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## Harmonizing the Liner Notes: How the USCO's Adoption of Metadata Standards Will Improve the Efficiency of Licensing Agreements for Audiovisual Works

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# HARMONIZING THE LINER NOTES: HOW THE USCO'S ADOPTION OF METADATA STANDARDS WILL IMPROVE THE EFFICIENCY OF LICENSING AGREEMENTS FOR AUDIOVISUAL WORKS

MICHAEL REED\*

*It is no secret that making a living as a musician is not as lucrative of a proposition as it was a generation ago. For this reason, musicians have had to diversify their sources of income. Placement of a song in advertisements, film, or television programs have become an integral part of many successful musician's careers, but far too many independent artists still find these opportunities out of reach. This disparity is often the result of technical deficiencies in the audio files submitted for consideration, making it difficult to identify and contact the requisite rights holders in order to negotiate a sync license. This article proposes that the consistent application of uniform metadata to audio files could solve this problem and argues that the United State Copyright Office should be empowered by Congress to issue metadata identifiers as a part of the copyright registration process for audio files. Such a change to the registration process would have the beneficial effects of ensuring a reliable method of rights holder authentication and lay down critical legal infrastructure which would promote the formation of a publicly searchable database of copyrighted songs, both developments will make it easier for those looking to license songs for audiovisual works from musicians to get in touch the proper parties in order to facilitate these transactions.*

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### INTRODUCTION

Shonda Rhimes may be one of the best Artists & Repertoire ("A&R")<sup>1</sup> people working in the music industry over the past two decades.<sup>2</sup> This is surprising because she doesn't actually work for a record company. Rhimes is a showrunner<sup>3</sup> for broadcast network hits such as *Grey's Anatomy*,

1. DONALD PASSMAN, ALL YOU NEED TO KNOW ABOUT THE MUSIC BUSINESS 125 (9th ed. 2015). Traditionally, A&R people were executives at record labels who performed key roles, such as finding and signing talent, advising artists on their careers, matching singers to songwriters, and overseeing recording sessions. Today, many of these roles are fulfilled by producers, however, A&R do still play a role in finding talent and connecting talent to producers and recording projects. Shonda Rhimes role as a show runner is a hybrid of the traditional and contemporary roles of an A&R person, where she scouted talent and matched artists to particular projects which she oversaw.

2. Melinda Newman, *Shonda Rhimes on Her Early Battles Over Music for Her Shows and the Artists She's Obsessed With*, BILLBOARD (Sept. 17, 2015), <http://www.billboard.com/articles/news/magazine-feature/6700362/shonda-rhimes-music-greys-anatomy-scandal-how-to-get-away-with-murder-shondaland>.

3. Cori Hundt, *How to Become a Showrunner*, BACKSTAGE (July 23, 2018, 12:30 pm), <https://www.backstage.com/backstage-guides/how-become-showrunner> ("[A] showrunner quite literally "runs the show" to make sure all of the writing and producing on a TV series is punctual, on budget, and of high artistic quality for the network or studio.").

*Scandal*, and *How to Get Away With Murder*.<sup>4</sup> *Grey's Anatomy*, in particular, has launched many contemporary rock artists into mainstream success.<sup>5</sup> Indie rock darlings The Postal Service and Tegan and Sara both enjoyed minor success as touring bands before receiving a major bump from having their songs featured in Rhimes's shows.<sup>6</sup> Others like Snow Patrol were catapulted into fame after having a song featured in the second season finale of *Grey's Anatomy*, which eventually led to an invite to perform on Saturday Night Live and a Grammy award for Best Rock Song.<sup>7</sup> According to Rhimes, the music that scores a scene is essential to conveying the plot and can create a transformative experience.<sup>8</sup> For an up-and-coming artist, the right placement can make the difference between a big break and being broke.<sup>9</sup> Often the highest hurdle to negotiating a lucrative placement is whether or not someone in Rhimes's position is confident that she can clear<sup>10</sup> the use of a song for her show.<sup>11</sup> This requires that the rights holders for a particular song are identifiable in an accurate and efficient manner. In this respect, the metadata in audio files plays a pivotal role in the placement of songs in audiovisual works.<sup>12</sup>

To facilitate the efficient identification of rights to negotiate licensing agreements, reliable and authoritative standards for metadata need to be instituted. We've all noticed how a song helps set the mood of a television show or movie, or how the music in a commercial affects how you feel about what's being advertised. It should come as no surprise that there is a great

4. *Id.*

5. Courtney E. Smith, *Music Is a Driving Force in ShondaLand*, RADIO.COM (Sept. 25, 2014, 8:00 am), <https://web.archive.org/web/20161221175135/http://radio.com:80/2014/09/25/shonda-rhimes-shondaland-music-greys-anatomy-scandal-how-to-get-away-with-murder>.

6. *Id.*

7. *Id.* (Smith comments on the rise of Snow Patrol following their debut on *Grey's Anatomy*, saying, "It is, quite literally, the kind of success that money can't buy.")

8. See Newman, *supra* note 2.

9. Jay Cridlin, *Tegan and Sara's 'Sara Quin Talks About Snowshoes, 'Grey's Anatomy' and Funny Canadians*, TAMPA BAY TIMES (Feb. 16, 2016, 1:00 pm), <http://www.tampabay.com/blogs/soundcheck/content/tegan-and-saras-sara-quin-talks-about-snowshoes-greys-anatomy-and-funny-canadians> ("We were six or seven years into our career, and we finally had sold 50,000 records. That was a big deal for us. All of a sudden we were getting these placements on television, and you're tapping into a completely different market. The number of people that watch those television shows — even a show that's maybe not the biggest show on television, you're still looking at . . . more than a million people.")

10. David G. Powell, *All Clear? A Basic Primer on Music Clearance*, INTERNATIONAL DOCUMENTARY ASSOCIATION (May 13, 2003), <https://www.documentary.org/magazine/all-clear-basic-primer-music-clearance> ("clearing a song" means that all of the applicable licenses have been negotiated and permission has been granted by the rights holder for the inclusion of their work in film, television show, advertisement, or other audiovisual work).

11. Promusinfo, *How to Work with Music Supervisors – SPOT 2014*, YOUTUBE (May 14, 2014), <https://www.youtube.com/watch?v=VKKxK5wX3Cw>.

12. *Id.*

deal of time and effort that goes into making sure the right song lands in the right scene.<sup>13</sup> When this serendipity is reached, not only does the film or advertisement have its intended effect, but the featured artist succeeds as well.<sup>14</sup> Especially as revenue from sound recordings fails to keep up with the costs of production in the United States (“U.S.”),<sup>15</sup> more musicians are turning to song placements to supplement their income.<sup>16</sup>

Music supervisors at movie studios and advertising firms are the people in charge of making sure that the music fits a project and is cleared for use, usually relying on huge databases of sound recordings on their office or person hard drives to pull potential songs for inclusion for any given project.<sup>17</sup> This article argues that the adoption of a metadata standard for audio files in the U.S. would increase the efficiency by which artists can be identified by parties looking to place a song in a film, television show, advertisement or other audiovisual work and thereby potentially benefit from inclusion in these projects. These benefits can be realized by allowing the United States Copyright Office (“USCO”) to issue metadata identifiers for

13. JESSICA HOPPER, *THE FIRST COLLECTION OF CRITICISM BY A LIVING FEMALE ROCK CRITIC: HOW SELLING OUT SAVED INDIE ROCK*, 165 (2015).

14. Steven Gordon, *A Simple Guide To Signing The Best Sync Deal Possible*, DIGITAL MUSIC NEWS (May 25, 2015), <http://www.digitalmusicnews.com/2015/05/25/a-simple-guide-to-signing-the-best-sync-deal-possible/> (“[A] major motion picture will usually pay from \$10,000 to \$25,000 for a song or master by an indie writer, artist or producer.”); Kayli Woods, *5 Musical Artists Who Got Their Start on ‘Grey’s Anatomy’*, MIC (Oct. 1, 2013), <https://mic.com/articles/65723/5-musical-artists-who-got-their-start-on-grey-s-anatomy> (Many musicians’ careers have been elevated due in part to the use of one of their songs in powerful scene or effective advertisement); Tim Ingham, *Global Record Industry Income Drops Below \$15Bn for First Time in Decades*, MUSIC BUSINESS WORLDWIDE (Apr. 14, 2015), <http://www.musicbusinessworldwide.com/global-record-industry-income-drops-below-15bn-for-first-time-in-history/> (“[Synchronization] revenues – income from the use of music in advertising, film, games and television – increased by 8.4% worldwide in 2014 with big gains in markets such as France (+46.6%), Germany (+30.4%) and Japan (+33.5%).”).

15. DAVID BYRNE, *HOW MUSIC WORKS*, 244–53 (2012). David Byrne, of Talking Heads fame, was advanced \$225,000 to record his album *Grown Backwards* by the record label Nonesuch. After breaking down the expenses of recording the album (which mostly went toward paying musicians to play compositions that he had written) Byrne was able to keep \$7,000 of his advance. The record was successful and sold well. The royalties from said sales amounted to \$58,000 for Byrne. This would seem like a good payday except for the fact that these royalties are not paid all at once, as they are doled out over a period of six years. Byrne admits that this is impossible to live off of and therefore he must supplement his income through licensing deals for television, film, and the writing and sale of books [such as *How Music Works*].

16. See Ingham, *supra* note 14 (“New statistics from the IFPI show that overall global record industry revenues dipped by just 0.4% (in 2014) . . . The biggest culprits for the fall were an 8.1% decline in revenues from physical format sales.”); See Smith, *supra* note 5 (“[A]lternate routes to expose our music to a wide audience’ such as [sync placements] are ‘a must.’”).

17. Ari Herstand, *How To Guarantee Your Music Is Heard By A Film/Tv Supervisor*, ARI’S TAKE (June 16, 2015), <http://aristake.com/post/the-only-way-to-guarantee-your-music-is-heard-by-a-filmtv-music-supervisor>. (“Music supervisors are the actual people who take the cues from the producers and director when the “picture is locked” and underscore the picture with songs. They then negotiate with owners of that song a fee to allow them to sync the song to their video (be it a TV show, film, commercial, trailer or video game).”)

each musical work and sound recording registered with their office and to facilitate the compiling of these codes into a publicly searchable database.<sup>18</sup>

Part I of this article identifies applicable copyright laws in the United States, gives an overview of the current market for synchronizing sound recordings with audiovisual works, and defines the problems caused by a lack of standardized audio file metadata. Part II introduces draft legislation to enable the USCO to issue standardized metadata identifiers with each registration of a sound recording or musical work and permit it to share this registration information within a publicly searchable database. This part also provides an explanation of how the legislation should be implemented and the benefits it is expected to produce. Part III addresses potential criticisms of the proposed changes to registration policies through the implementation of the proposed legislation.

