

Copyright Licensing in Music Distribution, Reproduction, and Public Performance

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Summary

This report provides an overview of the complexities of the Copyright Act's provisions concerning music licensing. It also discusses four issues involving copyrights in musical works and sound recordings that have been the subject of recent congressional and judicial consideration: (1) extending copyright protection to pre-1972 sound recordings; (2) requiring radio broadcasters to compensate recording artists; (3) changing the standard used to calculate royalties for digital music transmissions; and (4) modifying antitrust consent decrees governing songwriter performance royalties.

Copyright law provides protection for original works of authorship by conferring certain exclusive rights upon their creators. Music is an example of a kind of literary and artistic work that falls squarely within the scope of copyright law. Federal law recognizes copyright protection for two separate and distinct types of music-related creations: "musical works" and "sound recordings." A musical work refers to a songwriter's musical composition and accompanying lyrics, while a sound recording is a particular version of a musician singing or playing a musical work, as that rendition is captured in a recording medium such as a compact disc, cassette tape, vinyl album, or MP3 file.

If a third party wants to use a copyrighted work in a particular way, he or she must ordinarily seek permission from the copyright holder; in the music industry, such permission is often referred to as "licensing." A license permits a third party to do something with a copyrighted work that implicates a copyright holder's exclusive right, possibly in exchange for monetary compensation known as a royalty fee, without concern of infringing the copyright holder's rights. Some licenses are negotiated instruments between a copyright holder and a third party (referred to as "voluntary licenses"). Other licenses are provided by the Copyright Act. These statutory licenses are instruments that compel copyright holders to allow others to exercise a holder's rights without negotiated permission. In copyright law, they are commonly referred to as "compulsory" licenses. When statutory requirements are satisfied by the party interested in using the copyrighted work, a compulsory license is available if the party complies with the terms of the statutory license as well as pays the statutory royalty fees.

The licensing system behind the use of musical works and sound recordings differs depending on (1) whether the music is transmitted digitally or through analog means, (2) who the user is, and (3) the particular "exclusive right" of the copyright holder that is implicated by the use. Whenever a user reproduces or distributes a non-digital or digital sound recording, the sound recording copyright holder and musical work copyright holder are both entitled to payment. Whenever a user publicly performs a sound recording via non-digital transmission, authorization from *only* the musical work copyright holder is needed. However, if the sound recording is publicly performed through digital audio transmission, both the musical work copyright holder and the sound recording copyright holder have a right to receive royalties.

A more comprehensive understanding of music licensing requires a familiarity with the Digital Performance Right in Sound Recordings Act (DPRSRA) and the Digital Millennium Copyright Act (DMCA). This report explains how these laws amend the Copyright Act to, among other things, refine the scope of licensing for both types of copyright holders.

The Copyright Act also sets forth several exemptions from infringement liability for certain unauthorized uses, including the fair use doctrine (17 U.S.C. § 107) and limitations on the public performance right under specific situations (17 U.S.C. § 110).

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Introduction

In 2013, Congress initiated a comprehensive review of U.S. copyright law[1] in order to determine whether legislative reforms are needed to address technological developments in modes of communication, social interaction, and entertainment. Innovative businesses that rely on the use of vast amounts of digital media, such as Facebook, YouTube, Pandora, and Instagram, offer the potential to help copyright holders promote their creative material (such as photos, music, and videos) for artistic, educational, and commercial reasons. However, these digital services may also increase the risk of infringing copyright holders' rights because they often provide faster, cheaper, and easier means of engaging in unauthorized reproduction, distribution, and public performance of copyrighted works than previous technologies.

Copyright holders in the music industry have experienced challenges in adapting to the pace of technological advances that continually offer the public many new ways of listening to music. In the last 20 years, how consumers purchase and enjoy music has changed dramatically with the advent of the Internet, Amazon and iTunes, digital music streaming services, and smartphones. The existing music licensing system by which copyright holders are paid for the use of their music has struggled to adjust to new music delivery methods and consequently, may be unable to provide music copyright holders with adequate compensation for their creative efforts. At the same time, the current licensing rules may be hindering or limiting businesses that want to offer innovative music delivery platforms. As the U.S. Copyright Office has recently observed,

> [O]ur music licensing system is in need of repair. The question … is how to fix it, in light of the often conflicting objectives of longtime industry participants with vested interests in traditional business models and infrastructure; digital distributors that do not produce or own music and for which music represents merely a cost of doing business; consumers whose appetite for music through varied platforms and devices only continues to grow; and individual creators whose very livelihoods are at stake.[2]

The first part of this report provides an overview of copyright law that relates to music licensing. The second half discusses issues involving copyrights in musical works and sound recordings that have been the subject of recent congressional and judicial consideration.

