

In Sync: Encouraging Fair Compensation for Musical Theatrical Compositions Through A Compulsory Synchronization License

Chris Johnson

I. Introduction	45
II. Copyright Enforcement and the Licensing of Musical Theatrical Compositions	47
A. Basic Licensing Framework for Musical Theatrical Compositions	48
1. Grand Rights	48
2. Small Rights	50
3. Recording Rights	50
a. Mechanical Licensing	51
b. Synchronization Licensing	52
B. Expression and the Online Culture of Infringement	52
C. Proposed Solutions and Associated Criticisms	54
1. Universal Compulsory Synchronization License	55
2. “Content ID” – The Current YouTube Approach	56
II. A Compulsory Synchronization License	57
A. Limited License	57
1. A Compulsory Synchronization License for Musical Theatrical Compositions	57
2. A Parallel to the Mechanical Licensing Provision	58
a. Limited Scope	58
b. Necessary Evolution	59
B. An Efficient Solution	60
III. Potential Objections to a Compulsory Synchronization License for Musical Theatrical Compositions	60
A. Harmony in the Distribution of Synchronization Licenses	61
1. Fitting Synchronization into the Theatrical Framework	61
2. A Testing Ground for an Expanded Synchronization Framework	61
B. Rate Determination	62

C. Trading Control for Compensation.....	63
IV. Conclusion.....	63

I. INTRODUCTION

On August 4, 2011, *The Unauthorized Autobiography of Samantha Brown* opened at Norma Terris Theatre, a regional theatre in Connecticut.¹ It was written by Kait Kerrigan and Brian Lowdermilk based on a concept conceived by Lowdermilk and Zach Altman.² The Norma Terris Theatre, which seats 235 audience members, is a stage dedicated to developing new works in an attempt to work out any problems the show may have before the mounting of a more ambitious production.³ The show closed on August 28, after approximately 30 performances.⁴ *Samantha Brown* will likely never see the inside of a Broadway theatre. Like so many other fledgling musicals, this regional theatre production may be the highest profile production that *Samantha Brown* will ever mount. Stories like this, though perhaps not widely publicized, are commonplace in the world of musical theatre. In at least one respect, however, *Samantha Brown* became an exception to this rule, thanks to a single song from its score.

Two and a half years prior to *Samantha Brown*'s opening night, Kerrigan and Lowdermilk posted a video on YouTube of Aaron Tveit, a then up-and-coming Broadway performer, singing one of their songs.⁵ This video of *Run Away With Me*, a straightforward but powerful ballad from *Samantha Brown*, has since garnered over a million views on the user-generated content site⁶ and has inspired countless others to post their own renditions.⁷ Despite the fact that the staged production of the show at the Norma Terris Theatre was seen by less than 7,000 patrons, nearly 3,500 unique user-generated video covers of *Run Away With Me* have generated millions of views.⁸ Because the current musical theatre licensing framework provides no efficient marketplace for Kerrigan and Lowdermilk, there is no doubt that they were not properly compensated for the use of their work.⁹

1. Kenneth Jones, *Meghann Fahy Is Samantha Brown in New Goodspeed Musical; Andrew Durand, Stephen Bogardus Co-Star*, PLAYBILL.com (Aug. 4, 2011), <http://www.playbill.com/news/article/meghann-fahy-is-samantha-brown-in-new-goodspeed-musical-andrew-durand-steph-181473>.

2. *Id.*

3. *Id.*; *The Norma Terris Theatre*, GOODSPEED.org, <http://www.goodspeed.org/about/our-facilities> (last visited July 27, 2015).

4. Jones, *supra* note 1.

5. Kerrigan & Lowdermilk, *Run Away With Me – Aaron Tveit*, YOUTUBE.com (Feb. 23, 2009), <https://www.youtube.com/watch?v=61EL69OZSIY>.

6. *Id.*

7. YOUTUBE, https://www.youtube.com/results?search_query=%22run+away+with+me%22+kerrigan+and+lowdermilk (last visited July 27, 2015).

8. *Id.*

9. E-mail from Kait Kerrigan to Chris Johnson (Aug. 4, 2015, 16:46 CST) (on file with author) (detailing the fact that Kerrigan and Lowdermilk are not compensated for performances of

Typically, the exploitation of musical theatre focuses on the licensing of the theatrical rights, especially the “grand” rights, which allow for a full performance of the work of musical theatre.¹⁰ These rights, as well as most of the other common rights associated with musical theatre, are distributed by contracting with licensing houses through a well-established process.¹¹ No such centralized licensing structure has been established regarding the synchronization of musical theatrical works, however, despite the expansion of user-generated video covers of these works.¹²

In order to distribute an audio-visual work that incorporates a recording of a published musical composition, one must negotiate for a synchronization license with the owner of the musical composition.¹³ This licensing framework was designed for the use of musical compositions in motion pictures,¹⁴ and has not been altered to more efficiently govern the issues raised by newer media and user generated content on websites like YouTube.¹⁵

This is particularly problematic due to the combination of extreme ease of access to these websites and a general lack of understanding of the surrounding licensing law by the users.¹⁶ The ubiquity of cover videos on these sites gives users the impression that the appropriation of musical theatre compositions is legal. Additionally, despite the user-friendly nature of these user-generated-content sites, they do not effectively notify users that uploading an unlicensed cover song is copyright infringement; though the Terms and Conditions of service mention licensing and ownership rights, the information provided is often incomplete and overly simplistic.¹⁷ As a result, even though infringement is commonplace, many users are completely unaware of their participation in it.¹⁸ Regardless, the sheer number of works that are currently

their songs uploaded to YouTube from any account other than their own).

10. *Common Music Licensing Terms: Dramatic or Nondramatic Performance / Dramatic (or “Grand”) Rights*, ASCAP, <http://www.ascap.com/licensing/termsdefined.aspx> (last visited July 27, 2015).

11. See Shane D. Valenzi, *A Rollicking Band of Pirates: Licensing the Exclusive Right of Public Performance in the Theatre Industry*, 14 VAND. J. ENT. & TECH. L. 759 (2012); Robert Hofler, *Life After Death on Broadway*, VARIETY, Nov. 20, 2009, <http://www.variety.com/article/VR1118011669> (last visited July 27, 2015).

