The Statutory Monopoly for Public Performances of Musical Works: A Comprehensive Solution to the Consequences of Fractional Licensing

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INTRODUCTION

The Copyright Act of 1976 grants copyright owners various exclusive rights in their works, including the right to publicly display or perform the work.[1] These rights may be transferred to other owners or licensed for use by others.[2] Copyright owners of musical works are compensated when music users pay to perform those works publicly, whether it be in a restaurant, retail store, radio station, etc. It would be impossible for composers and music publishers to identify every music user and enforce their rights, so performing rights organizations serve as intermediaries between copyright owners and music users.[3]

Different copyright holders are represented by different performing rights organizations, requiring licensees to work with whichever organization licenses the particular work(s) they wish to use.[4] This means that music users must pay fees for licenses from different performing rights organizations at a time.[5] Not only are copyright owners represented by a number of organizations, but individual works themselves can be licensed through different organizations. For example, imagine that Bob Dylan owns 50 percent of the copyright to "Like a Rolling Stone," and his music publisher owns the other 50 percent. Bob Dylan is free to license his rights through one performing rights organization, while his publisher may license their interest through any other performing rights organization.[6] This is known as fractional licensing.

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1. 17 U.S.C. § 106.

2. *Id.* § 201(d)(2).

3. *See* Jay Fujitani, CONTROLLING THE MARKET POWER OF PERFORMING RIGHTS SOCIETIES: AN ADMINISTRATIVE SUBSTITUTE FOR ANTITRUST REGULATION, 72 CAL. L. REV. 103 (1984).

4. *See* David Oxenford, *Court of Appeals Upholds BMI Decision Allowing Fractional Music Licensing – What Are the Issues?* BROADCAST LAW BLOG (Dec. 20, 2017), https://www.broadcastlawblog.com/2017/12/articles/court-of-appeals-upholds-bmi-decision-allowing-fractional-music-licensing-what-are-the-issues/ [https://perma.cc/WEY8-HB8X].

5. *Id.*

6. *Id.*

Copyright law is intended to promote progress in science and the arts by incentivizing authorship through legal protection,[7] but certain features – such as allowing access through fair use and introducing works in the public domain after a certain length of time – speak to the collective nature of copyright protection.[8] The ability for copyright holders to license their works furthers this goal by moving these works into the public sphere.[9] Both copyright owners and music users benefit from having intermediaries, but the advantages that performing rights organizations provide are complicated by ineffective competition.[10] Although the introduction of additional performing rights organizations initially had an impact on anticompetitive behavior, current regulatory issues are now a result of these tactics.[11]

This Note will propose that the Library of Congress should designate a single organization to be the sole licensor of public performances for musical works in order to eliminate regulatory problems like fractional licensing. Although the United States and other countries have statutorily designated agents for copyright licensing matters, this proposal would deviate insofar it would be limited to musical works, and licensing would still be voluntary.[12] It also leaves room for those with significant bargaining power to negotiate directly with copyright owners, akin to the "self-generation" principle in utilities regulation.[13] This solution is appropriate given the need for a streamlined licensing regime that promotes the goals of copyright law by facilitating access to public performances of musical works.

Public performance licensing concerns a myriad of actors from the entertainment industry, as well as music users, legislators, and consumers. But this issue is substantively a legal one. Fractional licensing itself is a product of copyright law that allows multiple people to be copyright owners of a single work.[14] Lawyers are involved at every stage of this process, from the legislative process, to drafting contracts on behalf of copyright owners, to suing infringers in court. However, legal ethics and professional rules of conduct fall short in addressing the structural problems of the current licensing regime. Though lawyers have an important role to play in advocating for and shaping a competent statutory

7. U.S. CONST. art. I § 8, cl. 8.

8. *See* CHRISTOPHE GEIGER, WHAT IF WE COULD IMAGINE COPYRIGHT? 79 (Rebecca Giblin & Kimberlee Weatherall eds., 2017).

9. *Id*.

10. *See* Fujinati, *supra* note 3.

11. *See* David Oxenford, *BMI Judge Rejects DOJ Conclusion that Consent Decree Requires 100% of Songs – What Does that Mean for Music Services?* BROADCAST LAW BLOG (Sept. 18, 2016), https://www.broadcastlawblog.com/2016/09/articles/bmi-judge-rejects-doj-conclusion-that-consent-decree-requires-100-of-songs-what-does-that-mean-for-music-services/ [https://perma.cc/XG5K-RCKA].

12. Determination of Reasonable Rates and Terms for the Digital Performance of Sound Recordings and Ephemeral Recordings, 67 Fed. Reg. 45,239 (July 8, 2002).

13. *See* Scott Hempling, Regulating Public Utility Performance: The Law of Market Structure, Pricing and Jurisdiction 19 (2013).

14. *See* Oxenford, *supra* note 4.

regime, any attempt to place responsibility on individual actors, rather than to reform the market itself, fails to understand the nature of fractional licensing.

