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**United States Response to Questionnaire Concerning
Remuneration for the use of works: Exclusivity v. other approaches**

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By Bart M.J. Szewczyk and June M. Besek¹

Authors' Note: The U.S. Copyright Act is contained in Title 17 of the United States Code and is available on the Copyright Office website, <<http://www.copyright.gov>>. Statutory references in this response are to Title 17, unless otherwise indicated.

A. Questions in relation to scope and enforcement of exclusive rights under existing law

In many areas, exclusive rights can be exercised and enforced in relation to users either on the basis of license agreements or, in cases of infringements, on the basis of enforcement rules and mechanisms. However, in particular in the internet environment, it may be difficult to identify users, who may be anonymous, so that a license agreement in the first place cannot be concluded and infringements are difficult to pursue. The first set of questions addresses these problematic areas. Since most problems arise in the digital environment, questions focus thereon.

- 1. How are the following acts covered by the copyright law of your country (statute and case law):**
 - i. Offering of hyperlinks to works**
 - ii. Offering of deep links to works**
 - iii. Framing/embedding of works**
 - iv. Streaming of works**
 - v. Download of works**
 - vi. Upload of works**
 - vii. Supply of a platform for 'user-generated content'**
 - viii. Other novel forms of use on the internet.**

Under U.S. case law, offering a hyperlink to a website that contains a work does not constitute direct copyright infringement because hyperlinks do not themselves contain

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copyrighted or protected derivative works.² However, there may be viable claims for contributory infringement or vicarious liability.³

Similarly, U.S. federal courts have held that offering deep links to works does not constitute direct copyright infringement, because the links transfer users to copyrighted target pages without any framing or embedding.⁴ However, claims for secondary liability might present a stronger case because a person who supplies a deep link is likely to have the specific knowledge of the infringing work requisite to meet that element of a contributory infringement or vicarious liability claim.

While more contentious, framing or embedding of works has thus far been held not to constitute direct copyright infringement, because a framed full version of a work does not constitute display of a copy of the work, where the work is not stored on an operator's own computer but instead is displayed from an unrelated website publisher's computer.⁵

Streaming of works via the Internet can constitute direct copyright infringement as a public performance or display of the protected work.⁶

Downloading of works can constitute direct copyright infringement as a reproduction or copying of the protected work.⁷ Uploading of works can constitute direct copyright infringement as a violation of the copyright holder's exclusive right of distribution.⁸ And most cases involve both claims of downloading and uploading in conjunction.⁹

Platforms for "user-generated content" can be exposed to copyright infringement suits, but may often benefit from the host service provider "safe harbor" set out at section 512(c),

² *Pearson Educ., Inc. v. Ishayev*, 963 F. Supp. 2d 239, 251 (S.D.N.Y. 2013) ("Because hyperlinks do not themselves contain the copyrighted or protected derivative works, forwarding them does not infringe on any of a copyright owner's five exclusive rights under § 106"); *MyPlayCity, Inc. v. Conduit Ltd.*, 2012 WL 1107648, at *12 (S.D.N.Y. Mar. 30, 2012) ("Because the actual transfer of a file between computers must occur, merely providing a 'link' to a site containing copyrighted material does not constitute direct infringement of a holder's distribution right."); *Perfect 10, Inc. v. Amazon.com, Inc.*, 508 F.3d 1146, 1161 (9th Cir. 2007) (providing HTML instructions that direct a user to a website housing copyrighted images "does not constitute direct infringement of the copyright owner's display rights" because "providing HTML instructions is not equivalent to showing a copy"); *Arista Records, Inc. v. Mp3Board, Inc.*, 2002 WL 1997918, at *4 (S.D.N.Y. Aug. 29, 2002) (supplying hyperlinks to unauthorized infringing files is insufficient to establish infringement).

³ *Online Policy Grp. v. Diebold, Inc.*, 337 F.Supp. 2d 1195, 1202 (N.D. Cal. 2004) ("Although hyperlinking per se does not constitute direct copyright infringement because there is no copying ... in some instances there may be a tenable claim of contributory infringement or vicarious liability.").