12. See *Common Music Licensing Terms: Synchronization or “Synch” Rights*, ASCAP, <http://www.ascap.com/licensing/termsdefined.aspx> (last visited July 27, 2015) (directing those seeking synchronization licenses to the individual rights holder).

13. Lewis Rinaudo Cohen, *The Synchronization Right: Business Practices and Legal Realities*, 7 CARDOZO L. REV. 787, 791-793 (1986) (discussing the applicability of the synchronization license).

14. *Id.* at 795-797.

15. Andy Baio, *The Tangled Issue of Cover Song Copyright on YouTube*, WIRED.com (Mar. 3, 2012), <http://www.wired.co.uk/news/archive/2012-05/03/cover-song-licensing-on-youtube> (last visited July 27, 2015).

16. *Id.*

17. YOUTUBE, <https://www.youtube.com/upload> (last visited July 27, 2015); see also *What is Copyright*, YOUTUBE, <https://support.google.com/youtube/answer/2797466> (last visited March 27, 2016).

18. Baio, *supra* note 15.

infringing would render an individualized approach to negotiating the relevant licenses next to impossible.¹⁹

In an attempt to update the licensing process for the synchronization of musical theatrical works, this article proposes the implementation of a licensing standard modeled after the mechanical license used in the production of audio-only recordings of published musical compositions. The proposal attempts to improve and limit previously suggested general solutions²⁰ in the interest of balancing the associated rights of composers and the users, especially in the interest of coping with the widespread culture of infringement that is currently commonplace on the internet. To this end, the statutory implementation of a limited compulsory synchronization license is proposed.

Part I of the article provides an overview of the practical and legal framework of licensing in musical theatre and discusses the issue of the lack of such a framework in synchronization and the general ignorance of the all too common infringers. This part discusses the ways in which the status quo and the previously proposed solutions fail to establish the appropriate balance of the rights of the composers and the users. Part II of the article provides a proposal for a potential solution, implementing lessons passed on from other licensing models and applying them to this relatively new problem. However, the statutory provision proposed is not meant to provide a limited solution to the problems emphasized by the evolution of the internet, but to provide a comprehensive and efficient framework for the future. Part III acknowledges potential criticisms regarding the proposed provision and attempts to further defend the arguments being made.

II. COPYRIGHT ENFORCEMENT AND THE LICENSING OF MUSICAL THEATRICAL COMPOSITIONS

The Constitution grants Congress “the power . . . to promote the progress of science . . . by securing for limited times to authors . . . the exclusive right to their . . . writings.”²¹ In its original manifestation, the Copyright Act of 1790 was entitled “Act for Encouragement of Learning, by Securing the Copies of Maps, Charts, and Books to the Authors and Proprietors of Such Copies,” and was designed to incentivize the development of original works by granting a limited monopoly.²² This intent is supported by two important rationales regarding the purpose and aim of copyright. The first, often referred to as the

19. Baio, *supra* note 15.

20. See Molly K Bently, *I Want my DVD: Considering a Modern Approach to Obtaining Synchronization Licenses*, 15 TEX. REV. ENT. & SPORTS L. 193 (2014).

21. U.S. Const. art. I, § 8, cl. 8.

22. See generally Edward C. Walterscheid, *Understanding the Copyright Act of 1790: The Issue of Common Law Copyright in America and the Modern Interpretation of the Copyright Power*, 53 J. COPYRIGHT SOC’Y U.S.A. 313 (2005) (providing a detailed exploration of the historical context of the development of the Copyright Act of 1790 as well as an analysis of the language of the Act as initially drafted.)

“utilitarian” rhetoric, notes that this legal protection is necessary to encourage artists to continue to bring their work to the marketplace.²³ The second, known as the “natural law” rhetoric, emphasizes ensuring that authors reap the fruits of their own labor and are compensated for their societal contributions.²⁴

The basic framework for the current system of copyright licensing of musical compositions has been effectively the same since the early 1900s.²⁵ Grand rights, also known as stock and amateur rights, have been licensed in generally the same way since at least the 1920s,²⁶ and performing rights organizations and the framework for licensing small rights were first established in 1913.²⁷ The compulsory, or mechanical, license for an audio-only recording of a musical composition dates back to the days of the player piano and the 1909 Copyright Act²⁸ and support for the synchronization right can be found in cases as early as 1939.²⁹ While the longevity of the basic framework cannot be denied, the evolution of technology, especially that of the Internet, has left gaps in an otherwise effective and efficient system.

A. Basic Licensing Framework for Musical Theatrical Compositions

Much like one must watch each individual song and scene in a musical to understand the overarching plot, in order to contemplate the inefficiencies of a comprehensive framework, one must understand each of the separate branches. To understand the musical theatrical licensing system, it is helpful to separate the basic framework into performance and recording rights. Performance rights break down further into grand rights, which deal with the show as a whole, and small rights, which deal with individual songs. Recording rights can be broken down into mechanical rights, which allow the audio-only recording of a previously published musical composition, and synchronization rights, which deal with the incorporation of a visual component with an audio recording.

1. Grand Rights

Perhaps the most important of the performance rights in musical theatre, the “grand right” deals with the performance of the whole production, not

23. See, e.g., Justin Hughes, *The Philosophy of Intellectual Property*, 77 GEO. L.J. 287 (1989).

24. See Walterscheid, *supra* note 22 at 329 (While natural law rhetoric has proved less compelling with the passage of time, at the time of the drafting of the Copyright Act of 1790, it was a commonly argued that the Constitution implied an inherent right of property in one’s ideas); *Twentieth Century Music Corp. v. Aiken*, 422 U.S. 151, 156 (1975).

25. Timothy A. Cohan, *Ghost in the Attic: The Notice of Intention to Use and the Compulsory License in the Digital Era*, 33 COLUM. J.L. & ARTS 499, 504-505 (2010).

26. About, TAMS WITMARK, <http://www.tamswitmark.com/about/> (last visited July 27, 2015).

27. 1914: A Monumental Year in Music History, ASCAP, <http://www.ascap.com/100.aspx#1914> (last visited July 27, 2015).

28. *Id.*

29. *Famous Music Corp v. Melz*, 26 F. SUPP. 767, 769 (W.D. La. 1939).

merely of one of the component parts.