## I. COPYRIGHT, METADATA, AND THE MARKET FOR SYNC PLACEMENTS

Within the U.S., there is a consensus that the music industry does not produce the wealth that it once did.<sup>19</sup> Record sales declined dramatically in the 2000's, digital sales are stagnant, and revenue from streaming is not making up the difference for most artists.<sup>20</sup> With the music industry revenue models beset by uncertainty, artists have had to look to other means to sustain

18. The USCO is currently undergoing some structural changes following the firing of the Register of Copyrights, Maria Pallante, by the Librarian of Congress. A bill moving through Congress as of this writing (Register of Copyrights Selection and Accountability Act of 2017, S.1010, 115th Cong. (2017–2018)) would make the Register of Copyrights an appointee of the President of the United States. These transitions do not affect the substance of my proposal. In addition, a bill has recently been passed by both the House of Representatives and the Senate and was signed into law by the President in 2018 (Music Modernization Act, Pub. L. No. 115-264 (2018)). This Act drastically alters the way mechanical royalties are administered in the U.S., but as I will explain later in this article, the implementation of this Act will not diminish the utility of my proposal.

19. HOWARD L. VOGEL, ENTERTAINMENT INDUSTRY ECONOMICS: A GUIDE FOR FINANCIAL ANALYSIS, 268–69 and 286 (9th ed. 2015). The record industry was able to sustain itself in the 80's and 90's through the marketing of CDs. Revenues dropped off steeply in the 2000's due to advances in technology, which allowed songs to be exchanged through free peer-to-peer networks along with the rising market dominance of distribution platforms like the iTunes store, and later, streaming services like Spotify, both platforms have seriously undercut the market retail value of digital recordings.

20. *Id.* at 286. Artists used to make 10 percent of the suggested retail price from the sale of a CD. iTunes undercut these royalties severely, accruing between 7–10 cents for the artist per 99 cent download. Each play on streaming service produces a fraction of a cent, which often must be split between multiple owners of the sound recording. The royalty rate is different for each song on a streaming service and the rate is influenced by the negotiating power of the artist's record label; Michael Huppe, *House Introduces Comprehensive Music Licensing Reform Legislation*, SOUNDEXCHANGE (Apr. 10, 2018), <https://www.soundexchange.com/news/house-introduces-comprehensive-music-licensing-reform-legislation/>. In reaction to the deflated returns artists receive in royalties from performances of their works through platforms like Spotify and other digital platforms, Congress has introduced the Music Modernization Act to ensure that such platforms pay a fair market rate for the use of copyrighted works through the overhaul of the way mechanical royalties are administered in the U.S.

themselves.<sup>21</sup> One viable option for artists seeking exposure and compensation for their work is to have their music placed in a film, television show, advertisement, or other audiovisual work.<sup>22</sup> While there is some rancor regarding placement of one's songs on a network television program or in commercials as being a form of "selling-out,"<sup>23</sup> most musicians see it as a way to recoup costs and take the next step in their careers.<sup>24</sup> As more artists seek lucrative placements there is greater pressure to increase the efficiency of licensing agreements.<sup>25</sup> Any issues with the quality of attribution information attached to an audio file submitted for consideration to a production studio or advertising agency will reduce the likelihood of an artist's work being licensed for landing for inclusion in an audiovisual work down to the level of a statistical improbability.<sup>26</sup> The goal of this article is to explain how changes in the registration policies for copyrights in audio files and musical works can improve an artist's chances of landing a desirable licensing arrangement through the dissemination of reliable rights holder information in the form of standardized metadata identifiers.

21. VOGEL, *supra* note 19, at 279. While not always a reliable source of income, many musicians do in fact make most of their money while on tour, either through payment from the venue or the sale of their albums and merchandise during or after their performances; See Fiona Zwieb, *Which Crowdfunding Platform is Best for Musicians?*, CD BABY (June 19, 2015), <http://diymusician.cdbaby.com/musician-tips/which-crowdfunding-platform-is-best-for-musicians/>. Crowd funding and special offers to fans have become increasingly important to independent and established musicians alike and a number of platforms have popped up to help artists manage this aspect of their business. See also PLEDGEMUSIC, <http://www.pledgemusic.com/learn/fans/> (last visited Apr. 8, 2017).

22. BARRY IRWIN & ADAM REIS, *BAND LAW FOR BANDS*, 52–53 (2d ed. 2016).

23. See HOPPER, *supra* note 13, at 165; Big Think, *The New Rules of Music Licensing*, YOUTUBE (Apr. 20, 2012), <https://www.youtube.com/watch?v=knPK-95DKHM> (hereinafter, "New Rules"). While commenting on the string of licensing deals which catapulted his album *Play* into double platinum status, Moby states that these placements were a form of karma, where he was able squeeze money out of a greedy corporations who wanted to exploit his music.

24. Jason Blume, *10 Things You Need To Know About Placing Music On Tv And In Films*, BMI.COM (Apr. 25, 2014), [http://www.bmi.com/news/entry/10\\_things\\_you\\_need\\_to\\_know\\_about\\_placing\\_music\\_on\\_tv\\_and\\_in\\_films](http://www.bmi.com/news/entry/10_things_you_need_to_know_about_placing_music_on_tv_and_in_films).

25. Annabelle Gauberti, *MIDEM 2015 Masterclass on Sync Licensing*, YOUTUBE, (June 27, 2015), <https://www.youtube.com/watch?v=bauw4US8iNc>.

26. See Herstand, *supra* note 17; see Promusinfo, *supra* note 11. Andrea Von Foerster, Music Supervisor for Firestarter Music, explained during a panel that she receives somewhere around 1,000 emails a day from artists and their agents looking to have music synced in a film or television program. See also Gauberti, *supra* note 25. During the same panel, Chris Clark, music supervisor at advertising firm Leo Burnett, explained that if the songs that are submitted to him lack rights holder information, especially information about the ownership rights to the master sound recording and publishing, these songs will not be considered for licensing in any projects he is working on.

### A. Music Copyright in the U.S.

Authorship for a song is divided into two separate categories for each work under 17 U.S.C. § 102.<sup>27</sup> The first is a copyright in the composition of the song, including lyrics, known simply as a musical work.<sup>28</sup> The second is a copyright in the recording of a performance of a composition, known as a sound recording.<sup>29</sup> Copyright law grants the author of either a musical work or a sound recording certain exclusive rights.<sup>30</sup> Copies made of these sound recordings are known as phonorecords.<sup>31</sup> The exclusivity of these rights requires third parties seeking to exploit a copyrighted work to seek permission in the form of a license from the author.<sup>32</sup> The right to exploit musical works and sound recordings take different forms due to the statutory treatment and the economic value they represent to individual artists.<sup>33</sup>

In the U.S., granular data which are compiled to create an audio file, as well as attached metadata, are not subject to independent copyright

27. 17 U.S.C. § 102 (2016); Robert J. Driscoll & David D. Oxenford, *The Basics Of Music Licensing In Digital Media: 2011 Update*, DAVIS WRIGHT TREMAINE LLP (Feb. 22, 2011), <http://www.kab.net/kabadditionalinformation/additionaldownloads/d71461.aspx>.

28. 17 U.S.C. § 102(2) (2016).

29. 17 U.S.C. § 102(7) (2016).

30. 17 U.S.C. § 106 (2016). The grant under § 106 confers on the rights holder the exclusive right to reproduce, prepare derivatives, distribute, perform, display, and perform the work via digital audio transmission.

31. Neil Conley, *The Future Of Licensing Music Online: The Role Of Collective Rights Organizations And The Effect Of Territoriality*, 25 J. MARSHALL J. COMPUTER & INFO. L. 409, 438–39 (2008); KEVIN PARKS, *MUSIC & COPYRIGHT IN AMERICA: TOWARD THE CELESTIAL JUKEBOX*, 132 (2012) (the phonorecord is simply a copy of the sound recording, which itself is just a captured performance of the composition); 17 U.S.C. § 109 (2016) (the owner of a particular phonorecord is entitled to sell or dispose of it as they see fit).

32. See DRISCOLL & OXFORD, *supra* note 27. The exclusivity of this grant means that the rights holder is empowered to authorize or decline an offer by others to exercise rights over their work in the form of a license; 17 U.S.C. § 101 (2016). A “transfer of copyright ownership” is an assignment, mortgage, exclusive license, or any other conveyance, alienation, or hypothecation of a copyright or of any of the exclusive rights comprised in a copyright, whether or not it is limited in time or place of effect, but not including a nonexclusive license; See IRWIN & REIS, *supra* note 22, at 20. Many copyrighted works such as films and sound recordings become the property of the creator’s employer as soon as they are created through an arrangement known as “Work for Hire.”

33. See IRWIN & REIS, *supra* note 22, at 18–20. Often songs have more than one composer or lyricist. This makes most musical works joint works, as defined by the copyright act as works prepared by more than one author. Unless there is an agreement specifying the percentage contribution of each author to the work, authors who collaborate in the creation of a musical work generally are considered to have equal ownership stakes in the song. Artists will often license the rights to their compositions to publishing companies which handle the collection of royalties. Publishing companies work in tandem with PROs such as ASCAP and BMI to collect royalties for the public performance of their compositions, usually over territorial radio, in restaurants and business, or at sporting events; THOMAS R. LEAVENS, *MUSIC LAW FOR THE GENERAL PRACTITIONER* 15 (2013) (although these rights of authorship may be assigned like any other rights granted under § 106); 17 U.S.C. § 114 (2016); see PARKS, *supra* note 31, at 200–01 (presently, only the owner of the underlying musical work is compensated for these public performances).

protection.<sup>34</sup> Many courts in the EU have extended protection over databases in order to protect the investment of rights holders in these collections.<sup>35</sup> However, no such right exists in the U.S., unless the compiled data are organized in a way that is sufficiently original.<sup>36</sup> Neither protection represents a barrier to the collection and organization of metadata, provided this information is independently compiled and not extracted and appropriated whole from a protected database without authorization.<sup>37</sup>

### B. Metadata in Audio Files and Musical Works

“Metadata” can be difficult to define, but is essentially a fluid term referring to a variety of datasets that help identify a digital file or its contents within a database.<sup>38</sup> Metadata are commonly accessible by mp3 players, smartphones, and software like iTunes in order to locate and play songs, as well as to make specific files easily searchable within a digital library.<sup>39</sup> The information commonly found in the metadata of an audio file includes the composers of the song, recording artist, song title, album through which the recording was published, year the song was published, track number, musical genre, and in some cases, album art, lyrics, producer, and sound engineer responsible for mixing and mastering the original recording.<sup>40</sup>

34. *Feist Publ'ns, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 357 (1991) (holding that facts and data do not on their own meet the requisite bar of originality to invoke copyright protection); Directive 96/9/EC of the European Parliament and of the Council on the Legal Protection of Databases, 1996 O.J. L. 77/20 <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:31996L0009:EN:HTML> (last visited Nov. 17, 2018) [hereinafter *Parliament and Council Directive on Databases*] (“the right to prevent unauthorized extraction and/or re-utilization does not in any way constitute an extension of copyright protection to mere facts or data”); see *PASSMAN*, *supra* note 1, at 265–71. The fees for the use of a musical work vary based on the how long the song is used, the medium the license is sought for (generally films pay better than television, and television better than advertisements, although if it is an independent film project, the studio will obviously not be able to pay the same as a major network studio or large advertising firm), the relevance of the song to the scene, and who the songwriter is, or if the composition has been made famous by a particular performance, and whether a right for a particular sound recording for the composition is sought.