⁴ *Ticketmaster Corp. v. Tickets.com, Inc.*, 2000 WL 1887522 (C.D. Cal. 2000), *aff'd*, 2 Fed. Appx. 741 (9th Cir. 2001).

⁵ *Perfect 10, Inc. v. Amazon.com, Inc.*, 508 F.3d 1146 (9th Cir. 2014).

⁶ *WPIX, Inc. v. ivi, Inc.*, 691 F.3d 275 (2d Cir. 2012); *Fox Television Stations, Inc. v. BarryDriller Content Systems, PLC*, 915 F.Supp. 2d 1138 (C.D. Cal. 2012).

⁷ *Metro-Goldwyn-Mayer Studios Inc. v. Grokster, Ltd.*, 545 U.S. 913 (2005); *BMG Music v. Gonzalez*, 430 F.3d 888 (7th Cir. 2005).

⁸ *A&M Records, Inc. v. Napster, Inc.*, 239 F.3d 1004 (9th Cir. 2001); *Disney Enterprises, Inc. v. Hotfile Corp.*, 798 F.Supp. 2d 1303 (S.D. Fla. 2011).

⁹ See, e.g., *Columbia Pictures Industries, Inc. v. Fung*, 710 F.3d 1020 (9th Cir. 2013).

discussed below, or have in some cases obtained preemptive licenses granted by copyright owners to cover the usage of copyrighted content by their users.

2. **In cases in which there are practical obstacles to the conclusion of licensing agreements, in particular where multiple individual (end) users do not address right owners before using works (eg, users uploading protected content on platforms like Youtube), are there particular clearing mechanisms? In particular, are license agreements possible and practiced with involved third parties, such as platforms, regarding the exploitation acts done by the actual users (e.g., license agreements with the platform operator rather than with the platform users (uploaders))?**

Yes, there are. For instance, YouTube includes Content ID, a pre-clearance mechanism that compares the content a user wants to upload to a list supplied by copyright owners, and blocks material identified on the “black list” from going onto the website in the first place. All videos uploaded to YouTube are scanned against a database of files that have been submitted to YouTube by content owners. Content owners are copyright owners who meet certain criteria, own exclusive rights to a substantial body of original material, and are approved by YouTube for Content ID. The content owners can then decide what measures to take when content in a video on YouTube matches their work. They can mute audio that matches their music, block a whole video from being viewed, monetize the video by running ads against it, or track the video’s viewership statistics. Each of these remedies can be country-specific.¹⁰

Similarly, Audible Magic has a set of Content Identification Databases, such as the Advertising Database (used to identify or synchronize with over 25,000 TV spots and show promotions in the U.S.), Live TV Database (live TV content from more than 150 broadcast and cable channels in the U.S.), Motion Picture & Archived TV Database (films and past TV show episodes), Music Database (tens of millions of titles submitted by music studios and content owners world-wide), as well as custom databases providing a mixed selection from the above content identification databases. It offers flexible, multi-tiered pricing plans designed to meet the needs of a broad range of customers. For local database applications, licensing fees are based on the number of users engaged by the app. Local database licensing rates start at \$1,000/month. For hosted database applications, fees are based on database size (hours) and peak capacity (transactions per second). Hosted database licensing rates start at \$2,000/month.¹¹

3. **a) If there is infringement of copyright, in particular of exclusive rights covering the acts listed under 1. above, and the direct infringer cannot be identified or addressed, does your law (including case law) provide for liability of intermediaries or others for infringement by third persons, namely:**

¹⁰ See <https://support.google.com/youtube/answer/2797370?hl=en>.

¹¹ See <http://www.audiblemagic.com/content-databases/>.

- **for content providers**
- **for host providers**
- **for access providers**
- **for others?**

Content providers would be directly liable for copyright infringement.