Copyright Law Fundamentals

The source of federal copyright law originates with the Copyright and Patent Clause of the U.S. Constitution, which authorizes Congress "[t]o promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries."[3] Copyright refers to the exclusive rights granted by law to authors for the protection of original works of authorship fixed in any tangible medium of expression.[4] Original works must be captured in some form beyond a transitory duration. The types of creative works eligible for copyright protection include literary, musical, dramatic, and pictorial works;

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[1] *See* House Judiciary Committee, Press Release, *Chairman Goodlatte Announces Comprehensive Review of Copyright Law,* April 24, 2013, *at* http://judiciary.house.gov/index.cfm/2013/4/chairmangoodlatteannouncescomprehensivereviewofcopyrightlaw.

[2] U.S. COPYRIGHT OFFICE, COPYRIGHT AND THE MUSIC MARKETPLACE (Feb. 2015), at 13, *available at* http://copyright.gov/policy/musiclicensingstudy/copyright-and-the-music-marketplace.pdf.

[3] U.S. CONST. art. I, § 8, cl. 8.

[4] 17 U.S.C. § 102.

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motion pictures; and sound recordings.[5] Copyright is based on authorship and exists separate and apart from its physical embodiment. For example, if a person purchases a collection of books or records, the purchaser owns those particular material objects but not the rights afforded to the copyright holder.

The rights conferred on copyright holders do not last forever. Copyrights are limited in the number of years that copyright holders may exercise their exclusive rights. In general, an author of a work may enjoy copyright protection for the term of his or her life plus 70 additional years.[6] At the expiration of a term, the copyrighted work becomes part of the public domain. Works in the public domain are available for anyone to use without fear of infringement. The unauthorized use of a copyrighted work constitutes infringement of the particular exclusive right at issue, unless the action is permitted by a statutory exception, such as "fair use" for limited purposes.[7] The copyright holder may file a lawsuit against an alleged infringer for a violation of any of the exclusive rights conferred by copyright. The Copyright Act provides several civil remedies to the copyright holder that is harmed by infringement, including the possibility of obtaining injunctive relief,[8] actual damages suffered by the copyright owner due to the infringement,[9] statutory damages,[10] and costs and attorney fees.[11]

The Music Copyrights

In the realm of music, federal law recognizes copyright protection for two separate subject matter categories: "musical works" and "sound recordings."[12] Each of these copyrights confers a particular set of rights—some exclusive to one of the two different music copyright holders.

The Musical Work

A "musical work" is a lyrical and/or notational composition of a song, transcribed on a material object such as a sheet of paper. A holder of a musical work copyright is typically a composer, who authors the work, or a music publisher, who purchases copyrights from composers and exercises the rights of those composers.

Holders of copyright in musical works have the right to engage in, authorize others to exercise, or prevent third parties from exercising, the following rights:[13]

- *reproduction* of the copyrighted musical work;
- *preparation of derivative works* based on the copyrighted musical work;
- *distribution* of the musical work to the public by sale, rental, lease or lending;
- *performance* of the musical work *publicly*; and

[5] *Id.*

[6] 17 U.S.C. § 302. Other terms have been established for different works and different periods of time. For a concise chart explaining the different terms, see http://copyright.cornell.edu/resources/publicdomain.cfm.

[7] 17 U.S.C. § 107. This and other exceptions to infringement liability will be discussed *infra*.

[8] 17 U.S.C. § 502.

[9] 17 U.S.C. § 504(b).

[10] 17 U.S.C. § 504(c)(1).

[11] 17 U.S.C. § 505.

[12] 17 U.S.C. §§ 102(a)(2), (7).

[13] 17 U.S.C. §§ 106(1)-(5).

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- *display* of the musical work *publicly*.