I. COPYRIGHT LAW AND LICENSING BASICS

A. CONSTITUTIONAL AND STATUTORY AUTHORITY

Copyright law serves many functions: it provides legal and financial incentives to authors and promotes innovation while maintaining a commitment to the public interest.[15] Copyright law is rooted in the Constitution, which states that "The Congress shall have the Power. . .To Promote the Progress of Science and the useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their Writings and Discoveries."[16] The constitutional authority to afford copyright protection to qualifying works has been codified in the Copyright Act of 1976[17] (the Act) and subsequent amendments. In addition to defining the characteristics a work must have to qualify for copyright protection, the Act defines the exclusive rights of copyright holders, sets limits on those rights, and lays the foundation for a regulatory regime.[18]

1. TENSION BETWEEN THE EXCLUSIVE RIGHTS OF COPYRIGHT HOLDERS AND THE PUBLIC INTEREST

The Act grants six exclusive rights for copyright holders:

> "Subject to sections 107 through 122, the owner of copyright under this title has the exclusive rights to do and to authorize any of the following: 1. To reproduce the copyrighted work in copies or phonorecords; 2. To prepare derivative works based upon the copyrighted work; 3. To distribute copies or phonorecords of the copyrighted work to the public by sale or other transfer of ownership, or by rental, leasing, or lending; 4. In the case of literary, musical, dramatic, and choreographic works, pantomimes, and motion pictures and other audiovisual works, to perform the copyrighted work publicly; 5. In the case of literary, musical, dramatic, and choreographic works, pantomimes, and motion pictures and other audiovisual works, including the individual images of a motion picture or other audiovisual work, to display the copyrighted work publicly; and 6. In the case of sound recordings, to perform the copyrighted work publicly by means of a digital audio transmission."[19]

Authors of works that qualify for copyright protection retain these rights to their works for a statutorily-set period of time.[20] These rights give authors the ability to control their works and receive financial compensation, as well as legal

15. *See* Geiger, *supra* note 8.
16. U.S. CONST. art. I § 8, cl. 8.
17. 17 U.S.C. §§ 101-810.
18. 17 U.S.C. § 102; 17 U.S.C. §§ 101-810.
19. 17 U.S.C. § 106.
20. 17 U.S.C. §§ 302-305.

redress, for the use of their works.[21] Though the Act contains many other provisions, these exclusive rights remain the core of copyright law.[22] Other provisions continue to flesh out the rights enumerated in section 106: any transfer or licensing involves the relinquishing of some or all of these rights to another party, and the various limitations outlined in the Act provide others with some level of access to these works that would otherwise infringe upon those rights.[23]

Copyright law is concerned with supporting authors in order to incentivize progress of the useful arts.[24] But it is also important to ask why this is necessary in the first place; why copyright and other intellectual property protections were deemed so crucial that they merited inclusion in the Constitution.[25] Aesthetic concerns, tasked with supporting the entertainment and arts industries, rely on public access and enjoyment of the arts.[26] Certain provisions of the Act itself, such as limitations on exclusive rights, fair use, and allowing works to enter the public domain,[27] indicate that copyright law is also concerned with access to these works. While copyright protection is, in the short-term, geared towards protecting the interests of the author, it also intends to ensure a rich catalog of artistic endeavors for the public to enjoy and to inspire future generations of authors.[28]

2. WHAT IS A PUBLIC PERFORMANCE?

The public performance right means that the copyright holder has the exclusive right to perform their work publicly. The Act defines what counts as a public performance in section 101:

> "To perform or display a work 'publicly' means – (1) to perform or display it at 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; or (2) to transmit or otherwise communicate a performance or display of the work to a place specified by clause (1) or to the public, by means of any device or process, 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."[29]

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21. *See* Denis De Freitas, "*Copyright and Music"*, 114 J. ROYAL MUSICAL ASS'N, 69, 69-70 (1989).

22. *See* JULIE E. COHEN, LYDIA LOREN, RUTH L. OKEDIJI, & MAUREEN A. O'ROURKE, COPYRIGHT IN A GLOBAL INFORMATION ECONOMY 4 (5th ed. 2020) ("In the language of property law, these exclusive rights make up the 'sticks' in the copyright owner's bundle of rights.").

23. *See, e.g.*, 17 U.S.C. § 201(d)(2).

24. *See* Cohen et al., *supra* note 22, at 6-10.

25. Neil W. Netanel, *Copyright and a Democratic Civil Society*, 106 YALE L.J., 283, 357-59 (1996).

26. *See, e.g.*, Geiger, *supra* note 8.

27. *See generally* 17 U.S.C. §§ 107-122.

28. *See* Netanel, *supra* note 25.

29. 17 U.S.C. § 101.