A grand right is the exclusive right to license the reproduction, adaptation, performance or other use of a dramatico-musical work . . . It is a right in all the contributions of the musical play as a single work . . . The subject of the grand right is a collective work comprised of words, music, choreography, the [plot or libretto], setting, scenery, costumes, and other visual representations.³⁰

In the modern landscape of musical theatre, the licensing of grand rights can be the most effective way to make a work of musical theatre profitable. Known in this context as “stock and amateur rights”, grand rights generate royalties that constitute pure profit.³¹ Even if a show flops on Broadway, the rights holders and producers can license the grand rights to regional and community theatres, allowing for more productions of the show and therefore increasing the pool of profit to draw royalties from.³² In fact, most shows lose money on Broadway, but this licensing framework can allow a show to continue to generate royalties for decades. For example, the 2003 Broadway flop *Seussical*, based on the stories of Dr. Seuss,³³ lost more than \$10 million on Broadway,³⁴ but typically licenses the grand rights for around 700 productions of the show each year.³⁵ Shows with this kind of impressive appeal, like *Seussical*, can bring in \$1 million to \$3 million per year in royalties for years following the initial distribution of rights.³⁶

Over the years, several companies have established a tight hold on the distribution market for these rights.³⁷ These licensing houses have developed deals with the rights holders of works of musical theatre for the exclusive right to license the grand rights to regional and community theatres.³⁸ Currently, practically all of these licenses are distributed by five licensing houses:³⁹ Dramatist’s Play Service focuses on “straight plays” (dramatic works without music), but distributes the rights to several important musicals, including recent Tony Award nominees *The Scottsboro Boys* and *Grey Gardens*, as well as cult favorites like *Bat Boy: The Musical* and *Hedwig and the Angry Inch*;⁴⁰ Samuel

30. AL KOHN & BOB KOHN, KOHN ON MUSIC LICENSING 978 (2d ed. 1996).

31. Robert Hofler, *Life After Death on Broadway*, VARIETY (Nov. 20, 2009), <http://www.variety.com/article/VR1118011669>.

32. See *Id.*; Elizabeth Weiss, *To Flip a Flop*, THE NEW YORKER (Jan. 7, 2014), <http://www.newyorker.com/business/currency/to-flip-a-flop>.

33. *Seussical*, MTI SHOWS, http://www.mtishows.com/show_detail.asp?showid=000229 (last visited July 27, 2015).

34. *Id.*

35. Hofler, *supra* note 31.

36. *Id.*

37. See Valenzi, *supra* note 11 at 779.

38. Douglas M. Nevin, Comment, *No Business Like Show Business: Copyright Law, the Theatre Industry, and the Dilemma of Rewarding Collaboration*, 53 EMORY L.J. 1533, 1556 n. 148 (2004).

39. See Valenzi, *supra* note 11.

40. *Musicals*, DRAMATISTS PLAY SERVICE, INC., <http://www.dramatists.com/dps/musicals.aspx> (last visited July 27, 2015).

French licenses mostly straight plays, but notably distributes rights to musicals such as *Grease* and *Chicago*,⁴¹ Tams Witmark distributes the rights to the Cole Porter and George Gershwin musicals, including *Anything Goes* and *Porgy and Bess*;⁴² Rodgers & Hammerstein Theatricals licenses the works of Richard Rodgers and Oscar Hammerstein, notably *Sound of Music* and *Oklahoma!*, Lerner and Lowe, including *My Fair Lady* and *Camelot*, and Andrew Lloyd Webber, including *Phantom of the Opera* and *Cats*;⁴³ and Music Theatre International (MTI) licenses the works of most every major musical theatre composer not previously mentioned as well as the Disney musicals.⁴⁴

2. *Small Rights*

Small rights, like grand rights, are performance rights, but are associated with individual songs rather than shows as a whole.⁴⁵ As it would be extremely inefficient for artists to individually license each and every use of a musical composition, private performing rights organizations (PROs) were quickly established to streamline the process.⁴⁶ Artists contract with PROs, which issue blanket licenses to entities, such as radio stations, hotels, restaurants, or even airports, to facilitate the licensing process and ensure proper compensation.⁴⁷ These licenses grant those entities the right to publicly perform any song by any artist member of the PRO, for the length of a defined term.⁴⁸

3. *Recording Rights*

As the music industry evolved over the last century, so too did the system of licensing.⁴⁹ The mechanical license came about when the advent of player pianos necessitated a protectable copy of a “mechanical invention made for the sole purpose of performing tunes mechanically upon a musical instrument”,⁵⁰ and the 1909 Copyright Act applied this rationale to the phonorecord as well.⁵¹ The synchronization license, on the other hand, is not explicitly mentioned in

41. *Musicals*, SAMUEL FRENCH, INC, <http://www.samuelfrench.com/catalog/search?cid=1009> (last visited July 27, 2015).

42. *Our Shows*, TAMS WITMARK, <http://www.tamswitmark.com/shows/> (last visited July 27, 2015).

43. *All Shows*, RODGERS & HAMMERSTEIN THEATRICALS, http://www.rnh.com/shows_all.html (last visited July 27, 2015).

44. *All Shows*, MUSIC THEATRE INTERNATIONAL, http://www.mtishows.com/show_results.asp (last visited July 27, 2015).

45. *About Licensing*, MUSIC THEATRE INTERNATIONAL, http://www.mtishows.com/content.asp?id=3_3_0 (Last visited July 27, 2015).

46. Donald S. Passman, *All You Need To Know About the Music Business* 233-34 (2000).

47. *Id.* See also, *Get an ASCAP License*, ASCAP, <http://www.ascap.com/licensing/licensefinder> (last visited July 27, 2015).

48. *Id.*

49. Cohan, *supra* note 25 at 504-510.

50. *Kennedy v. McTammany*, 33 F. 584, 584 (C.C. Mass. 1888).

51. Cohan, *supra* note 25 at 504-510

any sort of statutory provision, though it is considered statutorily protected⁵² and has been a staple of collaboration between the music and motion picture industries since the introduction of sound to motion pictures in 1928.⁵³ The most recent significant change to either right took place in the 1976 Copyright Act, which further fleshed out the mechanical license, providing specific details that better fit the contemporary industry and practices.⁵⁴

a. *Mechanical Licensing*

A mechanical license is interchangeably referred to as a mechanical license, a compulsory license, or a statutory license. The mechanical descriptor refers to the fact that piano rolls, the paper that let player pianos play different songs, represented a mechanical invention. The license is also referred to as statutory or compulsory because it is protected by a statutory requirement.⁵⁵ Put simply, the mechanical license allows anyone to make an audio-only recording of a song distributed to the public and mandates a statutory rate of compensation.