Host providers can be also directly as well as contributorily liable for copyright infringement, but section 512(c) provides a safe harbor if the service provider (A) (i) does not have actual knowledge that the material or an activity using the material on the system or network is infringing; (ii) in the absence of such actual knowledge, is not aware of facts or circumstances from which infringing activity is apparent; or (iii) upon obtaining such knowledge or awareness, acts expeditiously to remove, or disable access to, the material; (B) does not receive a financial benefit directly attributable to the infringing activity, in a case in which the service provider has the right and ability to control such activity; and (C) upon notification of claimed infringement as described in paragraph (3), responds expeditiously to remove, or disable access to, the material that is claimed to be infringing or to be the subject of infringing activity.

Access providers are not liable for copyright infringement under the safe harbor of section 512(a), if (1) the transmission of the material was initiated by or at the direction of a person other than the service provider; (2) the transmission, routing, provision of connections, or storage is carried out through an automatic technical process without selection of the material by the service provider; (3) the service provider does not select the recipients of the material except as an automatic response to the request of another person; (4) no copy of the material made by the service provider in the course of such intermediate or transient storage is maintained on the system or network in a manner ordinarily accessible to anyone other than anticipated recipients, and no such copy is maintained on the system or network in a manner ordinarily accessible to such anticipated recipients for a longer period than is reasonably necessary for the transmission, routing, or provision of connections; and (5) the material is transmitted through the system or network without modification of its content.

Search engines are not liable for copyright infringement under the safe harbor of section 512(d), if the service provider (1) (A) does not have actual knowledge that the material or activity is infringing; (B) in the absence of such actual knowledge, is not aware of facts or circumstances from which infringing activity is apparent; or (C) upon obtaining such knowledge or awareness, acts expeditiously to remove, or disable access to, the material; (2) does not receive a financial benefit directly attributable to the infringing activity, in a case in which the service provider has the right and ability to control such activity; and (3) upon notification of claimed infringement as described in subsection (c)(3), responds expeditiously to remove, or disable access to, the material that is claimed to be infringing or to be the subject of infringing activity, except that, for purposes of this paragraph, the information described in subsection (c)(3)(A)(iii) shall be identification of the reference or

link, to material or activity claimed to be infringing, that is to be removed or access to which is to be disabled, and information reasonably sufficient to permit the service provider to locate that reference or link.

b) If so, under what conditions are they liable, and for what (in particular, damages, information on the direct infringer, information on the scope of infringement to estimate the amount of damage)?

Failure to qualify for the safe harbor does not automatically mean that an ISP is an infringer; a copyright owner still has to initiate and prevail in a regular copyright infringement suit. And in many cases, courts have held ISPs not liable for direct infringement, because their activities were nonvolitional,¹² although they can still be secondarily liable. Available remedies include injunctions and actual and, potentially, statutory damages. Independently of the service provider's liability (or immunity), the service provider may be compelled to provide information about the infringing end-user in order to permit the copyright owner to initiate an action under section 512(h), though in practice, this measure is rarely utilized.

4. In these cases of infringement, who has standing to sue:

- **the author**
- **the exclusive licensee**
- **the non-exclusive licensee**
- **the employer of the author**
- **the CMO that manages the exclusive right?**

Under section 501(a), the owner of an exclusive right has standing to sue. The author has standing to sue if she is the copyright owner or beneficial owner, viz., someone who was an owner of an exclusive right but transferred that right in exchange for royalties.

Under section 501(b), any legal or beneficial owner of an exclusive right under a copyright is entitled to sue.

A non-exclusive licensee does not have standing to sue.

A creator's employer has standing to sue if the work is made for hire, because the employer in that instance will be the statutory author and copyright owner *ab initio*.

A CMO that manages the exclusive right would have standing to sue, but not if the CMO has non-exclusive rights. CMOs in the US do not hold exclusive rights, so do not have independent authority to sue. Individual members of the CMO usually appear as the named plaintiffs, even though the CMO may be managing and financing the suit.

¹² See, e.g., *Columbia Pictures Industries, Inc. v. Fung*, 710 F.3d 1020 (9th Cir. 2013).

B. Questions regarding mechanisms to ensure adequate remuneration for creators and performers in their relationship with licensees

If authors and performers exercise their exclusive rights by licensing them to exploitation businesses, such as publishers, the question arises how they best may ensure an adequate remuneration from such licenses.