The same section also defines what it means to perform a work, which includes rendering and playing the work, "or by means of any device or process."[30] This right belongs exclusively to the copyright holder.[31] For musical works, copyright owners have a broad public performance right that encompasses the above enumerated rights.[32] Copyright owners of sound recordings have a different public performance right. Their rights are limited to performances "by means of a digital audio transmission."[33]

Although the public performance right belongs exclusively to the copyright owner, the preamble to this section of the Act sets up the foundation for licensing.[34] Anytime you hear music on the radio or in your local coffee shop, that business must get permission from the copyright owner to publicly perform the work. Conduct that would otherwise constitute infringement is permissible if authorized by the copyright owner, which is often done through licensing.[35]

B. LICENSING THE PUBLIC PERFORMANCE RIGHT THROUGH PERFORMING RIGHTS ORGANIZATIONS

The preamble to section 106 of the Act says that the copyright owner "has the exclusive right to do and to authorize" any of the enumerated statutory rights.[36] Not only can copyright holders exercise those rights themselves, but they can also authorize others to do so.[37] Copyright owners typically do this by transferring the copyright or licensing its use to others in exchange for compensation.[38] This does not mean they have relinquished control of the work in its entirety; it merely allows the licensee to utilize the work within the confines of the license agreement.[39] Another way to think about licenses is as follows:

> "A license is not really the transfer of a right; instead, it is in the nature of the agreement not to sue, provided that the licensee acts in accordance with the terms of the license. The existence of a license authorizing the use of copyrighted material is an affirmative defense to an allegation of infringement."[40]

A copyright owner's ability to license the use of their works is vital to the copyright regime; however, the nature of musical works complicates this

30. *Id.*
31. 17 U.S.C. § 106.
32. *Id.*
33. *Id.*
34. *Id.*
35. American Society of Composers, Authors and Publishers, Writer Member Agreement https://www.ascap.com/~/media/files/pdf/join/ascap-writer-agreement.pdf [https://https://perma.cc/YW8K-WYCN] (last visited Apr. 11, 2021).
36. 17 U.S.C. § 106.
37. *Id.*
38. 17 U.S.C. § 201(d)(2).
39. *Id.*
40. Transfers of Copyright—Licenses, COPYRIGHT REGISTRATION PRACTICE, ch. 30, § 30.6, at 1 [hereinafter COPYRIGHT REGISTRATION PRACTICE].

process.[41] Although other copyrighted works are publicly performed, musical works operate differently on account of how vast they are. Musical works are played in retail stores, restaurants, gyms, hotels, and are utilized in commercials, television shows, movies, and even social media platforms. As consumers, this is deemed a benefit to our experience; however, for copyright owners and music users, the very scale of public performances poses one problem: how are music users supposed to identify every copyright owner and determine how much to pay them, and conversely, how are copyright owners expected to seek out every user in the country playing their music and enforce their rights against them?

This question was answered in the early 20th century with the creation of performing rights organizations. These organizations function as intermediaries between copyright owners and music users, the latter also referred to as licensees.[42] Copyright owners of musical works – i.e., songwriters, composers, and music publishers – contract with performing rights organizations to license their works on their behalf. When music users need a license, they pay a fee to these organizations in exchange for licenses that allow them to publicly perform the works. Performing rights organizations then redistribute these fees back to copyright owners in the form of royalty payments and fund their own operations by deducting 10% of those royalty payments.[43]

The first performing rights organization, American Society of Composers, Authors and Publishers ("ASCAP"), was formed in 1914. For many years, ASCAP had a monopoly on the licensing market, and used this to their advantage. In an attempt to boycott ASCAP's practices, radio stations stopped playing music licensed by ASCAP, and Broadcast Music, Inc. ("BMI") was formed in 1939 to compete with ASCAP.[44] Other performing rights organizations include SESAC, which was formed to protect the interests of European authors in the United States, and Global Music Rights ("GMR"), a new organization formed within the last decade.

II. THE EXISTENCE OF MORE THAN ONE PERFORMING RIGHTS ORGANIZATION RESULTS IN FRACTIONAL LICENSING THAT MAKES COMPLIANCE MORE DIFFICULT AND ENCOURAGES INFRINGEMENT

Although the introduction of new performing rights organizations had some influence on ASCAP's monopolistic and anticompetitive behavior, competition alone

41. *See* Geiger, *supra* note 8.

42. Copibec Copyright Specialists, Collective Rights Management, https://www.copibec.ca/en/collective-rights-management [https://perma.cc/628F-KJQA] (last visited Apr. 11, 2021).

43. *See generally* ASCAP FAQ https://www.ascap.com/help [perma.cc/HV7E-PWTN] (last visited Apr. 14, 2021).

44. *See* Jeff Lunden, *Collecting Money For Songwriters, A 100-Year Tug Of War*, NPR, (Feb. 13, 2014), https://www.npr.org/2014/02/13/275920416/collecting-money-for-songwriters-a-100-year-tug-of-war [https://perma.cc/62FD-Y76R].

cannot solve market defects in this industry.[45] In other industries, competition is effective because one market player can serve as a replacement or substitute for another.[46] If a consumer does not like the Internet service in their apartment, they can terminate their contract with Verizon and go to another provider, which would influence Verizon's behavior by encouraging them to provide better service, lower rates, or otherwise ameliorate whatever made their customer leave.[47] The same is not true of performing rights organizations, because they do not act as substitutes for one another. While it would not make sense to have two different Internet providers in a single apartment, most music users, by contrast, do need licenses from multiple performing rights organizations.