35. See *Parliament and Council Directive on Databases*, *supra* note 34, art. 3(1).

36. *Feist Publ'ns, Inc.*, 499 U.S. at 345 (“sine qua non of copyright is originality”).

37. Chris Castle, *Eternal Vigilance: Why Copyright Owners Should Protect Their Metadata in Digital Retailer Agreements*, MUSIC TECHNOLOGY POLICY (Nov. 23, 2011), <https://musictechpolicy.com/tag/publishing-metadata/>. EU data protection is a serious concern for online retailers who want to keep their accounting practices secret from competitors, standardized metadata for audio files was designed to be shared and tends not to threaten expose commercially sensitive information when distributed.

38. Mark Harris, *Music Metadata Definition: What is Music Tagging?*, LIFEWIRE (Apr. 24, 2015), <https://www.lifewire.com/what-is-music-tagging-2438569> (the metadata embedded in audio files are commonly referred to as ID3 metadata in files accessed through iTunes).

39. *Id.*

40. Shane Greenstein, *Baking the Data Layer [Micro Economics]*, 34 IEEE MICRO ISSUE 4, July-August 2014, at 56 (this information is not only important for locating a particular song in a database, but also for identifying to whom royalties are owed for licensing purposes); Solveig Whittle, *A Musician's*

Metadata in a common mp3 file can either be manually added or filled in by software that has access to a networked database, such as Rovi, which is maintained by AllMusic.<sup>41</sup> Metadata embedded in an audio file is typically applied during the “mastering” phase<sup>42</sup> when the identifying information is encoded into wav files stored as a master audio file or on a master CD.<sup>43</sup> Metadata found in an mp3 in a typical consumer’s digital library is not generally definitive of the contents of a track and has usually been added manually when the file was placed in their library or through the use of third party tagging software.<sup>44</sup>

Certain varieties of metadata are popular with Performance Rights Organizations (“PROs”),<sup>45</sup> record labels, and artists’ management companies because they help to reliably identify works across platforms and help track royalties.<sup>46</sup> The two most widely used forms of standardized metadata are the International Standard Recording Codes (“ISRC”) and

*Guide To Editing Mp3 Music Metadata*, HYPEBOT (Feb. 21, 2014), <http://www.hypebot.com/hypebot/2014/02/a-musicians-guide-to-editing-mp3-music-metadata.html> [hereinafter “Whittle I”].

41. See Whittle I, *supra* note 40; *Product Submissions*, ALLMUSIC.COM (Nov. 28, 2016) <http://www.allmusic.com/product-submissions> (last visited Nov. 17, 2018); Solveig Whittle, *7 Steps to Add Your Songs to the CDDB Database*, SHADES OF SOLVEIG (May 20, 2013), <http://www.shadesofsolveig.com/2013/05/20/seven-step-to-add-your-songs-to-cddb-database/> [hereinafter “Whittle II”]. Software like iTunes also makes use of databases such as Gracenote CDDB (“Compact Disc Database”), which artists use to upload metadata about specific track listing of a CD through third-party software that automatically fills song title, artist, and album information when the CD is played or “ripped.” However, uploading or submitting metadata to either Rovi or CDDB does not embed this information into the audio file.

42. See PASSMAN, *supra* note 1, at 74. A master recording is the original recording of a performance, which all other copies are made from. They are called “masters” because they are the controlling, authentic recording of a performance. When a recording session is concluded an audio engineer edits, mixes and EQ’s the various instruments and vocal performance which had been captured into a single track which will become the master. This process is known as “mastering”.

43. See Whittle I, *supra* note 40. This is possible on a wav file because the audio quality is higher by making the file larger and capable of encompassing more data. Similar embedding techniques are uncommon for mp3s because they are of lower quality and smaller in size.

44. *Id.*

45. See PASSMAN, *supra* note 1, at 240. Performance Rights Organizations issue blanket licenses for the public performance of compositions in the U.S.. Any time a song is played (either live or as a recording) over the radio, in a club, coffee shop, retail outlet, amusement park, concert hall, in a television show, or through a website a royalty is owed to the composer. A blanket license is bought by the owners of an establishment or platform and the royalty owed to individual composers for the performance of their songs is paid out of the money collected from these licenses. There are three PRO’s’ in the U.S., which issue blanket licenses for performances, each is a non-profit, they are the American Society of Composers (“ASCAP”), the Broadcast Music, Incorporated (“BMI”), and the Society of European Stage Authors and Composers (“SESAC”). Individual artists or their publishers may sign up with (or affiliate with) one of these PROs in order to receive royalties for public performances that are reported to them. These PRO’s’ currently only collect and distribute royalties to composers, and are not responsible for collecting money which may be owed to recording artists.

46. *What is an ISRC?* INTERNATIONAL STANDARD RECORDING CODE (Oct. 9, 2016), <https://www.usisrc.org/about/index.html> (last visited Nov. 17, 2018).

International Standard Music Work Codes (“ISWC”).<sup>47</sup> While these identifiers have a good deal of support from the industry, they have not been universally adopted by rights holders.<sup>48</sup> Many problems stem from the limited adoption of these standards, including frustration by music supervisors attempting to clear songs for a project, loss of revenue due to inaccurate accounting, or missed licensing opportunities.<sup>49</sup> It is for these reasons that the USCO has endorsed the adoption of metadata into its registration process.<sup>50</sup>

### 1. How ISRCs Work

Both ISRC and the ISWC help catalogue and track music so that it can be sold or licensed, and help track particular songs once they have been sold.<sup>51</sup> They are unique, permanent, and internationally recognized reference numbers that help identify works in overlapping ways, ensuring complete transparency of relevant rights holder information when attached to a musical work or sound recording.<sup>52</sup> These unique identifiers can be embedded in the data of an audio file as a digital thumbprint.<sup>53</sup>

The ISRC was developed in 1986 by the Recording Industry Association of America (“RIAA”)<sup>54</sup> with the help of the International Organization for Standardization (“ISO”).<sup>55</sup> ISRCs are applied to the specific

47. *Id.*

48. Michael St. James, *5 Rules For Not Pissing Off Music Supervisors*, SONICBIDS BLOG (Nov. 20, 2014, 11:00 AM), <http://blog.sonicbids.com/5-rules-for-not-pissing-off-music-supervisors>; *Music Supervisor Sound Off on Getting Your Music into Film/TV*, ASCAP (July 8, 2015), <https://www.ascap.com/help/career-development/getting-your-music-into-filmtv>.

49. *See* James, *supra* note 48.

50. United States Copyright Office, *Copyright and The Music Marketplace Report*, 123 (2015), <https://copyright.gov/docs/musiclicensingstudy/copyright-and-the-music-marketplace.pdf> [hereinafter “*Marketplace Report*”].

51. Louise Matteo, *Two Sides of the Same Coin: ISRC and ISWC*, HYPERBOT.COM (Sept. 10, 2015), <http://www.hypebot.com/hypebot/2015/08/two-sides-of-the-same-coin-isrc-and-iswc-draft-1.html>.

52. *Id.*; Serona Elton, *Identifiers Used in the Music Industry*, 8 J. MUSIC & ENT. INDUSTRY EDUCATORS ASS’N 1 (2008), [http://www.meiea.org/Journal/html\\_ver/Vol08\\_No01/Elton-2008-MEIEA-Journal-Vol-8-No-1-p49.html](http://www.meiea.org/Journal/html_ver/Vol08_No01/Elton-2008-MEIEA-Journal-Vol-8-No-1-p49.html).

53. *Id.*

54. *See* PASSMAN, *supra* note 1, at 93 (the RIAA is an industry consortium of record companies that tracks record sales and certifies albums as gold (50,000 units sold) and platinum (1 million units sold)).

55. International Standard Recording Code, *ISRC Code Summary*, [https://www.usisrc.org/assets/attachment/ISRC\\_Summary.pdf](https://www.usisrc.org/assets/attachment/ISRC_Summary.pdf) (last visited Apr. 6, 2017) (hereinafter, “ISRC I”); The Association of Automatic Identification and Data Capture Technologies, *Layman’s Guide to ANSI, CEN, and ISO Bar Code Print Quality Documents*, 4 (2002), <https://www.bar-code.com/verifiers/LaymansGuidetoANSI.pdf>. The ISO is a non-governmental organization headquartered in Geneva, Switzerland that works with industry and governments to international standards in various areas of commerce, and were instrumental in the creation of the Universal Product Code (“UPC”), which you find attached to most consumer products.

and individual sound recordings performed by an artist.<sup>56</sup> The ISRC is usually applied for by a musician's record label through an office designated to issue these identifiers in that region.<sup>57</sup> Only the person who has the rights to the master recording can apply.<sup>58</sup> The administration of the ISRC is managed internationally by the International Federation of the Phonographic Industry ("IFPI"), with the RIAA acting as the local issuing authority within the U.S.<sup>59</sup> Each individual recording of a song receives its own ISRC, meaning that if an artist releases an album with ten songs on it, each individual track will receive its own ISRC.<sup>60</sup>

The ISRC is made up of a 10-digit alphanumeric registration code.<sup>61</sup> The structure of the ISRC is meant to convey certain information about the attached sound recording, even when isolated from the song it identifies.<sup>62</sup> The code is comprised of a two-letter country code, a three-digit alphanumeric which identifies the party it is issued to, a two-digit year for the year it was issued in, and a six-digit number, which identifies the particular sound recording.<sup>63</sup> These identifiers are meant to be encoded into the data of the recording at the pre-mastering stage, which is readable by software application, or sent separately to allow search and verification of the rights holder's information.<sup>64</sup> ISRC is used to track the sales of sound recordings, much like a UPC, as well as for keeping track of royalties due

56. See ISRC I, *supra* note 55. (they are also applied to music videos as these are considered to be part of the promotion and dissemination of the original sound recording and therefore also receive an ISRC); see ELTON, *supra* note 52; *What is ISAN?*, ISAN, <http://www.isan.org/about/> (last visited Feb. 5, 2017). A song can be given a separate identifier once it has been synced in a film or commercial, known as an International Standard Audiovisual Number ("ISAN"), but this is applied post-placement and serves a slightly different purpose from the ISRC or ISWC.