1. Does your law provide for legal rules, including by case law, on mechanisms for authors and performers to ensure an adequate remuneration in relation to exploitation businesses in the following cases:

- as a general rule for all kinds of contracts;
 - as regards ‘best-seller’ situations (i.e., when parties did not presume that the work would become a best-seller);
 - in the case of oppressive contracts;
 - in other cases;
- and if so, under what conditions?

No, the law does not provide for legal rules on mechanisms for authors and performers to ensure an adequate remuneration in relation to exploitation businesses in the above cases, other than the inalienable right in section 203 to terminate transfers, licenses and other grants of rights (made by the author on or after Jan. 1, 1978) 35 years after the execution of the grant. Section 304(c) provides similar termination rights with respect to works copyrighted before Jan. 1, 1978. There are contract law principles that provide relief from unconscionable contracts, but they are not limited to copyright-related contracts, and apply only in the most egregious cases.¹³

There are two exceptions: performers’ share of compulsory license royalties for noninteractive digital transmissions of sound recordings (section 114(g)) and section 1006 on private copying levy for “digital audio recording device” or media).

2. If your law provides for rules as addressed under B. 1. above, does the law determine the percentage of the income from exploitation to be received by authors and performers, or does it otherwise specify the amount of remuneration?

Generally N/A but see sections 114(g) and 1006 (see also infra #D1).

3. Please indicate also whether these mechanisms that are addressed under B. 1. and 2. above are efficient in practice.

¹³ See, e.g., *Song fi Inc. v. Google Inc.*, 2014 WL 5472794, at *6 (D.D.C. Oct. 29, 2014) (holding that unless there is some evidence of egregious tactics, a party seeking to avoid a contract for substantive unconscionability must show that the terms are so extreme as to appear unconscionable according to the mores and business practices of the time and place).

Termination rights are not easy to implement in practice. They must be exercised within a five-year period, beginning at the end of the 35 years after the date of publication. A notice of termination must clearly specify that it is made under section 203, the grant sought to be terminated, and the name and address of each grantee whose rights are being terminated, among other things. Moreover, notice must be served to each grantee no later than two years before the intended termination date and recorded with the U.S. Copyright Office.¹⁴

C. Questions in relation to statutory remuneration rights

The questions below concern the question of the scope of remuneration rights and their enforcement (which usually takes place through collective management organizations (CMOs)) towards users.

1. **In which cases do statutory remuneration rights exist in your country, e.g., public lending rights, resale rights, remuneration rights for private copying, or others (often, they are provided in the context with limitations of rights)?**

There are various statutory and compulsory licenses under the U.S. Copyright Act: sections 111 (statutory license for secondary transmissions by cable systems), 112 (statutory license for making of ephemeral recordings), 114 (statutory license for public performance of sound recordings by means of digital audio transmission), 115 (compulsory license for making and distributing of phonorecords), 118 (compulsory license for use of certain works in connection with noncommercial broadcasting), 119 (statutory license for secondary transmissions of distant television programming by satellite carriers), 122 (statutory license for secondary transmissions of local television programming by satellite carriers), and chapter 10 (statutory remuneration for distribution of digital audio recording devices and media). But, except for section 114 and section 1006, none of the statutory licenses include a set-aside for creators.

2. **Is there the possibility of obtaining compulsory licenses, and if so, under what conditions and for what categories of works?**

Same answer as #1 above.

3.
 - i. **For which statutory remuneration rights does your law provide for obligatory collective management?**

Sections 112(e) and 114(g) provide for obligatory collective management. The section 114 statutory license covers public performances by four classes of digital music services:

¹⁴ See *Classic Media, Inc. v. Mewborn*, 532 F.3d 978 (9th Cir. 2008) (describing “Lassie Works’ difficult journey home” when heir sought to exercise termination rights); *Siegel v. Warner Bros. Entertainment Inc.*, 658 F.Supp. 2d 1036 (C.D. Cal. 2009).

eligible nonsubscription services (i.e., noninteractive webcasters and simulcasters that charge no fees), preexisting subscription services (i.e., residential subscription services which began providing music over digital cable or satellite television before July 1998), new subscription services (i.e., noninteractive webcasters and simulcasters that charge a fee, as well as residential subscription services providing music over digital cable or satellite television since July 1998), and preexisting satellite digital audio radio services (i.e., SiriusXM Radio). The section 112 statutory license covers ephemeral reproductions (i.e., temporary server copies) made by all digital music services covered by section 114.