The Sound Recording

The sound recording is the recorded version of a musician singing or playing a musical work. The Copyright Act distinguishes the terms "sound recording" and "phonorecord." A sound recording is an original work of authorship that "result[s] from the fixation[14] of a series of musical, spoken, or other sounds" in a tangible medium of expression.[15] The sound recording copyright protects the elements of original authorship expressed in a particular recorded rendition. A phonorecord is the actual physical object from which the sound recording can be perceived, reproduced, or communicated directly or with a machine's aid.[16] Examples of phonorecords include compact discs, vinyl albums, and MP3-format digital music files. The sound recording copyright holder may include the recording artist, background musicians, and the record label that helps to produce the recording.[17]

Holders of rights in sound recordings have exclusive right to control the

- *reproduction* of the copyrighted sound recording;
- *preparation of derivative* works based on the copyrighted sound recording;
- *distribution of phonorecords* of the sound recording to the public by sale, rental, lease, or lending.

In addition, holders of sound recording copyrights have a qualified and limited public performance right. The Copyright Act covers the *performance* of the sound recording *publicly* by means of a *digital* audio transmission only.[18]

The Traditional Licensing System

Permission and the License

At the core of a copyright holder's bundle of rights is the concept of exclusivity. This exclusivity allows a copyright holder to exercise particular rights for the sole benefit of the holder. However, the copyright holder may license third parties to exercise one of the exclusive rights with respect to the protected work. Each exclusive right of a copyright holder is subject to licensing; for example, a third party wishing to reproduce a copyrighted work as well as publicly perform the

[14] A fixed work is one "in a tangible medium of expression when its embodiment in a copy or phonorecord, by or under the authority of the author, is sufficiently permanent or stable to permit it to be perceived, reproduced, or otherwise communicated for a period of more than transitory duration." 17 U.S.C. § 101. Fixation is an example of the many terms of art that the Copyright Act frequently employs; these terms often have meanings that differ from ordinary usage in everyday language. The copyright law-specific terms of art that are pertinent to the topics discussed in this report are defined in various footnotes or in the body text; for easier reference, they are also arranged in a glossary at the end of this report.

[15] *Id.*

[16] *Id.*

[17] A sound recording copyright holder (e.g., a recording artist or a record label) could also hold a copyright in the musical work as well. For clarity and convenience, this report addresses these music copyright holders as separate entities.

[18] 17 U.S.C. § 106(6). This right was added pursuant to the Digital Performance Right in Sound Recordings Act of 1995, which is discussed *infra*.

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work must negotiate separate licenses from the copyright holder to engage in the different activities. Copyright holders may transfer or waive one or more of these exclusive rights through written contract.[19]

Some licenses are negotiated instruments between a copyright holder and a third party (referred to as "voluntary licenses"). Other licenses are created by statute. Statutory licenses are instruments that compel copyright holders to allow others to exercise a holder's rights without negotiated permission. In copyright law, these are commonly referred to as "compulsory" licenses. When statutory requirements are satisfied by the party interested in using the copyrighted work, a compulsory license is available if the party complies with the terms of the statutory license as well as pays the statutory royalty fees.

Three Copyright Royalty Judges (CRJs) that comprise the Copyright Royalty Board (CRB) establish these statutory licenses and rates.[20] The Copyright Act provides a specific process for statutory license ratemaking.[21] First, the act encourages interested parties (for example, copyright holders and the users of sound recordings) to voluntarily negotiate a settlement agreement regarding the public performance royalty rate during an initial three-month period. In the absence of a voluntary agreement, written statements and testimony are gathered by the CRB, discovery takes place, hearings are held, and then the CRB issues a ruling that announces the royalty rate for the particular type of digital audio service at issue (Internet radio companies, cable/satellite radio providers, etc.). The CRB's royalty rates are effective for a five-year period; thus, the CRB repeats its ratemaking proceedings every five years. Any "aggrieved participant" in the proceeding who would be bound by the rates may appeal the CRB's determination to the U.S. Court of Appeals for the District of Columbia Circuit within 30 days after the rates are published in the Federal Register.[22]

Although the music licensing system is a complex area of overlapping and sometimes competing interests and responsibilities, the essence of licensing remains in the context of permission—whether voluntarily negotiated or statutorily compelled.

The Core Rights of Music Copyright Holders

Among the rights granted to copyright holders, three rights are essential in the music licensing context: the reproduction right, the distribution right, and the public performance right.

The right of reproduction is the right to duplicate, transcribe, imitate, or simulate a work in a fixed form. In the context of music copyrights, the right of reproduction authorizes the copying of musical works (e.g., duplicating sheet music) or sound recordings. Infringement of these rights would be the unlawful copying of the copyrighted work.

The right of distribution establishes the right to distribute copies or phonorecords of a copyrighted work to the public by sale or other transfer of ownership, or by rental, lease, or lending.[23] In the context of music copyrights, the right of distribution permits the sale of copies (sheet music) or

[19] 17 U.S.C. §§ 201(d), 204(a).