As mentioned above, the mechanical license stems from the fact that prior to the 1909 Copyright Act there was no statutory protection for any copy of a musical composition not in the form of sheet music.⁵⁶ For a time, manufacturers of piano rolls were able to produce without licenses, but when it became clear that the Copyright Act was going to be amended they put enormous pressure on publishers for exclusive rights to manufacture such copies.⁵⁷ Congress reacted to this, precluding the right to refuse permission by requiring that “once a copyright owner of a musical composition authorizes its reproduction and distribution, the owner must also offer such authorization to all takers”,⁵⁸ creating the basis for the modern compulsory license.

The mechanical license survived the inception of the 1976 Copyright Act with a few refinements and clarifications, including defining the “first use” that triggers the compulsory license, a limited right of “arrangement”, and the establishment of an independent entity to update the terms and rates of the license, among other things.⁵⁹ However, perhaps the most relevant codification was the

52. Cohen, *supra* note 13 at 793-796.

53. Alden-Rochelle, Inc. v. ASCAP, 80 F. Supp. 888, 892 (S.D.N.Y. 1948).

54. Cohan, *supra* note 25, 509.

55. 17 U.S.C. §115 (2015). “When phonorecords of a nondramatic musical work have been distributed to the public in the United States under the authority of the copyright owner, any other person, including those who make phonorecords or digital phonorecord deliveries, may, by complying with the provisions of this section, obtain a compulsory license to make and distribute phonorecords of the work.”

56. Cohan, *supra* note 25 at 502-3

57. *Id.* at 504.

58. W. Jonathan Cardi, *Uber-Middleman: Reshaping the Broken Landscape of Music Copyright*, 92 IOWA L. REV. 835, 872-73 (2007).

59. Cohan, *supra* note 25 at 509.

specific exclusion of the licensing of sound recordings.⁶⁰ There is no preclusion of the right to refuse the licensing of a sound recording.⁶¹ As a result, though anyone can record an audio-only version of a musical composition so long as they pay the statutory rate, they cannot license the use of a particular recording without negotiating directly with the owner.

b. *Synchronization Licensing*

Synchronization is the merger of two intangible pieces of intellectual property, the musical composition and the visual work.⁶² While the right to synchronization is not mentioned by name in the Copyright Act of 1976 or any other statutory copyright law, there is a consensus that it is statutorily protected.⁶³ In essence, it gives the right to exclude someone else from using a particular musical composition in an audio-visual work without permission.⁶⁴ Historically, the producer of an audio-visual work, such as a motion picture or a television show, would negotiate directly with the rights holder of the musical composition, as there is no compulsory aspect to this license.⁶⁵

However, each combination of a musical composition with a visual component is subject to that right, even when the audio and visual components are being recorded at the same time.⁶⁶ As a result, in order to upload a non-infringing video cover to a user-generated video site, such as YouTube, the user must obtain a synchronization license.⁶⁷ This is a widely acknowledged problem in the music industry in general,⁶⁸ but this issue has not been adequately addressed in the context of musical theatre. It seems likely that musical theatre composers would be willing to license their works for these uses if only there were a marketplace to facilitate the transaction.⁶⁹

B. *Expression and the Online Culture of Infringement*

Originally, synchronization licenses were used for the inclusion of musical compositions in motion pictures, but they apply to any combination of a musical composition and a set of visual images.⁷⁰ The producer of a film would contact the rights holder of a musical composition and negotiate a fee to com-

60. *Id.*

61. *Id.*

62. Cohen, *supra* note 13 at 795-96.

63. *Id.* at 793-94.

64. *Id.*

65. *Id.* at 789.

66. *Id.* at 795-96

67. *Do I Need a License to Use Music in My YouTube Video*, HARRY FOX AGENCY, https://www.harryfox.com/license_music/youtube_license.html (last visited July 27, 2015).

68. *Id.*

69. See *Artists*, NEWMUSICALTHEATRE.COM, <http://newmusicaltheatre.com/artist-profiles/> (last visited March 27, 2016) (demonstrating that contemporary musical theatre composers are already willing to sell their musical compositions in the form of sheet music when there is an appropriate marketplace).

70. Cohen, *supra* note 13.

pensate the rights holder for the inclusion of the composition.⁷¹ It was a relatively tangible transaction and high profile enough that there was little chance of an attempt to circumnavigate the system via infringement going unnoticed. These sorts of transactions still occur today with their own issues,⁷² but while the motion picture and the television industry have soldiered on, another audiovisual medium has risen in the ranks.⁷³

In 2005, the first video was uploaded to YouTube by one of its founders, and about a year later Google bought the site for over \$1.5 billion.⁷⁴ At that time, the site was patronized by one million viewers every month watching more than 100 million videos per day.⁷⁵ In the ten years since, the site has grown steadily, now boasting 1 billion unique users⁷⁶ and a staggering 300 hours of video uploaded every minute.⁷⁷ As the amount of content increases, so too does the difficulty of monitoring that content and enforcing the rights of songwriters and other creators.⁷⁸

Compounding this issue, many users have a tenuous grasp of copyright rights and the associated licenses necessary to avoid infringement.⁷⁹ Despite the unique medium, a user who intends to upload an audiovisual work to a site like YouTube requires the same licenses that a film or television producer would need to include a composer's musical composition in a motion picture or a television show.⁸⁰ However, when uploading a video to YouTube, the information on licensing and ownership rights only displays under advanced settings, providing cursory information and a link to the site's Terms and Conditions.⁸¹ Admittedly, Article 6 of YouTube's Terms and Conditions does note that as a user,

You further agree that Content you submit to the Service will not contain third party copyrighted material, or material that is subject to other third party proprietary rights, unless you have permission from the rightful owner of the material or you are otherwise legally entitled to post the material and to grant YouTube all of the license rights granted

71. See Bently, *supra* note 20.

72. *Id.*

73. Olufunmilayo B. Arewa, *YouTube, UGC, and Digital Music: Competing Business and Cultural Models in the Internet Age*, 104 NW. U.L. REV. 431, 431-434 (2010).