57. See Matteo, *supra* note 51.

58. *Id.*

59. Response to Notice of Inquiry by IFPI at 3, In the Matter of: Technological Upgrades to Registration And Recordation Functions, Docket No. 2013-2 (2013).

60. See ISRC I, *supra* note 55 (ISRC is currently administered by the National ISRC Agency in each of the 57 territories that recognize the code); see Matteo, *supra* note 51 (once assigned, the identifying ISRC will represent that recording in perpetuity and will never be reused or reassigned).

61. See ISRC I, *supra* note 55; see Elton *supra* note 52.

62. See ISRC I, *supra* note 55; see Elton *supra* note 52.

63. See ISRC I, *supra* note 55; see Elton *supra* note 52; International ISRC Agency, *International Standard Recording Registration Code [ISRC] Handbook*, 8-11 (2009)(, [hereinafter "ISRC II"]; Tegan and Sara, MUSICBRAINZ (Feb. 5, 2017), <https://musicbrainz.org/artist/d13f0f47-36f9-4661-87fe-2de56f45c649/recordings?page=4>. For example, Tegan and Sara's song "I Was a Fool" was released by Warner Brother Records in 2011 and registered through USISRC.com that same year in the U.S. The ISRC for "I Was a Fool" is US-WB-11-203029.

64. See ISRC II, *supra* note 63, at 11.

from digital licensing through SoundExchange, satellite radio, and streaming services.<sup>65</sup>

It is up to individual rights holders and their labels to maintain the veracity of these identifiers.<sup>66</sup> Presently, SoundExchange is attempting to expand a public database of sound recordings searchable by ISRC.<sup>67</sup> This search engine also powers the ISO's own public ISRC database which is managed by the IFPI.<sup>68</sup>

## 2. How ISWCs Work

Like the ISRC, the ISWC is an alphanumeric identifier that is attached to a song in order to help identify its rights holder.<sup>69</sup> The difference is that the ISWC identifies the author of published compositions, otherwise known as the underlying work.<sup>70</sup> This identifier was created by the French-based International Confederation of Societies of Authors and Composers ("CISAC") in collaboration with the ISO.<sup>71</sup> Like the ISRC it is a unique and fixed identifier, applied to a single musical work and it is not reused or reissued once assigned.<sup>72</sup> The ISWC also needs to be applied for in order to be assigned.<sup>73</sup> ASCAP has been designated with the authority to issue ISWCs for works published within the U.S.<sup>74</sup>

Each ISWC begins with the letter "T" and is comprised of a unique nine-digit identifier and ends with an additional check digit that is calculated using the Luhn algorithm<sup>75</sup> to guard against accidental or inaccurate

65. See Matteo, *supra* note 51. The ISRC allows for accurate identification of a single sound recording, along with the recording artists or artists featured on the track, title, version, year of release, release title or album name, label or publisher, release date, and UPC when applicable.

66. *FAQs for General*, ISRC, <https://www.usisrc.org/faqs/general.html> (last visited Feb. 5, 2017) (hereinafter "ISRC FAQ").

67. *SoundExchange Launches Public Search Website with Access to Industry's Best ISRC Data*, SOUNDEXCHANGE, (Mar. 8, 2016), <https://www.soundexchange.com/news/soundexchange-launches-public-search-website-with-access-to-industrys-best-isrc-data/> ("While ISRC data is available elsewhere, it has not been provided in such a comprehensive manner until now. The creation of this single, comprehensive online resource enables recording artists, rights owners, music services and fans to quickly locate accurate identifiers for creative content and download the associated metadata.") (hereinafter, "ISRC Search Launch"); *SoundExchange ISRC Search*, SOUNDEXCHANGE (Feb. 5, 2017), <https://isrc.soundexchange.com/#!/search>.

68. See ISRC Search Launch, *supra* note 67; *ISRC Search*, IFPI, <https://isrcsearch.ifpi.org/#!/search> (last visited Feb. 5, 2017).

69. See Matteo, *supra* note 51.

70. *Id.* (underlying work includes the lyrics, melody, and arrangement that make up a song).

71. *Id.*

72. *Id.*

73. *Id.* (ISWC are issued through one of 47 authorized ISWC agencies and are issued by territory).

74. *Id.* Like the ISRC, it is up to individual rights holders to ensure the veracity of the information attached to an ISWC and there is no single, publicly searchable database that contains all known ISWCs in the U.S.

75. *Luhn Algorithm*, GEEKS FOR GEEKS (Sept. 28, 2017), <https://www.geeksforgEEKS.org/luhn-algorithm/>. The Luhn algorithm is a method of validating an identification number and detect mistyped

copying.<sup>76</sup> The ISWC allows consistent tracking of works once they have been distributed, even across borders.<sup>77</sup> It can be embedded into a sound recording where it can be read by a software application.<sup>78</sup> While there may be many different versions of a song recorded over the decades, the same identifier would be applied to any sound recording which incorporates the same underlying composition.<sup>79</sup> Presently, there is no publicly accessible database of ISWC identifiers like that which SoundExchange maintains for the ISRC.

In order to maximize the rights attached to a song, artists have to complete two separate registration processes in order to make full use of the protections offered to copyrights under U.S. law and to receive the requisite metadata to track and license their songs. The inefficiency caused by these separated systems is apparent and the burden of these inefficiencies is shouldered solely by the artists. Surely, further investment by the government is necessary to unlock the full potential of ISWC identifiers and alleviate the cost of acquiring them.<sup>80</sup>

### C. Licensing and Synchronization of Music

Licensing a song for synchronization<sup>81</sup> (“sync”) in an audiovisual work is a meticulous process that requires a thorough understanding of the legal rights of authors the license is sought from. It also requires that numerous logistical questions be answered that are triggered by the unique aspects of the work for which a license is sought.<sup>82</sup> This can be a perplexing task, as a recording artist may not actually have the rights to the master recording of

or otherwise incorrect entries as a way of guarding against inadvertent error. It is utilized by most credit card companies for verifying transactions, but is not an effective tool against fraud or malicious attacks [hereinafter “Luhn Algorithm”].

76. *Id.*; ISWC INTERNATIONAL AGENCY, <http://www.iswc.org/en/faq.html> (last visited Nov. 17, 2018) [hereinafter “ISWC FAQ”] (ISWC allows for the identification of a work by title, composer or composers, work classification, and what version of the work is provided if there is more than one).

77. *See* Luhn Algorithm, *supra* note 75.

78. *Id.* (It is important to note that while this identifier can be embedded in the data of a single recording, it does not represent that sound recording, but rather just the particular underlying music work that belongs to the identified author); ISWC “T-900.014.239-2”, MUSICBRAINZ, <https://musicbrainz.org/iswc/T-900.014.239-2> (for example, the ISWC assigned to David Bowie for his song “Rebel Rebel” is T-900.014.239-2).

79. *See* ISWC FAQ, *supra* note 76.

80. *See* Marketplace Report, *supra* note 50.

81. *See* PASSMAN, *supra* note 1, at 265 (“A synchronization license is a license to use music in “timed synchronization” with visual images. A classic example is a song in a motion picture, where the song is synchronized with the action on the screen.”).

82. James A. Johnson, *Thou Shalt Not Steal: A Primer On Music Licensing*, 80 N.Y. ST. B.J. 23, 24 (2008).

their performance.<sup>83</sup> In addition, the composition of a song is usually owned by multiple composers who may be working through separate publishers.<sup>84</sup> In the U.S., the rights to a sound recording are folded into a Master Use License,<sup>85</sup> which must be negotiated when a license is sought to sync an original recording of a composition for an audiovisual work.<sup>86</sup>

Generally, the process for securing the rights for an audiovisual work proceeds as follows. A music supervisor is assigned a project by either the studio or advertising firm she works for.<sup>87</sup> She then goes to a library of music she has compiled that includes music submitted to her by musicians, publishers, record labels, licensing agencies,<sup>88</sup> and music pulled from their personal collections.<sup>89</sup> She then makes a playlist of songs that she thinks will work to enhance the visuals of the audiovisual work.<sup>90</sup> She then presents the playlist to the director, client, or whoever is in charge of making decisions for the project, along with her recommendations of which songs should go with which parts of the audiovisual work and why.<sup>91</sup> After a decision is made about which songs should be included in the project, the music supervisor and her team turn their attention to securing the rights to sync the selected songs.<sup>92</sup> This is where reliable rights holder information in the form of metadata comes in.<sup>93</sup> The music supervisor will need to negotiate and secure a license for both the composition of the song and the actual sound recording she wants to sync.<sup>94</sup> These two separate licenses can make for a lucrative negotiating situation for an independent artist who owns both the rights to

83. *Id.*; See LEAVENS, *supra* note 33, at 50–51.

84. See Johnson, *supra* note 82, at 24; See IRWIN & REIS, *supra* note 22, at 20 (a publisher runs the business side of songwriter's activities such as locating licensing opportunities and collecting and distributing royalties, often in exchange for the assignment of a percentage of the royalties owed to that artists).

85. See BYRNE, *supra* note 15, at 254. A Master Use License is a license acquired to sync a particular recording of a song to a film, television show, or advertisement. This license needs to be negotiated with the party who owns the rights to the Master Recording, this is typically the artist's record label. Artists tend to sign a seven-year deal with record labels that allow the label to collect a percentage (usually half) of the royalties from any license of the master recording for an audiovisual work.

86. See IRWIN & REIS, *supra* note 22, at 59–62.

87. See Promusinfo, *supra* note 11.

88. Grammy Foundation, *Grammy Pro Music Business Summit: Sync Licensing Today Panel / New York*, YOUTUBE, (Mar. 3, 2016), [https://www.youtube.com/watch?v=ZZo\\_MqLGNfY](https://www.youtube.com/watch?v=ZZo_MqLGNfY).

89. See Promusinfo, *supra* note 11.

90. *Id.*

91. *Id.*

92. *Id.*

93. *Id.* (“[A music supervisor’s] time is so limited . . . It’s great when everything is in the metadata, we don’t have to ask [the artists] any questions. You want as much information there for [a music supervisor] to not have any questions and to know what they need to do with [an artist’s track to have it cleared].”).