By contrast, interactive digital audio transmissions are not covered. Noninteractive services are very generally defined as those in which the user experience mimics a radio broadcast. That is, the users may not choose the specific track or artist they wish to hear, but are provided a pre-programmed or semi-random combination of tracks, the specific selection and order of which remain unknown to the listener (i.e. no pre-published playlist). For services which provide an interactive service or on-demand access to certain tracks or artists (e.g., Spotify), the statutory license does not apply, and a direct license must be obtained from the copyright holder.

SoundExchange is the collective management organization that collects and distributes digital performance royalties to feature artists and copyright holders.

ii. For which statutory remuneration rights does your law not provide for obligatory collective management, but in practice, the right is managed by a CMO?

N/A

iii. Who has to pay the remuneration regarding each of these statutory remuneration rights – the user, a third person (e.g., a copy shop or a manufacturer of a copying equipment and devices) or a tax payer (through money allocated from the public budget)?

For rights under section 112 and 114, license users pay royalties to SoundExchange, which then distributes them to artists and copyright owners.

For digital audio recordings, section 1003 requires manufacturers or importers of devices and media such as blank CDs, personal audio devices, automobile systems, media centers, and satellite radio devices that have music recording capabilities, to make royalty payments, which are then distributed to individual claimants from a Sound Recordings Fund and a Musical Works Fund established by the Audio Home Recording Act of 1992.

iv. How is the tariff / the remuneration for each of these remuneration rights fixed (in particular, by contract, by law, by a Commission, etc.)?

With respect to digital audio recordings, the parties negotiate and the Copyright Royalty Board confirms their agreement; in the absence of agreement between the parties, the Board sets the tariff (section 1010). With respect to the section 114 statutory license generally, the Board establishes rates and terms according to a willing buyer/willing seller standard.¹⁵

v. Is there supervision of CMOs regarding tariffs, and if so, what are the criteria for supervision?

Yes, there are Antitrust Consent Decrees for the American Society of Composers, Authors and Publishers (“ASCAP”) and Broadcast Music, Inc. (“BMI”), overseen by the U.S. Department of Justice, Antitrust Division, and enforced by federal district courts in New York City. ASCAP and BMI operate on a not-for-profit basis and together represent around over 90% of the songs available for licensing in the United States. They are CMOs (more commonly referred to as performing rights organizations, “PROs”) that manage certain public performance rights for musical works (as distinguished from sound recordings). However, they do not collect in accordance with a statutory remuneration right, but rather with a rate set by the PRO and overseen by the rate court which can set a rate if there is a dispute. And use of a PRO is not mandatory, but almost all songwriters and music publishers belong to a PRO since it is difficult to monitor the use of one’s musical works otherwise.

The Consent Decrees, originally entered in 1941, are the products of lawsuits brought by the United States against ASCAP and BMI under Section 1 of the Sherman Act, 15 U.S.C. §1, to address competitive concerns arising from the market power each organization acquired through the aggregation of public performance rights held by their member songwriters and music publishers. The decrees impose constraints on ASCAP’s and BMI’s membership and licensing practices. In ASCAP’s case, this includes an express prohibition on licensing any rights other than public performance rights.

Since their entry in 1941, the Department has periodically reviewed the operation and effectiveness of the Consent Decrees. Both Consent Decrees have been amended since their entry. The ASCAP Consent Decree was last amended in 2001 and the BMI Consent Decree was last amended in 1994.