74. Joel Landau, *YouTube's 10-year anniversary: Ohio man who shot company's first video at San Diego Zoo said he didn't even know what it was for*, NYDailyNews.com (Feb. 14, 2015), <http://www.nydailynews.com/news/national/youtube-hits-10-year-anniversary-article-1.2108649>.

75. *Id.*

76. *Id.*

77. See *Statistics*, YOUTUBE, <https://www.youtube.com/yt/press/statistics.html> (last visited July 27, 2015).

78. See *How Content ID works*, YOUTUBE, <https://support.google.com/youtube/answer/2797370?hl=en> (last visited July 27, 2015).

79. Baio, *supra* note 15.

80. See Cohen, *supra* note 13.

81. YOUTUBE, *supra* note 17.

herein.⁸²

However, such “clickwrap”⁸³ agreements are rarely read by the users, and when they are, their meaning is less than obvious to the average user.⁸⁴

Each of these points bears strongly on the general state of music copyright, but there is more pointed significance in the context of an emerging musical theatre culture on the Internet. As in every other entertainment industry,⁸⁵ the Internet constitutes a new frontier for discovery and career opportunities.⁸⁶ Musical Theatre performers are encouraged to maintain professional websites, posting reels and performances to expand their online profile.⁸⁷

There is no evidence of widespread malicious infringement.⁸⁸ Musical theatre performers invest in their careers to a great degree. Despite the notoriously limited compensation one can expect when starting out as an actor,⁸⁹ they are prepared to spend on a website⁹⁰ and headshots,⁹¹ among other things. Thus, it follows that they would be willing to compensate a composer for the right to use their works in the same capacity. These conditions indicate a real possibility of market failure.⁹² There is a composer willing to sell and a performer willing to pay, but no efficient marketplace to facilitate the transaction.

C. Proposed Solutions and Associated Criticisms

This problem of infringement, specifically as related to the Internet, has been around for just over a decade, but the many proposed solutions lack a substantial framework, instead forming a haphazard lattice of underdeveloped ide-

82. *Terms of Service*, YOUTUBE, <https://www.youtube.com/static?template=terms> (last visited July 27, 2015).

83. “Clickwrap” agreements are those in which a user must provide affirmative assent to viewable contract terms to gain access to a service or product, often through the use of ‘Agree’ and ‘Disagree’ buttons. Raymond P. Kolak & Ryan D. Strohmeier, *Do Web-Based Terms of Sale Work?*, 29 No. 2 GPSOLO 60 (2012).

84. See Devin Looijen, Note, *Time for a Change: The Schema of Contract in the Digital Era*, 8 J. TELECOMM. & HIGH TECH. L. 547 (2010).

85. See Yuval Rosenberg, *Target: Dream Job*, FAST COMPANY (Apr. 1, 2006), <http://www.fastcompany.com/55984/target-dream-job> (last visited July 27, 2015).

86. See *YouTube Star Chester See Starts Performances in Rock of Ages on Broadway*, BROADWAY.COM (Oct. 27, 2014), <http://www.broadway.com/buzz/178063/youtube-star-chester-see-starts-performances-in-rock-of-ages-on-broadway/> (last visited July 27, 2015).

87. Taryn Southern, *The Actor’s Website: Dos and Don’ts*, BACKSTAGE (June 12, 2012), <http://www.backstage.com/advice-for-actors/first-person/the-actors-website-dos-and-donts/> (last visited July 27, 2015).

88. Baio, *supra* note 15.

89. Emma Miller, *Sometimes You Earn \$0, Sometimes You Earn \$10K: How an Actor Does Money*, THE BILLFOLD (Sept. 17, 2014), <http://thebillfold.com/2014/09/sometimes-you-earn-0-sometimes-you-earn-10k-how-an-actor-does-money/>.

90. Southern, *supra* note 85.

91. Matt Newton, *7 Tips for a Better Headshot*, BACKSTAGE (Mar. 28, 2014), <http://www.backstage.com/advice-for-actors/backstage-experts/7-tips-better-headshot/>.

92. For an explanation of market failure, see Wendy J. Gordon, *Fair Use as Market Failure: A Structural and Economic Analysis of the Betamax Case and its Predecessors*, 82 Colum. L. Rev. 1600, 1614 (1982).

as, legal theories without practical implementation, and incomplete but well-meaning attempts to work within the current system. Each contributes to a different facet of a solution, but no proposal to date has found a way to encompass all of the relevant factors.

1. *Universal Compulsory Synchronization License*

One potential solution involves a universal compulsory synchronization license.⁹³ This all-inclusive license would allow for the combination of any recording of a musical work, including the master recording, with a visual component so long as the statutory rate is paid.⁹⁴ This solution misses the mark, but comes remarkably close, especially considering the fact that solution was initially intended to solve a problem with the current law regarding a more traditional form of synchronization.⁹⁵

Synchronization for television and film productions can involve multiple negotiations, because each individual license typically only covers one form of distribution.⁹⁶ For example, when a series that was first released on television is later distributed for home media/DVD release, a second synchronization license is required.⁹⁷ As a result, artists whose recordings are used in particularly successful television series have been known to leverage the show's popularity for a more sizable payout the second time around.⁹⁸ In order to curb the perceived misuse of the system through "re-use fees", it has been suggested that an all-inclusive compulsory synchronization license be instituted.⁹⁹

Such a broad compulsory synchronization license, however, is untenable. The all-inclusive license would include the equivalent of a "Master" license, allowing for the compulsory licensing of the original sound recording as well as the musical composition. This severely limits an artist's creative control.¹⁰⁰ In addition, it directly conflicts with one of the more important codifications of the 1976 Copyright Act, the specific exclusion of the sound recording from the compulsory license.¹⁰¹ The compulsory license that is already a part of the musical licensing structure only allows for the use of the musical composition, not the master recording.¹⁰² The inclusion of a master license would therefore involve a much more extensive overhaul of musical copyright than the mere expansion of the compulsory license for musical compositions to include

93. See Bently, *supra* note 20

94. *Id.*

95. *Id.*

96. *Id.*

97. *Id.*

98. *Id.*

99. *Id.*

100. See inter alia Tatiana Siegel, *Fade-out on final-cut privileges?*, VARIETY (Jan. 22, 2010), <http://variety.com/2010/film/features/fade-out-on-final-cut-privileges-1118014187/>.

101. Cohan, *supra* note 25 at 509.

102. 17 U.S.C. §115 (2015) ("A person may not obtain a compulsory license for use of the work in the making of phonorecords duplicating a sound recording fixed by another. . .").

synchronization.