94. See PASSMAN *supra* note 1, at 484.

their compositions and their sound recordings resulting in essentially two avenues of income from a single source.<sup>95</sup> Even if an artist is signed to a publisher who takes a percentage of their songwriting royalties (usually half), or a record label who owns a portion of the artist's master recordings (either indefinitely or for a designated period of time) and will take a percentage of the negotiated price for the license (again, usually half), this is a double payday for the artist.<sup>96</sup> In both situations, the exposure for the project is enough to generate interest in the artist's work and can potentially lead to more sync deals in the future or even increased record sales.<sup>97</sup>

The reproduction of a sound recording and underlying composition in an audiovisual work such as a film does not create a separate phonorecord.<sup>98</sup> A film is a separate work that may contain other copyrighted works, but the use of included works need to be separately negotiated to ensure that the interests of the independent rights holders of these works are protected.<sup>99</sup> This gives musicians a good deal of bargaining power in negotiating the terms of a deal because their song ultimately cannot be synced without their approval (provided they still own the rights to their compositions and master recordings).<sup>100</sup>

The price a composition can command for a placement is usually related to the desirability of its most popular performance or sound recording and is therefore directly attributable to the price that the master use license can command.<sup>101</sup> Other factors that may affect the profitability of a placement are the popularity of the performing artist or composer, length of the placement in terms of seconds and minutes, the desirability of the particular placement of a song within the context of the project, whether the music is emanating from a tangible source within a scene like a television or stereo (or if it is simply in the background), the budget of the project that the license is sought for, and whether both the composition and the sound recording are being sought, or if the producer intends to have a house band cover the song for placement in the project.<sup>102</sup>

95. *Id.*

96. *See* IRWIN & REIS, *supra* note 22, at 59–62.

97. *See* BYRNE, *supra* note 15, at 268–69.

98. 17 U.S.C. § 109; William Archer, *Keeping Score Securing The Rights For Musical Works In Film And Television Production Requires Separate Consideration For A Variety Of Uses*, 32 L.A. LAW. 42, 43 (2008); *see* IRWIN & REIS *supra* note 22, at 60 (there is no statutory provision like 17 U.S.C. § 115 to permit for the compulsory licensing of a composition or sound recording for an advertisement, film, or television show).

99. 17 U.S.C. § 109; Archer, *supra* note 98, at 43; IRWIN & REIS *supra* note 22, at 60.

100. *See* Archer, *supra* note 98, at 43; *see also* Gauberti, *supra* note 25.

101. *Id.*

102. *See* Blume, *supra* note 24.

Signing a licensing deal with publishers to pitch music to producers and music supervisors at advertising agencies and studios is an excellent way for songwriters to pursue the financial benefits of a lucrative placement.<sup>103</sup> However, publishers are not responsible for securing the rights necessary to negotiate a master use licenses before making their pitch, making these arrangements less beneficial for artists who do not own the rights to their master recordings.<sup>104</sup>

The complexities of clearing rights for placement in audiovisual works has led to specialized firms taking on the role usually played by music supervisors and their staff, creating licensing agencies that act as clearinghouses for songs which are pre-cleared and available for commercial licensing.<sup>105</sup> These music-licensing companies maintain large searchable catalogues, known as libraries, which contain thousands of pieces of client artists' music, which they make available to producers and music supervisors for placement in a variety of projects.<sup>106</sup> Pitching and placement through agreements made with music licensing companies are typically non-exclusive, meaning that the artists can work with multiple companies at a time in order to find placements for their works.<sup>107</sup> This also means that a music supervisor will likely receive the same song from multiple sources, and that the metadata from any one of these sources may not be complete or entirely accurate.<sup>108</sup>

The opportunity that a lucrative placement can offer an artist may never materialize if a music supervisor can't find the artist's song in a library.<sup>109</sup> Even more embarrassing, artists run the risk of their work being a match for a project, but if the music supervisor can't readily identify who they need to contact in order to clear its use, the artist's song may be passed over in favor of a song by an author who can be identified more easily.<sup>110</sup> Due to the

103. See Archer, *supra* note 98.

104. *Id.*

105. See IRWIN & REIS, *supra* note 22, at 53–55; Grammy Foundation, *supra* note 88.

106. IRWIN & REIS, *supra* note 22, at 53–55; see Blume, *supra* note 24.

107. See Blume, *supra* note 24. Even though artists typically prefer to be the ones to make the final decision to accept a particular licensing arrangement, some music licensing companies require pre-approval arrangements where any placement the company is able to negotiate for the artists is considered to have been made with the artist's consent. Music licensing companies are typically only able to grant a sync license to the underlying composition, unless the client artist also retains the rights to their masters, the producer or music supervisor will also need to seek approval by the owner of the sound recording. Archer, *supra* note 98, at 44. Increasingly though, artists are retaining rights to their master recordings as record labels continue to grapple with obsolesces due to lagging sales.

108. See Grammy Foundation, *supra* note 88.

109. *Id.*

110. *Id.*; Pam Lewis-Rudden, *What Music Supervisors Wish You Knew*, SYNCHBLOG (May 19, 2015), <http://blog.synchtank.com/what-music-supervisors-wish-you-knew>; see also Grammy Foundation, *supra* note 88.

volume of material that music supervisors sift through, the difference in the accuracy of metadata is between a work either sitting in obscurity on a hard drive or becoming profitably synced to a project.<sup>111</sup> Even if metadata are included, they may not be authoritative, meaning that a music supervisor and their staff might not know whether they are in touch with all of the parties necessary to clear a song by the deadlines set within a production schedule.<sup>112</sup> An authoritative database where authorship information is collected and easily searchable would alleviate a great deal of the consternation and frustrating complexity associated with the clearance process.<sup>113</sup>

*D. Problem: Inconsistencies in Metadata Create Inefficiencies in Licensing Agreements*

Presently, standards are not enforced for the application of metadata for the purpose of identifying rights holder information for copyrighted works.<sup>114</sup> The U.S. Copyright Office has identified this as a major drag on the efficiency of licensing musical works.<sup>115</sup> The catalogs of record labels and publishers contain countless musical works and change hands frequently, making it extremely difficult to determine the rights holder of a work at any given time.<sup>116</sup> To complicate matters further, the underlying compositions are usually collaborative works with multiple authors, each potentially working with a different publisher and P.R.O.<sup>117</sup> Audio files do not frequently include authoritative forms of metadata to identify ownership such as ISRC for sound recordings or the ISWC for composers.<sup>118</sup>

The role that data plays in promoting efficiency within the music industry is becoming increasingly apparent. Metadata in audio files increase the transparency of transactions and allow for royalties to be more accurately accounted.<sup>119</sup> For instance, the analysis data pools generated by music sales, website traffic, and social media buzz can help artists identify trends and

111. See Grammy Foundation, *supra* note 88.

112. See Lewis-Rudden, *supra* note 110; see also Promusinfo, *supra* note 11.

113. See *Marketplace Report*, *supra* note 50, at 123.

114. *Id.*

115. *Id.*

116. *Id.*

117. *Id.*; Chris Robley, *What is a Performing Rights Organization?*, CDBABY (Apr. 29, 2013), <https://diymusician.cdbaby.com/musician-tips/what-is-a-performing-rights-organization/> (“A Performing Rights Organization (or P.R.O.) helps songwriters and publishers get paid for the usage of their music by collecting one of the most important forms of publishing revenue: performance royalties.”)

118. *Marketplace Report*, *supra* note 50, at 123–24.

119. See JOHN SEABROOK, *THE SONG MACHINE: INSIDE THE HIT FACTORY*, 12–17 (2015); John Connor Coulston, *Meet Soundstr, The Tech Startup Trying To Streamline Performing Rights Royalty Payments*, AMERICAN SONGWRITER (Oct. 21, 2016), <http://americansongwriter.com/2016/10/meet-soundstr-tech-startup-trying-streamline-performing-rights-royalty-payments/>.

assess fan reactions.<sup>120</sup> More importantly, for licensing and distribution, accurate metadata should be embedded in each track at the mastering stage.<sup>121</sup> The metadata should identify the title, composer, performing artists, producer, year the track was recorded, publishers, owner of the sound recording, and up-to-date contact information for each identified party.<sup>122</sup>

Even if metadata were used with the regularity that music supervisors and other gatekeepers demand, there is no publicly searchable database that is comprehensive enough to aggregate information in a way that would help streamline efforts to determine ownership.<sup>123</sup> This has resulted in private companies having to maintain separate and redundant databases of authorship information that are incomplete and a drain on resources due to a lack of centralization.<sup>124</sup> The inefficiencies of the present system will hamper licensing of songs for the foreseeable future and expose even well-meaning actors to the potential liability for the use of works which they believed have been cleared.<sup>125</sup>

It seems clear that if licensing agreements are going to represent an ever-increasing percentage of artist income, then the process for acquiring the benefits of these licenses needs to be streamlined. The USCO has issued a number of statements asserting it is willing to review its registration policies in order to promote the universal adoption of metadata standards within the U.S.<sup>126</sup> If the USCO is allowed to revise its registration policies, this will likely have far-reaching effects and encourage countries in the EU to adopt compatible standards owing to the fact that the U.S. is a major exporter of intellectual property. The efficiencies associated with improved metadata policies will likely increase the profitability of music works

120. Sabri Ben-Achour, *Putting Big Data to Work For Musicians*, MARKETPLACE (Mar. 24, 2016, 12:30 PM), <https://www.marketplace.org/2016/03/24/world/our-actuality-podcast-back-season-2>; Steve Knopper, *Follow Kanye on Twitter? Universal Wants to Make Money Off That*, ROLLING STONE (Jan. 5, 2015), <http://www.rollingstone.com/music/news/universal-global-music-data-alliance-20150105>.

121. See Grammy Foundation, *supra* note 88.

122. *Marketplace Report*, *supra* note 50, at 123; see Promusinfo, *supra* note 11.

123. *Id.* at 124; Jordan Bromley, *The Music Modernization Act: What Is It & Why Does It Matter?*, BILLBOARD (PAGES) (Feb. 2, 2018), <https://www.billboard.com/articles/business/8216857/music-modernization-act-what-is-it-why-does-it-matter-jordan-bromley>. The Music Modernization Act looks to streamline the mechanical licensing process and make publishing and songwriter information more readily available in the form of a database, but it does not have a way of promoting the accurate identification of works and right holders outside of that database.

124. *Marketplace Report*, *supra* note 50, at 124–25.

125. *Id.*

126. Maria A Pallente, *The Next Generation Copyright Office: What It Means and Why It Matters*, 61 J. COPYRIGHT SOC'Y U.S.A., 213, 217 (2014); International Standards Organization, *International ISRC Agency Report 2014*, 1 (2014), [https://groups.niso.org/apps/group\\_public/download.php/12724/sc9n752\\_ISRC\\_RA\\_report\\_for\\_SC9\\_May2014\\_meeting.pdf](https://groups.niso.org/apps/group_public/download.php/12724/sc9n752_ISRC_RA_report_for_SC9_May2014_meeting.pdf) (hereinafter, "ISRC Report").

domestically while demonstrating the advantages of these policies abroad.<sup>127</sup> The harmonization of metadata standards is not likely to occur internationally via treaty. Instead, the U.S. will need to lead by example if it wants to see parity abroad.