[20] With the enactment of the Copyright Royalty and Distribution Reform Act of 2004 (P.L. 108-419) on Nov. 30, 2004, the Copyright Arbitration Royalty Panel (CARP) system that had been part of the U.S. Copyright Office since 1993 was replaced with a board of three Copyright Royalty Judges. The CRJs are full-time employees of the Library of Congress who are appointed for six-year terms with an opportunity for reappointment.

[21] 17 U.S.C. §§ 803, 804.

[22] 17 U.S.C. § 803(d)(1).

[23] 17 U.S.C. § 106(3).

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phonorecords (sound recordings) to the public. Infringement of this right would be any unauthorized public distribution of a copy or phonorecord.

The right of public[24] performance means the exhibition, rendition, or playing of a copyrighted work, either directly or by means of any device or process.[25] Public performance not only covers the initial rendition, but also any further act by which the rendition is transmitted or communicated to the public. In the context of music copyrights, the public performance right allows promotion and performance of the music. Infringement of this right would be the public performance of a copyrighted work without the consent of the copyright holder.

The Licensing of Reproduction and Distribution Rights

The legal landscape concerning music copyrights and licensing originates in the 1908 Supreme Court case of *White Smith v. Apollo Music*.[26] In *White Smith*, a composer challenged piano roll technology[27] as a violation of a musical work copyright holder's right to make copies of a work.[28] The Court ruled that the rolls were not copies of musical compositions, but rather component parts of a player piano machine.[29] Hence, there was no infringement of the composer's copyright.[30]

Through legislation, Congress overturned *White Smith* in 1909 by granting to musical work copyright holders the right to control the "mechanical[31] reproduction" of their works.[32] As a consequence, piano rolls would be infringements of the musical composition copyright. However, piano roll companies could still acquire the rights to make the rolls from musical work holders. To prevent monopolization by a large manufacturer of piano rolls, Congress subjected the mechanical reproduction right to a compulsory license, allowing any manufacturer of piano rolls to mechanically reproduce a musical work in exchange for a payment of a royalty fee, without negotiating with the copyright holder for permission. Thus, the compulsory license for the reproduction of musical works is commonly referred to as a "mechanical license."

Section 115 of the Copyright Act of 1976, as amended, is the current authority for a compulsory license (or a statutory mechanical license) for reproduction and distribution of musical works.[33] The license protects the musical work copyright holder's right to control certain reproductions of

[24] To perform a work "publicly" means (1) to perform a work at a place open to the public, or at any place where a substantial number of persons outside a normal circle of a family and its social acquaintances is gathered; or (2) to transmit or otherwise communicate a performance of the work to a place specified by clause (1) or to the public by means of any device or process, whether the members of the public capable of receiving the performance receive it in the same place or in separate places and at the same time or at different times. 17 U.S.C. § 101.

[25] 17 U.S.C. §§ 106(4), 101.

[26] 209 U.S. 1 (1908).

[27] Piano rolls are cylinder rolls with perforations that mechanically cause notes to be played on self-playing pianos. *Id.* at 9-10.

[28] *Id.* at 9.

[29] *Id.* at 12.

[30] *Id*.

[31] The term "mechanical" was derived from a determination that the reproduction is heard with the aid of a machine. AL KOHN & BOB KOHN, KOHN ON MUSIC LICENSING 677 (3rd ed. 2002).

[32] Act of Mar. 4, 1909, ch. 320, § 1(b), 35 Stat.1075.

[33] 17 U.S.C. § 115. In 1995, the Digital Performance Right in Sound Recordings Act (DPRSRA) amended the compulsory license to include the reproduction and distribution of digital phonorecord deliveries (DPDs) over the Internet. DPDs will be discussed *infra*.

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the work (e.g., copying the sheet music) but permits the recording of a song by a third party on "mechanical" media such as a piano roll or record.[34] In its present form, it essentially allows reproduction of musical compositions that may be heard with the aid of a mechanical device.[35] The mechanical license is validly obtained only after a musical work has been initially distributed publicly under the authority of the copyright holder. The license is authorized when the licensee's (recipient or user) primary purpose is to distribute the work publicly for private use. Currently, the mechanical license rate is 9.1 cents for songs five minutes or less, or 1.75 cents per minute or fraction thereof for songs over five minutes, whichever is greater.[36]

Although the §115 mechanical license compensates the *musical work* copyright holder for reproduction and distribution rights, it does *not* authorize the duplication of a *sound recording*.[37] Permission to duplicate a sound recording must be obtained from whoever owns the sound recording copyright—likely either the recording artist or record studio.

