Unfortunately, the scope of the rights licensing related information the HFA provides is little more than a heading titled “Represented by HFA” marked with a capital “N.”¹⁴⁷

A consolidated, independently maintained database that indicated who owned each of the digital transmission rights, how to contact the rights holders, and possibly the rates and uses the rights owners generally deem acceptable would make it significantly easier for on-demand services to stream songs.¹⁴⁸ Given the recent developments in digital and audio recognition software, a database of this nature might not be that far off.¹⁴⁹

V. “Beyond Here Lies Nothing” – Conclusion

On-demand streaming might be the future of the music industry, but the complicated digital transmission rights licensing landscape is making it difficult for these services to enter and compete in the digital marketplace. A clarification of the rights necessary to stream a digital audio file, preferably one that prevents rights holders from double dipping at royalties negotiation tables could result in an increase in the number of on-demand services and, likewise,

¹⁴⁵ See generally *Songfile*, THE HARRY FOX AGENCY (Feb. 26, 2010), <http://www.harryfox.com/songfile/termsofuse/publictermsofuse>

¹⁴⁶ See *id.*

¹⁴⁷ *Id.* (the database includes the following disclaimer: The above information may not reflect all of the artists or albums have [sic] recorded versions of this song).

¹⁴⁸ Especially songs composed and recorded by new, independent artists and labels.

¹⁴⁹ See e.g., SoundHound and Shazam (examples of companies that have recently made significant developments in Sound 2 Sound (S2S) acoustic fingerprint recognition technology).

an increase in legitimate digital music consumption. Hopefully, the licensing landscape is smoothed before Billboard is forced to amend its current process to account for the next wave of would-be celestial jukeboxes.