## II. PROPOSAL: ADOPTION OF A STANDARDIZED SYSTEM OF METADATA FOR MUSIC

Identifying rights holders in a sea of content has always been a struggle. The best solution is for Congress to permit the USCO to adopt a system issuing digital identifiers that may be attached to songs in order to help identify rights holders and track the distribution of certain works in the marketplace. The identifiers that have the most institutional support are the International Standard Recording Code (“ISRC”) and International Standard Musical Work Code (ISWC).<sup>128</sup> If the benefits of these identifiers are to be realized, there needs to be wider adoption and consistent application of these codes by industry actors. To this end, it is imperative that Congress allows the USCO to adopt the issuing of ISRC and ISWC metadata as part of its registration process.

### A. *Registration of Audio Files and Musical Works Must Include Metadata*

This section discusses the specific metadata standards the USCO should adopt and present draft legislation to implement metadata identifiers into the copyright registration process. While the ISO, International ISRC Agency, IFPI, ASCAP and other stakeholders have acted in concert to promote metadata standards which locate, track, and maximize the economic potential of musical works, these efforts have thus fallen short of realizing the complete benefits of these signifiers and are far from universal in their adoption.<sup>129</sup> There may be historical explanations for why music industry stakeholders are slow to pool resources, but a great deal of benefit is lost to all of them when their efforts are not coordinated.<sup>130</sup> The infrastructure is present to reduce friction for licensing deals and the USCO is in a position

127. See VOGEL, *supra* note 19, at 269.

128. RIAA, <https://www.riaa.com/resources-learning/technical-standards/> (last visited Apr. 16, 2017, 5:30 PM) (“ISRC, the International Standard Recording Code, is the internationally recognized identification tool for sound and music video recordings.”) (hereinafter, “RIAA Standards”).

129. See ISRC Report, *supra* note 126, at 2.

130. Moya Lothian-McLean, *Sexism, Deceit, and Power: The Corrupt Mechanics Behind Modern Pop Music* (Feb. 10, 2016, 6:31 PM), [https://noisy.vice.com/en\\_us/article/from-sexism-to-the-corrupt-mechanics-behind-modern-pop-music](https://noisy.vice.com/en_us/article/from-sexism-to-the-corrupt-mechanics-behind-modern-pop-music) (“When push comes to shove, it tends to revert to this very primal ‘I’ll screw you before you can screw me’ attitude.”).

to make that process even simpler. As the example of SoundExchange's ISRC database illustrates, sometimes investment from outside the industry is necessary to improve resources within the industry.<sup>131</sup>

### 1. Draft Legislation

In order to actualize the potential benefits of the proposed legislation, I recommend that Congress pass a clear and unambiguous grant of authority, which enables the USCO to troubleshoot the implantation process through its current rule making powers. An amendment to 17 U.S.C. § 408 should suffice. A draft of the proposed legislation is included below:

#### (g) Registration of Musical Work or Phonorecord

At any time during the subsistence of the term of copyright in any musical work or sound recording, following a properly completed registration of a copyright with the Copyright Office, the owner of the copyright will be issued an International Standard Musical Work Code for each registered music work and an International Standard Recoding Code for each registered sound recording. These Codes will be published along with their corresponding musical works and sound recordings in the Library of Congress.

(1) Copyright Office will provide SoundExchange, and other partners Congress has designated for the receipt of metadata for this purpose outlined in this section, with the International Standard Musical Work Code of each registered musical work and the International Standard Recoding Code of each registered sound recording, along with the owner information for each, for inclusion in a database of these Codes to be made available for free to the public.

### 2. Explanation of Draft Legislation

The USCO is well aware of the problems caused by a lack of reliable rights holder information for sound recordings and compositions.<sup>132</sup> Its dialog with the RIAA, Digital Media Association ("DiMA"), and PROs like ASCAP and BMI, has brought to its attention the need for a centralized authority to handle the assignment and cataloging of uniform metadata identifiers in digital recordings.<sup>133</sup> To ensure that the industry endorsed identifiers like the ISRC and ISWR are uniformly applied to musical works and sound recordings, the USCO has asked Congress to grant it the authority to issue and monitor the cataloging of this metadata through its registration

131. See ISRC Search Launch, *supra* note 67.

132. *Marketplace Report*, *supra* note 50, at 152.

133. *Id.* at 152-53.

process.<sup>134</sup> The USCO has recognized that without a single authoritative source of metadata identifiers and central cataloging system, those seeking to license works expend a tremendous amount of time attempting to clear the use of selected works, often leading to frustration and abandonment of attempts to locate the implicated rights holders.<sup>135</sup>

To solve the inefficiencies and potential liability created by incomplete and inconsistent use of identifiers, the USCO could begin by folding the application for ISRCs and ISWCs into its registration process.<sup>136</sup> The USCO may then assign an ISRC to the master of each new sound recording and an ISWC for each transcription of a new musical work. The USCO should include instructions along with the certificate of registration on how the use of the code and how to embed it into an audio file. The USCO could also go a step further by embedding the identifier itself and returning a newly registered official master to the rights holder either as an attachment or via a secure cloud application.<sup>137</sup> Following registration, the identifier should be made searchable, along with all relevant rights holder information, in a public database maintained for this purpose.<sup>138</sup> The database would list both the registered ISRC and ISWC in order to reduce barriers to licensing agreements and tracking royalties.<sup>139</sup>

The USCO believes that it would need to be given the ability by Congress to create its own PRO to manage this information and perform other administrative functions of 17 U.S.C. § 112, § 114, and § 115.<sup>140</sup> While the argument for the creation of such an entity is compelling, it would not be necessary to execute the proposal made here. Existing infrastructure at the USCO and SoundExchange is sufficient for complete implementation. That being said, the execution of this proposal is beyond the USCO's rulemaking powers and Congress will need to enact new legislation in order to grant the

134. *Id.* at 224–25.

135. *Id.* at 153. Even more concerning is the fact that many times, upon seeking what they believe to be a valid license, parties begin distributing a work containing song for which they do not have the rights, due to inaccurate or conflicting rights holder information. This of course can leave parties attempting to act in good faith while incurring enormous legal liability. *See also* Grammy Foundation, *supra* note 88.

136. This would require some coordination with ISO, RIAA, ASCAP, and BMI to accomplish.

137. Tom Adamich, *Linked Data Identifiers- Part 3 - International Standard Recording Code (ISRC)*, 34 TECHNICALITIES 3, 19 (May/June 2014). ISRCs can easily be integrated into the data of a digital sound recording to allow for easy tracking and automatic identification via software application.

138. SOUNDEXCHANGE, <https://isrc.soundexchange.com/#!/search> (last visited Apr. 15, 2017).

139. SoundExchange's current public database could be easily expanded to meet this need. SoundExchange's database would not need to replace the need for private databases maintained by PROs, labels, studios, and advertisers, but it would serve a useful function and an authoritative resource by which interested parties could cross-reference their own catalogues to find missing information and correct information that is erroneous or incorrect.

140. *Marketplace Report*, *supra* note 50, at 215.

agency the authority to issue ISRC and ISWC identifiers through its registration process.

### *B. Advantages of Adoption*

There are a number of advantages that the adoption of a metadata standard by the USCO will produce for rights holders, potential licensees, and international artists looking to make inroads into U.S. markets. The following sections outline many of these benefits and how the proposal in this article will help realize them.

#### *1. Rights Holder Authentication*

The primary issue with private databases maintained by music supervisors is that the files in these databases do not have compatible cataloging systems and the works that they compile come from multiple sources.<sup>141</sup> These sources include professional licensing agencies, publishers, record labels, and the artist themselves, each of which have their own methods for keeping track of artists in their catalogues that are not cross-collateralized between platforms.<sup>142</sup>

A single music supervisor may receive the same song from multiple sources, but, because of incomplete author information attached to the audio file, they may not know whom to credit the track to.<sup>143</sup> Metadata issued by the USCO and indexed in a publicly accessible database maintained by SoundExchange would provide an authoritative source to verify author information in an audio file as complete and accurate.<sup>144</sup> It would also provide a consistent way of tracking royalties for artists after their work has been placed in an audiovisual work.<sup>145</sup>

The viability of metadata to serve this proposed function is of course contingent on the rights holder seeking registration with the USCO or having previously applied for a metadata identifier through the RIAA (“ISRC”) or ASCAP (“ISWC”). If the work is transferred subsequent to the registration,

141. Grammy Foundation, *supra* note 88.

142. *Id.* (Kate Uricoli, music supervisor at Heavy Duty Productions explains that songs submitted to her must have metadata embedded in them so that she can identify the source of a sound recording. If she is working with five or six different companies and they are sending her twenty to thirty songs a day each, she needs to be able to look at a song and not wonder where it came from. Sometimes she will receive the same song from more than one source. Metadata has to be there so when she finds a song that works for her project she knows who to contract in order to have it placed).

143. *Id.*

144. ISRC II, *supra* note 63, at 6.

145. RIAA Standards, *supra* note 128 (it will also improve the ability to track the flow of royalties across platforms and international borders).

then the USCO will need to be informed of any change in ownership.<sup>146</sup> Since the parties to the transfer benefit the most from the accuracy of information attached to metadata in SoundExchange's database, it is reasonable that the burden should fall to them to inform the USCO of this change. Finally, an effort will need to be made to ensure that all previously registered works are retroactively outfitted with the requisite metadata identifiers.

## 2. *Market Harmonization*

In allowing the USCO to issue metadata identifiers, it will further standardize the application of music copyrights around the globe.<sup>147</sup> The proposal will increase the efficiency of tracking royalties across borders making it easier for artists in foreign countries to have music placed in markets where there may otherwise be a language barrier.<sup>148</sup> Both ISRCs and ISWCs are alphanumeric, meaning that they can be understood by anyone familiar with Romanized letters and Arabic numerals.<sup>149</sup> This should sidestep many of the language barriers that might otherwise handicap foreign artists seeking a placement in American media, and vice-versa.

The universal applicability of the ISRC and ISWC is such that the authorship information attached to a sound recording can remain in the author's native language while the code's format permits the verification of this information without the aid of a translator. Putting the regulatory muscle of the USCO behind the promotion of metadata signifiers and a public rights holder database would go a long way towards the harmonizing of global music marketplaces through a Global Repertoire Database, and exposing musicians to potential new fan bases outside of their home countries.<sup>150</sup>

## 3. *Metadata Protection Under the DMCA*

Within peer-to-peer networks, audio files that are transferred containing the code would simply be that much easier to track. This would not only allow right holders to track online piracy more easily, and therefore measure its impact on the market for their works, but also serve as a grounds for

146. ISRC FAQ, *supra* note 66.

147. See VOGEL, *supra* note 19, at 269, 274; see also ISRC Search Launch, *supra* note 67.

148. ISRC II, *supra* note 63, at 6.

149. *Id.* at 8.