A second important distinction is the limitation of this article's proposal to musical theatrical works on user-generated content sites. A universal and multimedia compulsory synchronization license brings forth far more ambitious and complicated issues, including the issues regarding the determination of a fair rate for both online uploads and motion picture synchronization. Perhaps more significantly, there is not a market failure in the greater music industry as apparent as in this arena, so there is a less compelling incentive to sidestep the private negotiation process for a universal compulsory license.

2. "Content ID" – The Current YouTube Approach

Content ID is an attempt by Google to accommodate both users and rights holders by using technology to identify infringing videos and giving the rights holders the option to track, monetize, or block the video to properly compensate the rights holders.¹⁰³ Content ID compares "uploaded YouTube videos against reference files provided by content owners."¹⁰⁴ If a match is found among the more than twenty-five million reference files, the system follows the rights holder's direction, proceeding to track, monetize, or block the video, in effect, a synchronization licensing system.¹⁰⁵ Google has partnered with "more than 5,000 partners, including U.S. network broadcasters, record labels, and movie studios" to expand their impressive collection of reference files to which they can compare new uploads.¹⁰⁶

However, Content ID is not without flaws. While there is certainly a compelling argument that Content ID has provided a relatively efficient solution to the infringement problem on user-generated content sites, it seems to have taken an approach that burdens users to a greater degree than content creators.¹⁰⁷ There is also an issue of transparency: while there is no question that Google has amassed an incredible volume of source files, it is next to impossible for the average user to determine whether the song they want to use has been deemed acceptable to synchronize by YouTube's partners.¹⁰⁸ In addition, because the system was built on the catalogs of major labels, the outsiders, including musical theatre composers, have not benefited as substantially from the program.¹⁰⁹

103. Benjamin Boroughf, *The Next Great YouTube: Improving Content ID to Foster Creativity, Cooperation, and Fair Compensation*, 25 ALB. L.J. SCI. & TECH. 95, 104-105 (2015).

104. Charles S. Sims & Elizabeth A. Figueira, *Youtube, Google Find Safe Harbor in New York Court*, 27-SEP COMM. LAW. 3, 4 (2010).

105. Boroughf, *supra* note 98.

106. *Id.*

107. Boroughf, *supra* note 98 at 101-4.

108. *Id.* at 107-8.

109. *Id.* at 104.

II. A COMPULSORY SYNCHRONIZATION LICENSE

As demonstrated by the market failure regarding the licensing of musical works developed for theatrical productions, there is a compelling need for a compulsory licensing standard for this type of work. While YouTube has taken substantial steps regarding the synchronization issues with many songwriters and labels,¹¹⁰ the established licensing organizations for theatrical works have failed to meet or even recognize the issue.¹¹¹ This article proposes a compulsory synchronization license in order to authorize the ongoing public use of musical theatrical compositions while ensuring that songwriters are appropriately compensated.

A. Limited License

As the market failure described in Part I applies only to this particular kind of musical composition, the compulsory synchronization license provision proposed by this article will be appropriately limited. In an effort to align the proposal with the current copyright law framework, the provision will be modeled after the mechanical license provision set forth in §115 of the Copyright Act.¹¹²

1. A Compulsory Synchronization License for Musical Theatrical Compositions

In order for the provision to be flexible enough to protect the rights of songwriters and users, the proposal reflects a broader character than the other sections of the Copyright Act, but it has been drafted in the appropriate legislative style and would fit into Chapter 1 of the Copyright Act, constituting an addendum to the mechanical licensing provision of §115 as §115A. A draft of the provision might look like the following:

Nondramatic Synchronization of Musical Theatrical Compositions

- (1) When a compulsory license under Section 115 of this Title is sought regarding a musical theatrical composition, a compulsory synchronization license for electronic distribution may also be obtained if:
 - (a) the musical composition used in the synchronization would still constitute a nondramatic musical work; and
 - (b) the musical composition was written in the course of the creation of an encompassing theatrical work.
- (2) Royalty rates and associated terms of this additional license are to be determined as in the standard compulsory license as defined in Section 115.

An important distinction to note in the terms of the proposed provision is the

110. *Id.* at 104-5

111. Valenzi, *supra* note 11.

112. 17 U.S.C. §115 (2015).

differentiation between a musical theatrical composition and a dramatic musical work. Dramatic musical works are specifically excluded from the mechanical licensing provision of §115.¹¹³ Despite the semantic similarity, the two terms refer to separate categories of musical work. While copyright law does not specifically define the terms “dramatic” or “nondramatic”, a dramatic use of a work is generally understood as one that contributes to an overarching story or plotline.¹¹⁴ As individual video covers of musical theatrical compositions would not be used in service of any overarching plot, there would be no tension with the current language of §115.

2. *A Parallel to the Mechanical Licensing Provision*

The proposed provision will constitute a parallel provision to the longstanding provision regarding the compulsory license for audio-only recordings. Because the synchronization right is not mentioned in the Copyright Act and the inspiration for the compulsory synchronization license lies within §115, it is the most appropriate location for this provision. The proposed license is triggered by the distribution of the work to the public under the authority of the copyright owner,¹¹⁵ and though it only applies to a narrow category of musical compositions, it is a corollary of the standard mechanical license.

a. *Limited Scope*

The proposed provision, by necessity, is one of limited scope. Ten years into the age of user generated content sites like YouTube, many of the associated problems have been sorted out within the current framework, so this provision is designed to fill in the gaps associated with musical works developed for theatrical productions. It attempts to fill the holes between the established procedures regarding theatrical and musical rights and the aforementioned user generated content framework to provide the most useful standard for both users and content creators.

The compulsory synchronization license will only cover nondramatic audiovisual works incorporating musical theatrical compositions. While this sounds contradictory, the widely accepted definition of nondramatic merely necessitates the use of a musical composition in service of the central plot of an encompassing work.¹¹⁶ As a result, the use of a single musical composition from a theatrical production in a synchronized audiovisual work would not

113. 17 U.S.C. §115 (2015).

114. *Common Music Licensing Terms*, ASCAP, <http://www.ascap.com/licensing/termsdefined.aspx> (last visited July 27, 2015).

115. 17 U.S.C. §115 (2015); (“When phonorecords of a nondramatic musical work have been distributed to the public in the United States under the authority of the copyright owner. . .”).