Most phonorecord creators do not use the compulsory license system to obtain permission to use musical works.[38] In 1927, the National Music Publishers Company (NMPC)[39] created the Harry Fox Agency (HFA) to issue and administer mechanical licenses. Currently, most mechanical licenses are obtained through HFA because there is a reduction in the transaction costs offered by HFA. Although HFA has the right to authorize licenses only for musical works it represents, HFA represents 27,000 music publishers, which represent more than 160,000 songwriters.[40]

The Licensing of Public Performances

Prior to the 1909 Copyright Act, Congress granted musical works copyright holders the right to control the public performance of their works.[41] The 1909 Act further recognized a public

[34] 2 MELVILLE B.NIMMER & DAVID NIMMER, NIMMER ON COPYRIGHT § 8.04[A] (2006).

[35] KOHN ON MUSIC LICENSING, *supra* footnote 31, at 677.

[36] U.S. Copyright Office, *Copyright Royalty Rates, Section 115, the Mechanical License*, *available at* http://copyright.gov/licensing/m200a.pdf. However, the Harry Fox Agency, a wholly owned subsidiary of the National Music Publisher's Association, typically negotiates and issues these licenses on behalf of songwriters, and the mechanical license is seldom used for the permission to make or distribute copyrighted musical compositions; such rate rarely exceeds that set by the U.S. Copyright Office. *See* http://www.harryfox.com/public/FAQ.jsp.

[37] 17 U.S.C. § 115(a)(1) ("A person may not obtain a compulsory license for the use of the work in the making of phonorecords duplicating a sound recording fixed by another, unless (i) such sound recording was fixed lawfully; and (ii) the making of the phonorecords was authorized by the owner of copyright in the sound recording.... ").

[38] Indeed, the Copyright Royalty Judges have acknowledged this anomaly: "[V]irtually no one uses Section 115 to license reproductions of musical works ... The Judges are, therefore, seemingly tasked with setting rates and terms of a useless license. The testimony in this proceeding makes clear, however, that despite its disuse, the Section 115 license exerts a ghost-in-the-attic like effect on all those who live below it. ... Thus, the rates and terms that we set today will have considerable impact on the private agreements that enable copyright users to clear the rights for reproduction and distribution of musical works." Copyright Royalty Board, Library of Congress, *In the Matter of Mechanical and Digital Phonorecord Delivery Rate Determination Proceeding: Final Determination of Rates and Terms,* at 13, *available at* http://www.loc.gov/crb/proceedings/2006-3/dpra-public-final-rate-terms.pdf.

[39] The NMPC is now known as the NMPA, or National Music Publishers' Association.

[40] *Oversight Hearing on the Discussion Draft of* H.R. 5553*, the "Section 115 Reform Act (SIRA) of 2006": Hearing Before the House Judiciary Comm., Subcomm. on Courts, the Internet, and Intellectual Property*, 109th Cong., 2nd Sess. (2006) (Statement of David Israelite, President and CEO of NMPA), at 4 ("However, even though HFA represents most commercially relevant musical works, it does not currently represent all music publishers or all musical works, and, therefore, digital music services cannot receive all the licenses they need from HFA.").

[41] Act of Jan. 6, 1897, ch. 4, 29 Stat. 481-82, amended by Act of Mar. 4, 1909, ch. 320, § 25, 35 Stat. 1081.

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performance right but limited the right only to performances engaged in for profit.[42] Not until 1976 was the for-profit limitation removed.

Despite possessing the right to control public performance, musical work copyright holders had difficulty in collecting licensing fees for performances. This problem was alleviated by the creation of performing rights organizations (PROs).[43] In 1914, a group of nine music business leaders established the American Society of Composers, Authors, and Publishers (ASCAP).[44] ASCAP licenses thousands of musical compositions for public performances under blanket license agreements.[45] A holder of a blanket license may publicly perform any and all of the songs in the PRO's repertory, in return for paying either a flat fee or a percentage of total revenue.[46] For business owners, these blanket licenses significantly reduce the transaction costs involved in complying with the requirements of the Copyright Act. For musical work copyright holders, these licenses allow receipt of a share of the royalties that were previously not of much value.