150. See Poppy Reid, *IFPI & SoundExchange Launch Searchable Database for World's Recordings*, THE MUSIC NETWORK (Mar. 10, 2016), <https://www.themusicnetwork.com/news/ifpi-and-soundexchange-launch-searchable-database-for-worlds-recordings> ("with the quantity of data expected to grow as we move deeper into the digital age, this tool will be vital to ensuring better communication throughout the music ecosystem." Statement made by Frances Moore, IFPI's Chief Executive); Klementina Milosic, *The Failure of the Global Repertoire Database*, HYPRBOT (Aug. 31, 2015), <http://www.hypebot.com/hypebot/2015/08/the-failure-of-the-global-repertoire-database-effort-draft.html>.

intervening in these networks to stop the proliferation of illegal downloads. This would be made possible due to the fact that the metadata would serve the same function in these peer-to-peer networks as it does in a marketplace like the iTunes store or in the SoundExchange database. Encrypted metadata would help identify a work's authors and any transfer of a work within such frameworks while requiring a corresponding compensation to the attached rights holders.

Under the provisions of the Digital Millennium Copyright Act ("DMCA"), which deals with anti-circumvention measures, the application of ISRC and ISWC metadata to audio files may take on an additional dimension of utility. The relevant provision 17 U.S.C. § 1201(a) states that "[n]o person shall circumvent a technological measure that effectively controls access to a work protected under this title."<sup>151</sup> Metadata specifically are protected from removal by a third party under 17 U.S.C. § 1202(b).<sup>152</sup> This means that any transfer or reproduction of a work within a peer-to-peer network that does not include the metadata issued to that work by the USCO would result in additional civil liability for tampering with digital security measures recognized under the DMCA in tandem with the liability that accrues due to the violation of § 106.<sup>153</sup> A favorable decision by the Register would therefore make the metadata issued by the USCO not only a means of ensuring that rights holders are properly compensated for the use of their work, but also provide a useful tool for investigating the costs of piracy and ultimately combating it.

The technology that falls within the scope of this provision is determined by the Registrar of Copyrights upon consideration of statutorily provided factors.<sup>154</sup> The function of both the ISRC and ISWC are to help identify author information to improve the efficient payment of royalties. Thus, metadata can act as a tool for controlling the use of copyrighted works by making any party who removes these codes from an audio file liable for their actions to the rights holder.<sup>155</sup> Therefore, the application of these metadata signifiers could be used to combat piracy.

151. 17 U.S.C. § 1201(a).

152. 17 U.S.C. § 1202(b) ("No person shall, without the authority of the copyright owner or the law— (1) intentionally remove or alter any copyright management information, (2) distribute or import for distribution copyright management information knowing that the copyright management information has been removed or altered without authority of the copyright owner or the law, or (3) distribute, import for distribution, or publicly perform works, copies of works, or phonorecords, knowing that copyright management information has been removed or altered without authority of the copyright owner or the law.").

153. 17 U.S.C. § 504.

154. 17 U.S.C. § 1201(a)(1)(C).

155. *See* 17 U.S.C. § 1201(a).

If the USCO is allowed to embed metadata signifiers into the master recordings of registered music works, then a rule could be issued by the Register prescribing the unauthorized transfer or reproduction of an audio file which contains the registered work and does not contain the issued code, making such a transfer a violation of the DMCA and subject the violating party to civil penalties.<sup>156</sup> Within peer-to-peer networks, audio files that are transferred containing the code would simply be much easier to track.<sup>157</sup> This would not only allow right holders to track online piracy more easily, and therefore measure its impact on the market for their works, but also serve as grounds for intervening in networks where illegal transfers of copyrighted works are prolific.

### III. CRITICISM AND OTHER CONSIDERATIONS

Part III of this article addresses a number of potential criticisms that may be brought as objections to the proposal of this article. The compatibility of this article's proposal with existing U.S. legislation should be evident at this point, however I believe it is necessary to make clear that this proposal is also compatible with proposed U.S. legislation and the U.S.'s obligation to the international community. The remaining criticisms address justifications for this article's proposal which will be considered and satisfactorily discharged in turn.

#### A. *Proposal is Compatible with Music Modernization Act*

As previously alluded, Congress is presently considering the passage of the Music Modernization Act ("Act").<sup>158</sup> The Act has passed in the House of Representatives and Senate and was signed into law on October 11, 2018.<sup>159</sup> The key substantive provisions of the bill have not changed since they were passed in the House. These provisions are as follows: (1) the closing of the loophole of federal copyright protection which excludes sound recordings created before February 15, 1972, (2) codifying SoundExchange's practice of honoring "Letters of Direction" from artists who want to share their royalties with producers and other creative partners who have contributed to their sound recordings, (3) allow eligible parties to receive royalties from the

156. *Id.*

157. This would be made possible due to the fact that the metadata would serve the same function in these peer-to-peer networks as it does in a marketplace like the iTunes store or in the SoundExchange database.

158. Huppe, *supra* note 20.

159. Benjamin Sobel, *Music Modernization Act Signed into Law*, JOLT DIGEST (Oct. 29, 2018), <https://jolt.law.harvard.edu/digest/music-modernization-act-signed-into-law>.

sound recordings made before 1995's Digital Performance Rights Act was passed, and (4) establish a "willing buyer, willing seller" standard for the licensing of music through mechanical licensing arrangements to ensure that digital platforms like Spotify are paying fair market rates for the songs streamed through their service.<sup>160</sup> The last of these provisions also creates a database of rights holder information of songwriters and publishers which would help to streamline the mechanical licensing process.<sup>161</sup>

Without elaborating on the details of legislation that has yet to be implemented, it is fair to assert that the database created through the Music Modernization Act is compatible with the proposal of this paper, as the ISWC issued by the USCO during the registration process could be folded into the other metadata used to organize artist information in this database. Further, a metadata identifier like the ISRC and ISWC which can be used to reliably identify rights holder information outside of the database established by the Act is an important tool for ensuring that artist information remains consistent outside of libraries that the government and industry partners directly control. The application of metadata like the ISWC and ISRC to audio files outside of the Act database would allow for the information attached to these files to be easily checked against that of a more authoritative database and allow an easy and reliable way of verifying rights holder information so that it stays consistent across multiple libraries and databases. These identifiers have the additional benefit of being easily transcribed by hand and can be used as a kind of serial number checksum<sup>162</sup> to verify the accurate rights holder information. Additionally, because the identifiers will be generated and applied at the time a work is registered with the USCO, there will be an automatic and predictable means by which these identifiers will be created, applied, and made available for inclusion in the Act and other databases.

The database proposed by the Act is not a competing proposal to that outlined in this article, but one that creates further legal and logistical infrastructure for which it can be realized. The proposal in this article takes a hand in glove approach to existing and proposed law as the preceding section has served to reinforce. To reiterate a finer point of this article, it is only through networked cooperation and the leveraging of technology that industry partners enable artists to fully realize the benefits of smoothly transacted licensing agreements for the use of their works by interested businesses.

160. *Id.*; Music Modernization Act, H.R. 5447, 115th Cong. §§ 101, 202, 302 (2017–2018).

161. H.R. 5447, 115th Cong. § 101(d)(3)(E).

162. *Luhn Algorithm*, *supra* note 75.

*B. The Adoption Of Metadata Standards For Audio-Files Will Not Violate Berne Article 5*

It is of course necessary to address objections to the proposal of this article on the basis that it creates a new registration requirement for foreign copyrights in violation of Berne Article 5. This criticism is unfounded. The U.S. is a signatory to the Berne Convention (“Berne”) as of March 1, 1989.<sup>163</sup> While the U.S. is not bound by every article of Berne, it is required to adhere to Article 5, which prohibits registration formalities for protection of copyrights.<sup>164</sup> This means that works in foreign jurisdictions of a member nation must be allotted the same level of protection that would be applicable in their nation of origin and cannot be subject to any formal registration requirements before these rights can be exercised.<sup>165</sup>

In other words, copyright holder’s works cannot be subject to formalities requirements for renewal, proper notice, or manufacturing specifications when seeking to exercise their rights in a foreign jurisdiction.<sup>166</sup> The concern then is that, whenever a change is made to a signatory’s copyright registration process, this new policy will disadvantage foreign rights holder in exercising their rights within that signatory’s jurisdiction.

This concern is easily dismissed. It is not necessary to register a sound recording or musical work belonging to a foreign national with the USCO in order to exercise the right to protect or exploit that work within the U.S. This fact would not change after the adoption of a metadata standard as part of the USCO’s registration process. Having a metadata identifier issued to the rights holder by the USCO is not a requirement to exercising one’s rights over that work within the U.S. The application of ISRC and ISWC to audio files is a means of improving efficiencies within the marketplace for song licenses, not a requirement for entering the marketplace.

It is important to maintain the voluntariness of these codes to avoid running afoul of Article 5. This means that a public relations campaign may need to be initiated to promote the benefits of these signifiers. It may be

163. DANIEL C.K. CHOW & EDWARD LEE, *INTERNATIONAL INTELLECTUAL PROPERTY: PROBLEMS, CASES, AND MATERIALS*, 86, 104 (2d ed. 2012). The Berne Convention is one of the many international treaties, which exist to harmonize the intellectual property laws of the many sovereign nations throughout the world.

164. Berne Convention for the Protection of Literary and Artistic Works, art. 5, Sept. 9, 1886, as revised at Paris on July 24, 1971 and as amended in 1979, 1161 U.N.T.S. 3; CHOW & LEE, *supra* note 163, at 101–02.

165. CHOW & LEE, *supra* note 163, at 101–02.

166. *Dam Things from Denmark, a/k/a Troll Co. ApS, v. Russ Berrie & Co., Inc.*, 290 F.3d 548, 554–55 (3d Cir. 2002).

worthwhile to consider changing other aspects of the Copyright Act to encourage use of metadata signifiers in a way that does not impact registration requirements, such as permitting a presumption in favor of works with applicable ISRC and ISWC in cases where infringement is at issue and allowing the collection of additional statutory damages where infringement of a work with issued metadata is found.

### *C. Autofill Software Provides a Way of Authenticating Rights Holders*

This section address the criticism that existing software applications serve the industry function of identifying the rights holder of a sound recording or musical work, making the issuing of ISRCs and ISWCs redundant. This is a practical consideration as many audio files are usually searchable by artist name, song title, or genre within a database through the standard search functions in media player software.<sup>167</sup> Given this fact, why are standardized metadata identifiers necessary?