116. *Common Music Licensing Terms: Dramatic or Nondramatic Performance / Dramatic (or “Grand”) Rights*, ASCAP, <http://www.ascap.com/licensing/termsdefined.aspx> (last visited July 27, 2015).

constitute a dramatic musical work.¹¹⁷ The proposed provision, therefore, only allows for a synchronization involving a standalone use of a musical theatrical production.

This limited category protects the rights of content creators while allowing them to be adequately compensated for the uses that take place outside of the current theatrical licensing framework. The nondramatic qualifier ensures that a user cannot use the compulsory synchronization license to get around the current theatrical licensing standard to post an audiovisual recording of a musical composition in context, which is consistent with the current practice of prohibiting audiovisual recording of theatrical performances of full productions.¹¹⁸ For example, a user would not be able to utilize this provision to obtain a license uploading an audio-visual recording of a full, or even limited, production of *Phantom of the Opera*, as such use of the songs together in the service of an overarching plot would violate the nondramatic exception.

The limited scope of the provision would also protect the copyright owners of songs collected in a so-called “jukebox musical”. These works, which utilize collections of pop music to tell a story, would not be susceptible to the compulsory license due to their inclusion in a work of theatre. The second exception, which requires that the musical theatrical work be developed specifically as a contribution to a theatrical production would protect artists like Green Day¹¹⁹ or ABBA¹²⁰ from acquiescing to the compulsory license because they allowed the development of a musical that utilized their previously developed musical compositions. Because the musical works were written long before the development of the musical, they would not meet the contemporaneity requirement and would thus not be eligible for a compulsory synchronization license.

b. *Necessary Evolution*

While Google has been able to bring much of the music industry into the fold, the musical portion of the theatre industry has sat idly by.¹²¹ Performance rights are dispersed much as they always have been,¹²² a reflection of the community effort that has always been so crucial to bringing a full theatrical production to the stage. This consistency has mostly been good for the industry, but it has missed opportunities when considering the increasing ease of distribution and access.

117. *Id.*

118. *About Licensing: Videotaping*, MUSIC THEATRE INTERNATIONAL, http://www.mtishows.com/content.asp?id=3_3_0 (last visited July 27, 2015).

119. *American Idiot*, MUSIC THEATRE INTERNATIONAL, http://www.mtishows.com/show_detail.asp?showid=000436 (last visited July 27, 2015).

120. *Mamma Mia!*, MUSIC THEATRE INTERNATIONAL, http://www.mtishows.com/show_detail.asp?showid=000432 (last visited July 27, 2015).

121. *Do's and Don'ts of Licensing: Video Recording*, MUSIC THEATRE INTERNATIONAL, <http://www.mtishows.com/dos-and-donts-of-licensing> (last visited March 27, 2016).

122. Valenzi, *supra* note 11.

Likewise, the mechanical licensing framework has not been meaningfully updated since the 1970s.¹²³ This lack of evolution has caused the market to update itself, with the introduction of Google's Content ID and other forms of mass licensing. However, this self-regulation has only truly made a difference to the big pop music labels, so an updated compulsory licensing standard with respect to musical theatrical compositions will help to fill in the gaps.

B. *An Efficient Solution*

The proposed provision will provide efficiency in an industry marked by convoluted licensing standards and a lack of clarity. At this time, if an individual user were to look into obtaining a synchronization license, it is remarkably difficult to figure out where to start. Assuming that the user is familiar with the general practice of performance licensing in musical theatre, she will look to Music Theatre International¹²⁴. She would not find any mention of synchronization rights, but would likely find the section on "Small Rights" as the closest category,¹²⁵ which would direct her to a performing rights agency, such as the ASCAP site. This would provide the first mention of synchronization rights, but would direct the user to the individual music publisher.¹²⁶ A Google search might indicate that the company that publishes the show that the user is looking for is Hal Leonard, and the search would continue. The Hal Leonard site would then let the user know that Hal Leonard can only issue synchronization rights to music that the company owns, and would direct the user to the copyright owner, and to check with a performing rights agency (such as ASCAP) if the user was unable to determine the identity of the owner.¹²⁷

The process is confusing, convoluted, and inefficient, notwithstanding even the difficulty of contacting the copyright owner of the songs to a Broadway show to negotiate a synchronization fee for a video the user wanted to post online. To the individual user, the process is vague if not seemingly futile. The compulsory license, on the other hand, provides the opportunity for efficiency. This compulsory synchronization will allow for a simplified, easy to comprehend royalty system, modeled off of that of the mechanical license. It could even provide the framework for a clearing house like the Harry Fox Agency to centralize the associated royalty collection to allow for an even more efficient and organized process.

III. POTENTIAL OBJECTIONS TO A COMPULSORY SYNCHRONIZATION LICENSE

123. Cohan, *supra* note 25 at 509.

124. *About Licensing*, MUSIC THEATRE INTERNATIONAL, http://www.mtishows.com/content.asp?id=3_3_0 (last visited July 6, 2015).

125. *Id.*

126. *Common Music Licensing Terms: Synchronization or "Synch" Rights*, ASCAP, <http://www.ascap.com/licensing/termsdefined.aspx> (last visited July 27, 2015).

127. *Frequently Asked Questions: How do I obtain a synchronization license*, HAL LEONARD, <https://www.halleonard.com/permissions/faq.jsp#a10> (last visited July 27, 2015).

FOR MUSICAL THEATRICAL COMPOSITIONS

The introduction of a compulsory synchronization license of any kind is likely to be met with trepidation because it is a departure from the way that synchronization rights have been distributed since their inception. While this is undoubtedly true, there is no question that synchronization, the process of combining a musical composition with a visual component, has changed significantly in the past ten years. Anticipated criticisms of the proposed framework will be addressed in the following section of the article.

A. Harmony in the Distribution of Synchronization Licenses

An important potential criticism of the proposed compulsory synchronization license for musical theatrical compositions is the fact that it separates these musical compositions from the general grouping. Despite the advantages of an all-encompassing framework for the synchronization rights of musical compositions, the fact is that musical theatre already operates on a separate framework.¹²⁸ The regulatory nature of copyright allows for this sort of industry specific separation quite often, and Congress has demonstrated a willingness to embrace these differences in statutory frameworks.¹²⁹

1. Fitting Synchronization into the Theatrical Framework

The rights associated with every aspect of musical theatre are already compartmentalized in licensing agreements by licensing houses such as Musical Theatre International, performing rights organizations such as ASCAP, and even publishers like Hal Leonard. For all intents and purposes, the only right associated with musical theatre that does not fit into this framework is that of synchronization. The solution, therefore, is not an effort to delineate compositions for musical theatre from other musical compositions, but to bring the distribution of synchronization licenses more in line with the licensing standards of the rest of the industry.