In response to requests by ASCAP and BMI to modify certain provisions of their decrees, the DOJ’s Antitrust Division announced in June 2014 that it would be evaluating the consent decrees, and has solicited and received extensive public comments on whether and how the decrees might be amended. Specifically, both ASCAP and BMI seek to modify the consent decrees to permit partial grants of rights, to replace the current ratesetting process with expedited arbitration, and to allow ASCAP and BMI to provide bundled licenses that include multiple rights in musical works. The DOJ has expressed its intent to examine the operation and effectiveness of the Consent Decrees, particularly in light of the changes in

¹⁵ Sections 114(f)(1), 801(b)(2).

the way music has been delivered and consumed since the most recent amendments to those decrees. At the same time, the DOJ is conducting a related investigation to determine whether there has been a coordinated effort among music publishers and PROs to raise royalty rates.¹⁶

vi. What problems exist when right holders assert the statutory remuneration right in relation to users or others who are obliged to pay the remuneration (e.g., a claim is rejected and results in long legal proceedings; those who are obliged to pay in the meantime go bankrupt, etc.)?

For instance, for royalties for digital audio recordings under the system established by the Audio Home Recording Act of 1992 (see above # iii), claimants under the Sound Recordings Fund or the Musical Works Fund must first reach a universal settlement regarding the distribution of royalties on the basis of the record sales of the claimants' music during the year for which the royalties were collected. Moreover, there are the customary difficulties with U.S. litigation, which can experience delays or result in a judgment against a defendant who is not able to pay.

Relatedly, ASCAP and BMI must grant licenses for public performance of musical works to anyone who requests them; once a license is requested, the CMOs cannot sue. But they have had a huge problem with ISPs requesting licenses and then stalling for years in coming forth with the information that the PRO needs to price the license. Under the current system, the ISPs have no real incentive to move things along.¹⁷ For instance, it is “not unheard of for an applicant to go out of business before a fee is ever set; as a result, the PROs (and, of course, in turn, our writers, composers and publishers) are never compensated for the use of their valuable repertoires.”¹⁸

vii. If problems to assert the remuneration exist, does your law provide for any solutions to these problems (e.g., an obligation to deposit a certain amount in a neutral account)?

If the claimants under the Audio Home Recording Act are unable to reach universal agreement, the Copyright Royalty Board determines distribution based upon evidence presented during an administrative trial. The Board will distribute royalties only once there is a universal settlement or the completion of the administrative trial.

If ASCAP or BMI cannot agree on a rate with a party who seeks a license, the courts that oversee their consent decrees will set a rate, a process that can take months or years. The

¹⁶ U.S. Copyright Office, Copyright and the Music Marketplace: A Report of the Register of Copyrights 37-38 (Feb. 2015), available at <http://copyright.gov/docs/musiclicensingstudy/copyright-and-the-music-marketplace.pdf>.

¹⁷ See, e.g., Joan M. McGivern, A Performing Rights Organization Perspective: The Challenges of Enforcement in the Digital Environment, 34 Colum. J. L. & Arts 631 (2011).

¹⁸ U.S. Copyright Office, Copyright and the Music Marketplace: A Report of the Register of Copyrights 94 (Feb. 2015).

Copyright Office has recommended a process to promptly establish an interim royalty that the licensee would be required to pay during the pendency of the rate setting process.¹⁹

D. Mechanisms to ensure adequate remuneration for creators and performers

The questions below address the issue of existing mechanisms, in particular within CMOs, to ensure that authors and performers, also in relation to exploitation businesses such as publishers and phonogram producers, receive an adequate remuneration.

- 1. In respect of the statutory remuneration rights under your law, does the law determine the percentage of the collected remuneration to be received by particular groups of right owners (e.g., the allocation between authors and producers, among different kinds of authors, performers, and producers, et al.)?**

Yes, under section 114(g)(2), receipts are to be distributed as follows: (A) 50 percent of the receipts shall be paid to the copyright owner of the exclusive right under section 106 (6) of this title to publicly perform a sound recording by means of a digital audio transmission [effectively, the record producer]. (B) 21/2 percent of the receipts shall be deposited in an escrow account managed by an independent administrator jointly appointed by copyright owners of sound recordings and the American Federation of Musicians (or any successor entity) to be distributed to nonfeatured musicians (whether or not members of the American Federation of Musicians) who have performed on sound recordings. (C) 21/2 percent of the receipts shall be deposited in an escrow account managed by an independent administrator jointly appointed by copyright owners of sound recordings and the American Federation of Television and Radio Artists (or any successor entity) to be distributed to nonfeatured vocalists (whether or not members of the American Federation of Television and Radio Artists) who have performed on sound recordings. (D) 45 percent of the receipts shall be paid, on a per sound recording basis, to the recording artist or artists featured on such sound recording (or the persons conveying rights in the artists' performance in the sound recordings).