BMI is not a substitute for ASCAP because they both license music for a broad range of copyright owners, thus requiring music users to obtain licenses from both.[48] Smaller performing rights organizations like GMR and SESAC also do not influence ASCAP's and BMI's markets because they represent different copyright owners. Even if a music user has a blanket license (a license that gives a user access to a performing rights organization's entire repertory) from ASCAP, which would cover most Bob Dylan songs, they may also need a license from BMI in the event that Bob Dylan's *publisher* is represented by BMI.[49] The same is true of smaller performing rights organizations; insofar as a musical work typically has at least two copyright owners (the songwriter and the publisher), and they are both free to license through whichever performing rights organization they please, it is not unlikely that a music user will need a license from multiple organizations.[50]

Not only does competition among performing rights organizations fail to yield the same positive outcomes as it might in other industries, competition actually exacerbates the problems that plague this industry.[51] Music users must pay for licenses from multiple performing rights organizations, all the time, for all sorts of music, and sometimes for the same piece of music.[52] Paying for multiple licenses is financially burdensome, particularly for small businesses and independent radio stations, and navigating an increasingly complicated market makes the risk of copyright infringement – whether intentional or not – more likely.

45. *See* Fujinati, *supra* note 3, at 121.
46. *See* Hempling, *supra* note 13, at 289.
47. Id.
48. *See* Oxenford, *supra* note 11.
49. *See* Oxenford, *supra* note 4.
50. *Id.*
51. *Id.*
52. *Id.*

A. THE DIFFICULTY FOR MUSIC USERS TO DETERMINE COPYRIGHT OWNERS AND FAILURE TO OBTAIN LICENSES RESULTS IN LITIGATION AND DAMAGES DUE TO COPYRIGHT INFRINGEMENT

Copyright infringement occurs when someone other than the copyright owner uses a protected work without permission in a way that implicates one or more of the copyright owner's exclusive rights.[53] If a production company were to create a film based on Viv Albertine's memoir without her or her publisher's consent, they would be infringing on Albertine's right to create derivative works. Similarly, if someone ran a coffee shop here in D.C. and played Bob Dylan records during business hours without a license, they would be infringing on Bob Dylan and his music publisher's rights to publicly perform that work (or to authorize such a performance).[54]

The financial burden on users having to pay multiple performing rights organizations, sometimes for the same musical work, is not the only burden music users face; nor is it the most problematic. Performing rights organizations sue copyright infringers on behalf of the copyright owners they represent.[55] They employ teams of investigators who monitor public performances and take note of the songs for which they license the rights.[56] If the establishment does not have a license, the performing rights organizations have a legal course of action.[57] Although performing rights organizations typically warn the music user that they are infringing on one or more copyrights in an attempt to get the business to obtain a license, they often take infringers to court.[58]

The issue here is partially financial: the cost of litigation for music users alone can be devastating; and paying damages and attorney's fees could quite literally bankrupt a business.[59] But being liable for copyright infringement alone exists as an issue in itself.[60] Copyright law is complicated and can prove difficult for seasoned practitioners; navigating this area of law absent a legal degree is an insurmountable task. Many music users are not aware of the potential ramifications of copyright infringement, or what actions amount to infringement.[61] This is not merely due to the complexities of copyright law; fractional licensing itself

53. 17 U.S.C. § 501.

54. *See* 17 U.S.C. § 106.

55. *See* Madison Bloom, *ASCAP Hit Multiple U.S. Bars With Copyright Lawsuits*, PITCHFORK (Feb. 27, 2019), https://pitchfork.com/news/ascap-hit-multiple-us-bars-with-copyright-lawsuits/ [https://perma.cc/FA3D-MUFN].

56. See generally Kathiane Boniello, Restaurateur Won't Face the Music After Losing Copyright Suit, NEW YORK POST (June 14, 2015).

57. American Society of Composers, Authors and Publishers, Writer Member Agreement https://www.ascap.com/~/media/files/pdf/join/ascap-writer-agreement.pdf [https://https://perma.cc/YW8K-WYCN] (last visited Apr. 11, 2021).

58. *See generally* Boniello, *supra* note 56.

59. *See* Bloom, *supra* note 55.

60. 17 U.S.C. § 501.

61. *See* Boniello, *supra* note 56.

undermines the integrity of the entire licensing regime.[62] A music user who has a blanket license from ASCAP may think they are protected from infringement, and they should be right to think that; but fractional licensing undercuts the protections these licenses are intended to provide, leaving users open to liability from copyright owners they may not know exist.[63]

Infringement speaks to the harm that the current system can have for copyright owners as well.[64] Although infringement suits award money damages, copyright infringement tarnishes the moral rights that authors have in their expression.[65] Infringing on those rights, whether intentional or not, creates intangible harm that speaks to the relationship between the author and their work.[66] Creating a regulatory regime that encourages compliance, rather than discouraging it through complicated licensing practices, benefits all parties involved and respects the goals of copyright.