2. A Testing Ground for an Expanded Synchronization Framework

Nonetheless, given the uncertain nature of the current synchronization landscape, such delineation would prove an effective process for testing the efficacy of a compulsory synchronization license. The proposal is an attempt to bring synchronization licenses for musical theatrical compositions into the Internet age. Especially given the concerns with transparency and enforcement on

128. See *Common Music Licensing Terms*, ASCAP, <http://www.ascap.com/licensing/termsdefined.aspx> (last visited July 27, 2015); *Frequently Asked Questions*, HAL LEONARD, <https://www.halleonard.com/permissions/faq.jsp#a10> (last visited July 13, 2015); *About Licensing*, MUSIC THEATRE INTERNATIONAL, http://www.mtishows.com/content.asp?id=3_3_0 (last visited July 27, 2015).

129. Joseph P. Liu, *Regulatory Copyright*, 83 N.C.L. REV. 87, 104-5 (2004).

YouTube and the larger issues with mass negotiated synchronization,¹³⁰ it would seem that a proving ground for a potentially uniform licensing framework would prove beneficial for all involved.

In addition, the practical effect of a statutory maximum would allow an organization to step into the void that currently exists within the market for synchronization. This void, filled by entities like MTI and ASCAP in their respective spheres of copyright licensing, exists not only in the musical theatre industry, but in the music industry as a whole, despite steps in the right direction.¹³¹ A statutory maximum for synchronization would eliminate the need to negotiate as it did in mechanical licenses, allowing for an organization like Harry Fox to step in to facilitate the transaction.

B. Rate Determination

An important potential criticism of this compulsory synchronization licensing framework is that regarding rate determination. It is relatively simple to say that all songwriters ought to be compensated for the use of their work on user-generated content sites, but it is rather more complicated to decide that every individual stream or view of a video on a user-generated content site is worth a relatively arbitrary amount of money in royalties.

While it is certainly a complicated determination with important and far-reaching consequences, it is actually very common in both the theatre and music industries. MTI utilizes a variable royalty rate based on the size of the theatre and the number of people who are in attendance.¹³² This effectively charges theatre companies with larger theatres and higher attendance a higher total price to license grand rights to shows, essentially putting a price on each seat in the house. Harry Fox, following the statutory standard set forth in §115, takes a more direct pricing approach, and charges 9.1¢ per unit (physical copy or download), and 1¢ per stream,¹³³ charging artists with a larger fan base a higher total price.

As in both of these examples, the proposal at hand would charge a higher total price to otherwise infringing users with the greatest reach. The 0.1¢ per view price point is suggested mainly for the ease of calculations, though the Copyright Royalty Judges would define the precise royalty rates.¹³⁴ The proposed rate would provide affordability for the average otherwise infringing user, one that does not generate an abundance of income from these sorts of videos, but allows the songwriter to profit more substantially from uploads by

130. See *Viacom v. YouTube*, 676 F.3d 19 (2nd Cir. 2012).

131. *Boroughf*, *supra* note 98.

132. *How to License a Musical*, MUSIC THEATRE INTERNATIONAL, http://www.mtishows.com/content.asp?id=3_1_0 (last visited July 27, 2015).

133. *What does Songfile Cost?*, HARRY FOX AGENCY, <http://www.songfile.com> (last visited July 27, 2015).

134. 17 U.S.C. §801 (2015).

otherwise infringing users with a higher view potential and therefore a more substantial income potential via monetization. For example, a user uploading a video that would generate a modest 500 views would only pay 50¢ in royalties, while one uploading a video that would generate a more impressive 500,000 views would pay \$500. This creates a fair balance by revenue generating royalties without being cost prohibitive to the average user.

C. *Trading Control for Compensation*

A conceptual criticism of the proposal that will no doubt be the question regarding whether the loss of control is worth the proposed compensation. While there is no question that the right to exclude is one of the most important aspects of property,¹³⁵ and copyright is no exception to that notion, this proposal is hardly the first example of an exception to this rule. The compulsory mechanical license itself is a powerful example and has been a staple of the intellectual property framework regarding music for over a century.¹³⁶

If exceptions to the right to exclude can be made in terms of the compulsory mechanical license, the extension to synchronization licenses in musical compositions developed for theatrical works is actually a logical next step. The entire business model of the musical industry is allowing other people to use their compositions in exchange for royalties and fees.¹³⁷ Songwriters regularly contract away their control and rights to exclude to licensing houses and performing arts organizations and the like in order to allow more people to perform their work.¹³⁸ As a result, while the very concept of a compulsory license might go against the idea of intellectual property, this is one of the most appropriate forums in which to make the attempt and test the results.

IV. CONCLUSION

A limited compulsory synchronization license for musical theatrical compositions could provide an effective solution to a gap in the theatrical licensing framework that will otherwise continue to expand with the continued evolution of technology. Ten years after the advent of user-generated content sites, the landscape of musical theatre on the Internet continues to evolve, and unless changes are made, the sheer number of instances of infringement will only grow. The proposed parallel provision to the mechanical licensing provision in §115 of the Copyright Act provides a solution that not only fits the licensing framework currently in use in the musical theatre industry but is also consistent

135. The Supreme Court has specifically referred to the right to exclude others as “one of the most essential sticks in the bundle of rights that are commonly characterized as property.” *Kaiser Aetna v. United States*, 444 U.S. 164, 176 (1979).

136. *Cardi*, supra note 57.

137. See generally *Licensing Help*, ASCAP, <http://www.ascap.com/licensing/licensingfaq.aspx#general> (last visited March 27, 2016) *Licensing FAQ*, BMI, <http://www.bmi.com/licensing/#faqs> (last visited March 27, 2016)

138. *Id.*

with the accepted principles of music copyright. As a result, a limited compulsory synchronization license will provide both a necessary update to a longstanding framework and template for the future evolution of this facet of both the music and theatre industries as well as the industry as a whole.