However, parties can contract out of this provision, which means that the record producer can effectively cut out the performers.

- 2. If so, what percentages are fixed by the law? Are these percentages different for different statutory remuneration rights?**

See answer to #1.

- 3. If there are no such legal determinations, how are the percentages or the otherwise fixed distribution keys for the different rights of remuneration determined in practice (in particular, by which decision-making procedures and by whom are these**

¹⁹ Id. at 157-58.

distribution keys determined inside CMOs)? Which percentages are in practice applied?

N/A

- 4. If owners of derived rights (such as publishers who derived the rights from their authors) transfer these derived statutory remuneration rights to a CMO, how and on the basis of which agreement is the remuneration distributed between them in this case?**

See answer to #1.

- 5. Which mechanisms of supervision exist in your country to control the distribution keys applied by CMOs, if any?**

Under the Antitrust Consent Decrees for ASCAP and BMI, the U.S. District Court for the Southern District of New York is authorized to set “reasonable” rates for ASCAP and BMI licenses in the event that the CMOs and users were unable to reach agreement. Currently, the ASCAP decree and ratesetting cases are overseen by Judge Denise Cote, and Judge Louis L. Stanton oversees these matters with respect to BMI.

E. Questions on new business models and their legal assessment

- 1. Which new business models do you know in your country in respect of the supply of works via the internet?**

Please list such business models, such as Spotify, Netflix, etc., and describe them briefly.

There are numerous business models to supply works via the internet, e.g., iTunes, AmazonMP3, Hulu, Yahoo Music, Google Play, MTV, Spotify, Netflix, Amazon Instant Video, Blockbuster On Demand, DirectTV, dish, HBO Go, Xbox Video, Vudu, Xfinity TV, Amazon, Kindle, Barnes & Noble, and others. There are over 500 digital music services globally, and over 50 sites in the U.S. where users can lawfully access movies and TV shows online. These websites provide downloads, subscription services, free streaming, cloud storage, digital radio, online simulcasts.²⁰ Within the music industry, for instance, streaming and downloading are mainstream business models.²¹

²⁰ U.S. Department of Commerce Internet Policy Task Force, Copyright Policy, Creativity, and Innovation in the Digital Economy (2013), available at <http://www.uspto.gov/sites/default/files/news/publications/copyrightgreenpaper.pdf>.

²¹ IFTI, Digital Music Report (2014).

2. Which of these business models have raised legal problems, which are, or have been, dealt with by courts? If there have been problems, please describe them and the solutions found

A number of P2P file-sharing services and cyberlockers, including BitTorrent, MP3.com, Hotfile, Medifire, and Megaupload, have become sources of illegal content. Several studies have found that a significant portion of Internet traffic is related to copyright infringement.²² Although some cases have been litigated in court, direct copyright infringement through such sites is difficult due to the mass number of potential individual defendants, obstacles in tracing acts of infringement to their source, and potential extraterritoriality of the source.²³ In addition to litigation, other attempted solutions have included public education and raising awareness about the purpose of copyright and the availability of legitimate alternatives.²⁴ Another attempted solution is filtering pursuant to agreement, discussed above.

3. In your country, are there offers that are based on flat rates, ‘pay-per-click’ or on other micro-payment models? Please indicate how popular (frequently offered or used) each of these models is.