B. EVEN IF A MUSIC USER WERE IN FULL COMPLIANCE WITH THE LAW, THEY WOULD STILL HAVE TO PAY FOR LICENSES FROM MULTIPLE ORGANIZATIONS

Even if a more sophisticated music user were able to successfully navigate the complexities of licensing, the problem of paying multiple performing rights organizations would still exist. For small businesses or music users for whom music is an afterthought in their business, such as a dentist's office that plays music in the waiting room, having to pay for licenses from multiple organizations is difficult to reconcile with the benefit they receive. Even music users for whom music is an integral part of their business model, such as radio stations or concert venues, should not be expected to juggle license fees for multiple organizations, especially when one thinks they have already paid their fair share.[67]

Generally, performing rights organizations have an incentive to set fees that disproportionately benefit copyright owners at the detriment of music users. As the price of license fees go up, performing rights organizations can increase the royalty payments that go back to copyright owners. Not only does this make that particular organization an easy favorite, but the organization itself will receive a financial benefit; as royalty payments increase, so will the organization's piece off the top. License fees can differ depending on the type of license required. Radio stations might negotiate per-program licenses for particular works that fit the needs of their programs, perhaps based on genre; blanket licenses, on the other hand, typically cover a performing rights organization's entire repertory,

62. *See* Oxenford, *supra* note 11.
63. *See* Copyright Registration Practice, *supra* note 40.
64. *See, e.g.*, De Freitas, *supra* note 21.
65. *See generally* Margaret J. Radin, *Property and Personhood*, 34 STAN. L. REV. 957 (1982).
66. *Id.*
67. *See* Oxenford, *supra* note 4.

and may differ in price between users depending on the size and nature of the establishment.[68]

Absent regulatory intervention in the negotiation of these license agreements, performing rights organizations can set fees in discriminatory or other harmful manners.[69] Presently, ASCAP and BMI operate pursuant to consent decrees issued by the Department of Justice ("DOJ"), which are intended to serve as a check on their market power.[70] More discussion of these decrees will come later, but it is important to note that these consent decrees are not permanent, and that the DOJ has indicated a willingness to revoke them.[71] Furthermore, other performing rights organizations are not subject to similar constraints, meaning that any regulation in this industry is largely limited to these decades-old consent decrees.[72]

Requiring music users to pay for multiple licenses, particularly given the lack of comprehensive regulation in this industry, does not serve the interest of copyright owners or music users. If music users cannot afford to pay for multiple licenses, they may forgo having music in their establishments, which would serve as a blow to royalty payments for copyright owners. Or they may elect to not pay and hope they can avoid a lawsuit. In both situations, copyright owners lose out on royalty payments, and the latter involves infringement that harms their financial interest and constitutes exploitation of their work without their consent.[73]

Compensating copyright owners for their work is an integral part of furthering the goal of copyright law: financial incentives are powerful in promoting the progress of science and the arts, as are legal protections and remedies.[74] But the ability for musical works to be performed publicly is equally important and facilitating public access through a coherent regulatory regime that encourages compliance is key to this end.[75] Exorbitant fees and damages awards cripple music users without doing anything to further the goals of copyright law or benefit copyright owners.

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68. *See* Hempling, *supra* note 13, at 291.

69. *See* Fujinati, *supra* note 3, at 121.

70. *Id.*

71. See David Oxenford, ASCAP and BMI Consent Decrees Under Review – How Performing Rights Organizations, Antitrust Policy and Statutory Licenses Could Create a Controversy, BROADCAST LAW BLOG (Mar. 17, 2019), https://www.broadcastlawblog.com/2019/03/articles/ascap-and-bmi-consent-decrees-under-review-how-performing-rights-organizations-antitrust-policy-and-statutory-licenses-create-a-controversy/ [https://perma.cc/49TA-AC8E].

72. *Id.*

73. *See* De Freitas, *supra* note 21.

74. *See* Cohen et al., *supra* note 22, at 6-10.

75. *See* De Freitas, *supra* note 21.

III. PROPOSAL: A SINGLE, GOVERNMENT-DESIGNATED ENTITY THROUGH WHICH COPYRIGHT OWNERS OF MUSICAL WORKS LICENSE THE PUBLIC PERFORMANCE RIGHT, AND FROM WHOM MUSIC USERS OBTAIN LICENSES

Introducing competition in the market and imposing consent decrees on industry players with significant market power has done little to alter the market for public performance licenses.[76] Instead, Congress should pass legislation designating a single organization to be the sole licensor of public performance rights for musical works.

This organization would be regulated in a similar fashion to public utilities. The statute would impose upon the designated agent an obligation to serve, contain language to review the agent's behavior with regard issues such as undue discrimination, and subject the entity to rate review by Copyright Royalty Board[77] judges, as well as general oversight by other regulatory bodies such as the Library of Congress and the Copyright Office. Although the designated agent will have the statutory authority to license the public performance right on behalf of copyright owners, the Copyright Office should have authority to set rules and regulations relating to the designated agent's conduct in order to prevent behavior that will harm consumers.