The answer is that file information populated by autofill software is not authoritative.<sup>168</sup> By linking audio files to metadata identifiers, it will be possible to trace the authorship of a particular musical work back to its registration with the USCO. In order to register a work with this agency the rights holder is required to submit verifiable information about themselves and their work to the office. This information will then be linked to metadata that will be indexed into a database that is open and available to the public. The metadata in this database therefore provides some assurance to those seeking to license music that the information attached to audio files is accurate and allows members of the public to identify and notify the agency in the event that information was improperly recorded or missing. While it is possible to search for id3 metadata in an iTunes library using an artist name or album titles, this information is added to these files by individuals who are not accountable for their accuracy and who are not required to verify this information before submitting it.<sup>169</sup> This problem would not impair metadata issued by the USCO because the agency can verify an author's information through its registration process.<sup>170</sup>

It may also occur to the observer that the issuing of dumb metadata like an ISRC or ISWC is of limited benefit when metadata can be autofilled by

167. Harris, *supra* note 38.

168. ISRC I, *supra* note 55.

169. Whittle I, *supra* note 40.

170. UNITED STATES COPYRIGHT OFFICE, CIRCULAR 1: COPYRIGHT BASICS, 7 (2012), <https://www.copyright.gov/circs/circ01.pdf>.

software like Rovi and artist information can be easily identified through phone applications like Shazam. These concerns are easily addressed when the source of the information for these tools is better understood. The metadata which is autofilled through Rovi is crowd-sourced through user submissions.<sup>171</sup> While AllMusic verifies the information that is submitted to them, this verification process is not as rigorous as that which takes place at the USCO. The information available through Shazam's database is slightly more reliable as it is submitted exclusively by artists or their representatives, but it is by no means comprehensive. In addition, ISRC and ISWC identifiers can be easily embedded into audio files for recognition and tracking by various software platforms eliminating the need to rely on Rovi or id3 data.<sup>172</sup>

If the information in an audio file is edited by the artist themselves, they may leave composer information and date of publication out, not knowing that these would be necessary in order to negotiate a deal to license their song. Artists may also submit the same song to a music supervisor through different licensing agencies with different track titles, or after changing their nom de plume, creating duplication in libraries and confusion as to who needs to be contacted in order to secure a license or to whom royalties are owed. Having a single authoritative resource to verify the accuracy of information contained in an audio file would dramatically reduce the confusion created through these scenarios. While AllMusic does verify the information, which is submitted to them, this verification process is not as rigorous as that which takes place at the USCO and therefore cannot be considered as authoritative as it is not necessarily being submitted by the authors themselves. In addition, the autofill technology often misidentifies tracks due to multiple track listings having been submitted and approved by the service, resulting in mislabeling of tracks that do not conform to the suggested listings.

Tools like autofill software or song identifying applications are useful for casual music fans to organize their personal libraries or to identify a song playing in a restaurant, but they lack the consistency and rigor necessary to identify parties one might hope to do business with. To create the kind of certainty necessary to encourage a contractual relationship between musicians and businesses who want to license their music, there needs to be an authoritative resource that musicians can use to verify who they are

171. *Id.*

172. Richard Smirke, *ASCAP, SACEM, and PRS For Music Team Up on Initiative to Improve Royalty Collection*, BILLBOARD (Apr. 7, 2017, 9:19 AM), <http://www.billboard.com/biz/articles/7752443/ascap-sacem-and-prs-for-music-team-up-on-initiative-to-improve-royalty>; Adamich, *supra* note 137, at 19.

contracting with, and for music licensors to track licensing revenues. These tools could be linked to ISRC and ISWC in order to reduce redundancies and improve their reliability and partnership between these softwares and SoundExchange, thus serving a great benefit to the music industry and fans alike. Presently, neither technology is sufficient to addressing the particular issues for which the proposed legislation of this article is directly concerned.

#### *D. Issues With Coordination Amongst International Partners*

This section addresses concerns over difficulties that might rise within the coordination between different stakeholders in the implementation of the draft legislation presented in this article. While metadata identifiers like ISRC and ISWC can be used internationally, they are actually issued by territory. In order to get a code applied to a work, a rights holder must apply to their local designated ISRC or ISWC office. Lack of communication between these offices has caused some confusion over the use of the identifiers resulting in situations where the same song has been issued multiple codes. These redundancies conflict with the purpose for which these identifiers were created, namely that a single code should identify the rights holder information of a sound recording or musical work anywhere in the world where it may appear.<sup>173</sup> Clearly, this is a problem that needs addressing.

The confusion that results from the territorial issuing of these codes can be solved one of two ways. One solution is to allow territories that can be allowed to continue to issue codes through their regional offices, with WIPO, ISO, and IFPI encouraging communication between these offices to ensure parity in regional databases. The other solution would be to permit WIPO to absorb the function of administering these codes. The U.S. would need to take a leading role in the promotion of either solution because it is the largest exporter of music in the world and therefore any approach it takes to managing musical works will likely be adopted globally.<sup>174</sup>

It is the global reach of the U.S.'s influence which makes this proposal viable as a way of identifying author information across platforms and databases around the globe. The U.S. adoption of a metadata standard that funnels authorship information into an authoritative, publicly searchable database will be a boon to U.S. musicians as well as international musicians looking to break into U.S. markets. These codes were created by international partnerships between industry stakeholders in the U.S. and

173. Matteo, *supra* note 51.

174. VOGEL, *supra* note 19, at 269.

EU.<sup>175</sup> Putting the muscle of the USCO's regulatory power behind these codes will encourage their wide scale adoption in the U.S. More authorship information will then be searchable in SoundExchange's database, which shares information with stakeholders in the EU.<sup>176</sup> Therefore, the act of the U.S. adopting these signifiers as part of its registration process for sound recordings and musical works will help to promote a global database of music as well as ensure greater harmonization between more regional databases. If the U.S.'s adoption and promotion of these signifiers do not prove sufficient to reduce database redundancy and induce regional cooperation, then there should be a discussion as to whether the administration of these signifiers should be handled by WIPO at the international level. Although, such a top down global initiative may not be necessary if the U.S. and the EU are successful in promoting regional cooperation.

#### CONCLUSION

The market for licensing songs for film, television shows, advertisements and other audiovisuals works is a difficult one for many artists to break into. For the gatekeepers who make the decisions as to which songs to place and where, a song just doesn't have to be good, but also easy to clear.<sup>177</sup> Music supervisors rely on huge databases of sound recordings when looking for the right song for a project.<sup>178</sup> If a music supervisor does not have the information they need to feel secure that they will be able to clear the use of a song for a particular placement, that song will be passed up for another which is less troublesome.<sup>179</sup> The adoption of a process of applying standardized metadata to musical works and sound recordings by the USCO at the time a work is registered with the Library of Congress, and then sharing this data with SoundExchange, as well as other agencies and industry partners, would provide an efficient and reliable means to identify and authenticate authorship information and bring about efficiencies in the licensing for audiovisual works. As previously mentioned, it is independent artists who own their own publishing and recording who serve to gain them

175. Matteo, *supra* note 51; ISRC I, *supra* note 55.

176. Reid, *supra* note 150.

177. *Music Supervisor Sound Off on Getting Your Music into Film/TV*, ASCAP.COM (July 8, 2015), <https://www.ascap.com/help/career-development/getting-your-music-into-filmtv> ("Always put as much contact information into the metadata of the songs as possible . . . If we love it and it works for a spot we are trying to fill, we need to know how to get in touch with you!") (Hereinafter, "*Sound Off*").

178. See Herstand, *supra* note 17.

179. *Id.*; see also *Sound Off*, *supra* note 177.

most from licensing deals, and who are also most likely to have gaps in the metadata of files submitted for consideration for licensing.

While the music industry has begun to implement standards for categorizing songs, these standards are far from universal. Many large advertising firms and record labels have incorporated the use of ISRC and ISWC,<sup>180</sup> but the application of these standardized identifiers like the aforementioned are not as widely embraced by artists working outside of the major label system who would still benefit from having a song placed in an audiovisual work.<sup>181</sup> This results in a tremendous loss of revenue and opportunity for up-and-coming artists. Language barriers can also contribute to the lack of efficiency and further compound missed opportunity for foreign born artists, artists hoping to break into major American markets, and vice-versa. In addition, songs are sometimes used in audiovisual works without permission, or under the mistaken impression that the work had been cleared for such uses, creating liability for production studios and advertising firms for copyright infringement. All of these problems stem from the simple fact that there is no uniform way in which songs are catalogued and rights holder information is categorized. It is for these reasons that the USCO has endorsed the adoption of ISRC and ISWC codes in its registration process for audio files and I have proposed that Congress take action to enable the agency to take the necessary steps to issue these identifiers and share them widely through a publicly searchable database.<sup>182</sup>

One of the U.S.' most unique and valuable resources is its pop culture, in particular its music. The adoption of registration policies that improve the efficiency of licensing transactions to ensure that artists who contribute to our cultural treasury may maximize the benefit which their works are entitled to reap. This benefit can be realized through the streamlined verification of artist's identity by productions studios and advertisers who take an interest in their work.

Despite several large databases of author information in existence, information is not shared between them, and there is no uniform way of cataloguing or categorizing authorship information, thus creating considerable confusing redundancies between platforms and information sets. There are few leaders in the field working to create transparency to improve identification of rights holders to ensure that they are properly compensated

180. INTERNATIONAL STANDARD RECORDING CODE, (Oct. 9, 2016), <https://www.usisrc.org/about/index.html>.

181. James, *supra* note 48.

182. *Marketplace Report*, *supra* note 50, at 123.

for their work.<sup>183</sup> Apple, in particular, has been very cagy about sharing information about its services and tends to keep metadata attached to songs in the iTunes store close to its chest.<sup>184</sup> While it is possible to cross-reference databases in order to find attribution information for songs, this process can be taxing and inefficient.<sup>185</sup> There is a clear need for a centralized database of song information and to standardize metadata across platforms in order to address these inefficiencies and open up revenue streams.<sup>186</sup>

Therefore, the adoption of metadata identifiers in the form of ISRC and ISWC by the USCO will produce significant efficiencies within the U.S. market for sync placements in audiovisual works by improving the ability of would be licensees to verify authoritative authorship information wherever a registered audio file is found. Further, the sharing of this authorship information in a publicly searchable database ensuring that the benefits of this technical overhaul of the copyright registration process will accrue to all musicians, whether or not they are pursuing their trade with the support of a label. The adoption of this proposal will make it easier for artists to be heard and to be paid fairly for their efforts, a worthy goal, whether you're a songwriter, music supervisor, or just a fan of *Grey's Anatomy*.

183. Solveig Whittle, *How About Standardizing the Technologies That Enable Artists Compensation?*, SHADES OF SOLVEIG (JUNE 20, 2012), <http://www.shadesofsolveig.com/2012/06/20/how-about-standardizing-the-technologies-that-enable-artist-compensation-11/>.

184. Greenstein, *supra* note 40.

185. Eliot Van Buskirk, *One Big Database Could Save the Music Business with Billions of Tiny Rivulets*, WIRED (Jan. 21, 2012), <https://www.wired.com/2012/01/database-save-music-business/>.

186. *Id.*