Yes, all of the offers are available, but overall statistics on each model are difficult to obtain.²⁵

For instance, the break-down of U.S. music industry revenues in 2013 was 40% for digital downloads, 21% for subscription and streaming, 3% for synchronization, 1% for ringtones & ringbacks, and 35% for physical sales. By comparison, only as recently as 2004, 98.4% of the industry’s revenues was from physical sales.²⁶ In recent years, the use of streaming has surged, with 54% growth for 2013-2014, an associated decrease in physical and digital

²² See Christopher S. Stewart, As Pirates Run Rampant, TV Studios Dial Up Pursuit, Wall Street J. (March 4, 2013) (reporting that antipiracy firm had “detected 5.4 billion instances of pirated content online” in 2009 and 14 billion in 2012); Envisional, Technical Report: An Estimate of Infringing Use of the Internet 2-3 (Jan. 2011) (finding that 23.76% of global internet traffic and 17.53% of U.S. internet traffic is dedicated to the infringement of non-pornographic copyrighted works), available at http://documents.envisional.com/docs/Envisional-Internet_Usage-Jan2011.pdf; Cisco, Visual Networking Index: Forecast and Methodology, 2011-2016 (May 2012), available at http://www.cisco.com/en/US/solutions/collateral/ns341/ns525/ns537/ns705/ns827/white_paper_c11-481360.pdf (estimating that file sharing Internet traffic will increase by 26% between 2011 and 2016); PRS for Music & Google, The six business models for copyright infringement (June 2012), available at <http://www.prsformusic.com/aboutus/policyandresearch/researchandconomics/Documents/TheSixBusinessModelsofCopyrightInfringement.pdf> (reporting 17% increase in page views of P2P file-sharing networks from 2011-2012); Ed Felten, Census of Files Available via BitTorrent, Freedom to Tinker (Jan. 29, 2010), available at <https://freedom-to-tinker.com/blog/felten/census-files-available-bittorrent/> (reporting results of study finding that all of the movie, TV and music torrents in a sample of 1,021 files were likely infringing).

²³ U.S. Department of Commerce Internet Policy Task Force, Copyright Policy, Creativity, and Innovation in the Digital Economy 40-41 (2013).

²⁴ Id.

²⁵ Id.

²⁶ U.S. Copyright Office, Copyright and the Music Marketplace: A Report of the Register of Copyrights 70 (Feb. 2015).

download sales, and a decline in mechanical revenues for music publishers and songwriters.²⁷ There has also been a shift from album sales to individual song purchases.

Another developing area is the market for so-called “micro-licenses” for music that is used in videos of modest economic value, such as wedding videos and corporate presentations. In the past, income received by rightsholders from licensing such uses might not overcome administrative or other costs. But the market is moving to take advantage of technological developments—especially online applications—that make micro-licensing more viable. This includes the aforementioned services like Rumblefish.²⁸

4. Within these business models, how do authors and performers get paid?

Authors and performers get paid through royalties or license fees. The existence or percentage of this remuneration will generally depend on the author’s or performer’s contract. Contracts may differ by sector, with some breaking out subsidiary rights and providing percentages.

Within the U.S. music industry, for instance, there has been a significant reduction in overall revenues since the late 1990s and in particular with the rise of streaming and digital downloads over the past few years. And for creators, increases in performance revenues have not compensated for the decrease in artist and mechanical royalties due to a decline in physical sales.²⁹ Songwriters are particularly concerned about digital streaming services such as Spotify, which do not require a subscription fee or generate a large amount of advertising revenue. For instance, Pharrell Williams received only \$2,700 in royalties from 43 million plays of his song “Happy” on Pandora. And artists such as Taylor Swift have removed their songs from Spotify for similar reasons.³⁰

Songwriters who are not also recording artists with some measure of control over their recordings typically do not have the option to withdraw their works from low-paying services, because—due to the combination of the section 115 compulsory license and the ASCAP and BMI consent decrees—they have no choice other than to permit the exploitation of their musical works by such providers. And even recording artists cannot remove their music from noninteractive digital services like Pandora that qualify for the section 112 and 114 compulsory licenses.³¹

New York, New York
9 April 2015

²⁷ Id. at 71.

²⁸ Id. at 58.

²⁹ Id. at 74.

³⁰ Id. at 75. Spotify is an interactive on-demand service and doesn’t fall under the section 114 license, and so it must negotiate with the sound recording copyright owners (who are not forced to have their recordings on Spotify).

³¹ Id. at 76.