A. SIMILARITIES AND DEPARTURES FROM OTHER LICENSING REGIMES

SoundExchange, formed in 2000 as a division of the Recording Industry Association of America ("RIAA"), was designated by the Library of Congress to be the sole organization tasked with handling the public performance licenses for sound recordings.[78] Sound recordings are distinct from musical works; sound recordings are a fixation of sounds in a phonorecord, while musical works refer to the underlying work – the composition, melody, etc. The public performance right that this Note is concerned with is those for musical works. Sound recordings have a more limited public performance right, applicable only to digital audio transmissions,[79] and are subject to statutory licenses[80] instead of voluntary ones. In her testimony to the Congressional Subcommittee on Intellectual Property, Register of Copyright Marybeth Peters described the licensing regime as follows:

> "Under section 114, an eligible music service may obtain a license to transmit certain kinds of performances of all sound recordings by filing a single notice of intent to use the statutory license with the Copyright Office. Royalty rates and terms of payments are established by the Copyright Royalty Judges

76. *See* Fujinati, *supra* note 3.

77. 17 U.S.C. § 801.

78. Determination of Reasonable Rates and Terms for the Digital Performance of Sound Recordings and Ephemeral Recordings, 67 Fed. Reg. 45,239 (July 8, 2002).

79. 17 U.S.C. § 106.

80. 17 U.S.C. § 115.

> through the mechanism set forth in Chapter 8 of the Copyright Act. The royalty payments are made to a designated agent of copyright owners and performers (currently SoundExchange, which is controlled equally by record companies and performers), which distributes the royalties to the copyright owners and performers."[81]

SoundExchange, which has been independent from the RIAA since 2003, remains the sole designated agent to receive and distribute royalty payments for the public performance of sound recordings. The public performance right for sound recordings is more limited than those for musical works, and thus SoundExchange works only with services that meet the criteria.

This proposal resembles SoundExchange, but with a few minor differences. The present proposal similarly involves the Library of Congress designating a sole organization to license the public performance rights for musical works. This would involve eliminating existing performing rights organizations in the United States or consolidating them into a single organization that has the statutory authority to perform this service. Though this process may not be as seamless as the creation of SoundExchange as it will necessarily involve reconstructing an existing market as opposed to creating a new one, the outcome will have lasting benefits for consumers, copyright owners, government officials, and music users alike.

1. MAINTAINING VOLUNTARY AGREEMENTS IN LIEU OF STATUTORY LICENSES

In copyright law, there are licenses for different exclusive rights – for example, one can license the public performance right, the derivative work right, etc.[82] But there are also different *types* of licenses, which are distinct from one another with regard to the terms of these agreements. The public performance rights for sound recordings are governed by statutory licenses, meaning the terms and conditions of the license are defined by a statute, as opposed to an agreement voluntarily reached by two parties.[83] SoundExchange operates under statutory licenses, with rates set by the Copyright Royalty Board.[84] On the other hand, the public performance right for musical works presently operate pursuant to voluntary licenses. Parties are thus free to negotiate the terms of their agreements, or even refuse to license their works in the first place.

This element of the proposal will deviate from the SoundExchange model. In order to ensure the continued value of musical works, the voluntary license regime ought to be maintained. Although this will be a statutory monopoly, music

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81. Statement of Marybeth Peters Register of Copyrights before the Subcommittee on Intellectual Property, Committee on the Judiciary (July 12, 2005), https://www.copyright.gov/docs/regstat071205.html [https://perma.cc/C55Z-NYKL].

82. *See, e.g.*, 17 U.S.C. §§ 115-116.

83. *See* Copyright Registration Practice, *supra* note 40.

84. 17 U.S.C. § 115(c)(1)(E-F).

users and the designated agent will retain the freedom to negotiate the terms of their agreements, subject to oversight by the Copyright Office in order to ensure the terms of those agreements are just and reasonable. This is effectively a hybrid regime in that market-based rates cannot apply because there will be no competition in statutory monopoly,[85] but rates will not be set by regulators, either. Regulatory bodies will instead broadly monitor these transactions to ensure that negotiated rates fall within a zone of reasonableness that reflects the appropriate value of the license.[86]

2. THE STATUTORY MONOPOLY'S AUTHORITY MUST BE LIMITED TO PUBLIC PERFORMANCE LICENSING OF MUSICAL WORKS

Congress should limit this new agent's authority to public performance licensing for musical works and not allow it to edge its way into other licensing practices. SoundExchange is the designated agent for administering public performance licenses for sound recordings, but it is not *limited* to this endeavor. While it is true that all music users that require these licenses must go to SoundExchange, there is no statutory language that limits SoundExchange's ability to expand beyond this market – and in fact, they have done so in the past in acquiring a Canadian mechanical licensing organization.[87]

One of the main concerns in a monopoly market is reaching beyond one's industry and attempting to utilize power in one market to manipulate another in their favor.[88] Although it is not clear that this is the case with SoundExchange, the historical power of performing rights organizations like ASCAP and BMI, coupled with the broader protections that the Act provides for musical works, could mean that failing to limit this proposed statutory monopoly's reach may disrupt other realms of copyright licensing. Appropriate statutory language that imposes reasonable limits on the agent's mission creep abilities should be implemented.

B. THE STATUTE SHOULD INCLUDE A "SELF-GENERATION" PRINCIPLE

Music users typically contract with performing rights organizations to obtain their public performance licenses.[89] Insofar as many of these entities lack the time or the resources to work with copyright owners directly, it is unlikely that this would change with the creation of a statutory monopoly. However, some organizations negotiate with copyright owners directly. Whether they have a

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85. *See* Hempling, *supra* note 13, at 216.

86. *Id*. at 232.

87. *See* Daniel Oxenford, *SoundExchange Acquires CMRRA – What Does it Mean for Music Licensing?*, BROADCAST LAW BLOG (May 18, 2017), https://www.broadcastlawblog.com/2017/05/articles/soundexchange-acquires-cmrra-what-does-it-mean-for-music-licensing/ [https://perma.cc/7BYF-C3YH].

88. *See* Hempling, *supra* note 13, at 135 (quoting Times-Picayune Publ'g Co. v. United States, 345 U.S. 594, 611 (1953) (holding that sellers may not utilize power in one market to dominate another).

89. *See generally* Fujinati, *supra* note 3.

certain level of bargaining power, or they have a particular interest in bypassing intermediaries, most contracts between performing rights organizations and authors are non-exclusive and therefore allow copyright owners to license their works outside of their respective performing rights organization(s) and work directly with users.[90]

This Note's proposed solution to maintain this self-generation principle within the proposed statutory monopoly for public performance licensing of musical works may appear to circumvent the purpose of having a designated agent, but this is not the case in practice. For example, the regulations surrounding SoundExchange allow music users to negotiate voluntary licenses with copyright owners of sound recordings.[91] This is true for other areas of copyright law that operate pursuant to statutory licenses, as well as statutory monopolies in other industries; although they are the default, courts will defer to voluntary agreements between parties, granted certain conditions are met.[92]

C. WHY ALTERNATIVE SOLUTIONS ARE INSUFFICIENT

1. THE ROLE OF LAWYERS IN PUBLIC PERFORMANCE LICENSING

This Note provides the foundation for a statutory monopoly in order to solve deeply rooted market deficiencies. This proposal is, admittedly, a significant departure from the present regulatory model. It could be argued that the duties of lawyers in entertainment and intellectual property might be a more conservative solution to these problems. Rule 2.1 of the Model Rules of Professional Conduct provides that, in one's role as an advisor, "a lawyer may refer not only to law but to other considerations such as moral, economic, social and political factors, that may be relevant to the client's situation."[93] Thus, one could imagine a lawyer for a performing rights organization encouraging their client to voluntarily enact policies that are advantageous to both copyright owners and music users, with the public interest in mind. However, the nature of the copyright licensing regime itself makes this an unlikely result for a number of reasons. Not only is Rule 2.1 voluntary as opposed to mandatory, but its application to this Note's proposal could be seen as contradictory to a lawyer's other duties to their client.[94]

A lawyer's duty is to their client, and while they are permitted to consider moral or other factors in representing a client, any lawyer who advocates such a position – that is, a position unrequired by law, and one that is likely to diminish the client's capital – is unlikely to keep their job for very long. The preamble to the *Model Rules* writes that "[a]s advisor, a lawyer provides a client with an informed understanding of the client's legal rights and obligations and explains

90. *Id.*
91. 17 U.S.C. § 115(2)(A)(i).
92. *Id.*
93. MODEL RULES OF PROF'L CONDUCT R.2.1 (2018) [hereinafter Model Rules].
94. MODEL RULES R. 2.1.

their practical implications. [. . .] As negotiator, a lawyer seeks a result advantageous to the client but consistent with the requirements of honest dealings with others."[95] Fractional licensing has been permitted by the courts, and in lieu of consent decrees or similar checks on anticompetitive behavior, there is no legal obligation on the part of performing rights organizations to invoke policies that further the public interest vision of copyright law advanced by this Note.[96] A lawyer for ASCAP who advocates for such policies – policies that would, ultimately, be financially disadvantageous to ASCAP – would fall short of representing their client's best interest.[97]

Furthermore, the context of Rule 2.1 sheds additional light on how it is ill-suited to address this issue. Comment 2 reflects on the nature of the lawyer's role as an advisor.

> "Advice couched in narrow legal terms may be of little value to a client, especially where practical considerations, such as cost or effects on other people, are predominant. Purely technical legal advice, therefore, can sometimes be inadequate. It is proper for a lawyer to refer to relevant moral and ethical considerations in giving advice. Although a lawyer is not a moral advisor as such, moral and ethical considerations impinge upon most legal questions and may decisively influence how the law will be applied."[98]

Rule 2.1 provides an avenue for lawyers to include moral and political obligations in the advice they render, but the general premise of the rule is concerned with the best interests of the client, not the public interest. In other industries, it is not hard to imagine how these two interests can converge. While it may be disadvantageous in the short-term for oil and gas companies to utilize alternatives to fracking, the long-term benefit to the general welfare might arguably save the corporation from a public relations nightmare, as well as future liability for the devastating results of climate change. The same is not true of performing rights organizations. Although social or political factors may influence the outcome of a particular dispute, the law itself remains unbothered. In a world where fractional licensing is accepted, the financial burden on music users and the risk of copyright infringement will continue to exist, regardless of corporate policy that may be more music user-friendly. Thus, while it is possible that Rule 2.1 or other legal ethics considerations might have some benefit on the market, any attempt at reform that fails to address the underlying cause of fractional licensing is inadequate and unlikely to succeed.

The realities of copyright law and the present market structure remain the primary obstacle to a system that is fair to both copyright owners and music users. The ethical responsibilities of lawyers may shed light on how market actors in

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95. MODEL RULES pmbl.
96. *See* Oxenford, *supra* note 11.
97. *See* MODEL RULES pmbl.
98. MODEL RULES R. 2.1 cmt. 2.

this industry should approach reform or illuminate them to the fact that reform is needed in the first place; however, this should not be left up to individual lawyers with the hopes that legal ethics and rules of professional conduct will guide them to a solution.

Fractional licensing exists because multiple performing rights organizations exist. The solution, then, should address the root of the problem. For the reasons set forth above, a statutory monopoly would not only address the problems fractional licensing causes for music users and copyright owners, but would also eliminate anticompetitive and other harmful conduct that has historically plagued the industry.

2. THE INADEQUACIES OF REGULATORY OVERSIGHT

This Note briefly mentioned the ASCAP and BMI consent decrees, but more discussion is warranted here. These consent decrees, issued by the Department of Justice Antitrust Division, contain provisions to protect against undue discrimination, require that these organizations have non-exclusive contracts with copyright owners, and obligate them to serve.[99] However, only ASCAP and BMI operate pursuant to these consent decrees, which means these protections are not afforded to anyone who works with other performing rights organizations.[100] Furthermore, the consent decrees are not permanent, and in the event they are revoked, the protections therein cease to exist.

When facing the potential revocation of their consent decrees, ASCAP and BMI themselves suggested some changes to smooth the transition.[101] One such suggestion involves creating a database that lists all the interested parties in a particular copyrighted work so that music users can navigate fractional licensing. The Music Modernization Act[102] provides for the same thing; however, this database does not yet exist. Some feel that this database would alleviate significant troubles with fractional licensing by simplifying the process of navigating repertories, making it easier for music users to identify copyright owners.[103] However, this fails to recognize the problem of fractional licensing, which would still exist even if it were easier to identify the author.

This database is a temporary fix for a deeper regulatory issue – one that could be solved more effectively and efficiently with the creation of a statutory monopoly. A single designated agent for licensing would eliminate the need for such a database because fractional licensing itself would disappear. There would no longer be an issue in navigating different repertories, nor would there be an

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99. U.S. v. Am. Soc'y of Composers, Authors Pub., 782 F. Supp. 778, 783 (S.D.N.Y. 1991).

100. *See* Oxenford, *supra* note 11.

101. *See* Variety Staff, *ASCAP, BMI Issue Joint Statement on Reforming Consent Decree*, VARIETY (Feb. 28, 2019), https://variety.com/2019/biz/news/ascap-bmi-issue-joint-statement-on-reforming-consent-decree-1203151948/ [https://perma.cc/7MWB-S3ZY].

102. H.R. 1551, 115th Cong. (2018).

103. *Id.*

issue with paying multiple organizations even once a user had correctly identified every copyright owner's respective entity. Furthermore, such a database would fail to eliminate other harmful conduct, such as forcing copyright owners into exclusive licenses and engaging in price discrimination amongst music users.[104] Enacting legislation to create a statutory monopoly and give the Copyright Office the appropriate rulemaking and enforcement mechanisms to oversee its operations not only addresses the problem of fractional licensing at its core, but also eliminates the need for temporary protections like consent decrees by proactively regulating the industry instead of reacting to problems as they arise.

CONCLUSION

Fractional licensing has long posed significant challenges in the music industry, creating a regulatory framework for licensing public performances that is incongruous with the goals of copyright law. A variety of solutions have been proposed in order to mitigate the consequences of fractional licensing, but these fail to address the issue at its core and leave much to be desired. Furthermore, competition in this field has had the opposite of its intended effect, and the protections afforded to music users only apply in certain circumstances. Creating a statutory monopoly would eliminate fractional licensing and streamline the public performance licensing process, making it more affordable and easier for music users to navigate. Such a proposal is not without precedent and would promote a regulatory framework that incentivizes collaboration as opposed to corporate interests.

104. *See* Fujinati, *supra* note 3.