Due to ASCAP's attempt to raise the royalty rates charged to radio stations, Broadcast Music, Inc. (BMI) became a new PRO in 1939.[47] The Society for European Stage Authors and Composers (SESAC), another PRO, was formed in 1930.[48] Each PRO can only license public performances of musical works under contract with that PRO.

For the public performance of musical works by various users, the royalty fees are established by voluntary license agreements that are the product of private negotiations between the PROs and the music user. In 1941, the U.S. Department of Justice (DOJ) brought antitrust suits against ASCAP and BMI on the basis that they were unlawfully monopolizing the licensing of performing rights. Both suits were settled by court-approved consent decrees, which now regulate ASCAP and BMI's licensing activities.[49] (The DOJ's Antirust Division oversees the consent decrees and "periodically review[s] the[ir] operation and effectiveness;"[50] the DOJ can modify the terms and conditions of the consent decrees if it is necessary to protect competition.)

When voluntary licensing agreements are reached between the PROs and the particular music user, they are submitted to the U.S. District Court for the Southern District of New York for approval as being reasonable and non-discriminatory.[51] The consent decrees also empower this particular federal district court to act as a "rate-setting court;" in the event that the PRO and a music user cannot agree on a fee, the court is required to determine a reasonable fee.[52] In setting the fee, "[t]he rate court is responsible for establishing the fair market value of the music rights,

[42] Act. of Mar. 4, 1909, ch. 320, § 1(e), 35 Stat. 1075.

[43] 17 U.S.C. § 101 (definition of a "performing rights society," which is another term for a PRO).

[44] For a chronological history of ASCAP's development, see http://www.ascap.com/about/history/.

[45] A blanket license is a single license that covers multiple works or all works permitted to be licensed.

[46] 2-8 MELVILLE B.NIMMER & DAVID NIMMER, NIMMER ON COPYRIGHT § 8.19[A] (2009). The U.S. Supreme Court has held that this kind of licensing practice does not constitute a violation of federal antitrust laws. Broadcast Music, Inc. v. Columbia Broadcasting System, Inc., 441 U.S. 1 (1979).

[47] For a historical background of BMI and its development, *see* http://www.bmi.com/about/75_years.

[48] For more information on SESAC, *see* http://www.sesac.com/aboutsesac/about.aspx.

[49] *See* United States v. ASCAP, 1940-43 Trade Cas. para. 56,104 (S.D.N.Y. 1941), as amended, United States v. ASCAP, 1950-51 Trade Cas. para. 62,595 (S.D.N.Y. 1950); United States v. Broadcast Music, Inc., 1966 Trade Cas. para. 71,941 (S.D.N.Y. 1966), modified by 1996-1 Trade Cas. para. 71,378 (S.D.N.Y. 1994).

[50] U.S. Dep't of Justice, *Antitrust Consent Decree Review*, *at* http://www.justice.gov/atr/cases/ascap-bmi-decree-review.html.

[51] Collins Court Music, Inc. v. Pulley, 704 F. Supp. 963, 966 (W.D. Mo. 1988).

[52] *See* United States v. Broad. Music, Inc., 426 F.3d 91, 92 (2d Cir. 2005).

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in other words, the price that a willing buyer and a willing seller would agree to in an arm's length transaction."[53] In addition, the rate court is also required to "tak[e] into account the fact that [the PRO], as a monopolist, exercises disproportionate power over the market for music rights."[54] The PROs collect the royalty fees from the music users and then distribute them 50-50 between songwriters and music publishers.[55]

Under current law, a third party's public performance of copyrighted sound recordings does not give rise to any license or royalty fee obligation, unless such performance involves a digital audio transmission. The limited circumstances in which sound recording copyright holders may be entitled to performance royalties are discussed in the section of this report that describes the digital music licensing system.

The Licensing of Jukeboxes

The licensing structure for the public performance of music using jukeboxes has a unique history. Under the Copyright Act, a "jukebox" is called a "coin-operated phonorecord player."[56] To qualify, a player must perform only non-dramatic musical works activated by the insertion of a coin or token, must be located in an establishment making no charge for admission, must have an accompanying list of titles available to the public, and must allow for a choice of works to be made by patrons.[57]

Under the Copyright Act of 1909, owners of jukeboxes were exempted from paying public performance fees unless a fee was charged for admission to a place where such jukebox performances occurred.[58] Over the course of 67 years, jukeboxes made substantial profits through popularity and widespread growth. As a result, § 116 of the Copyright Act of 1976 established a compulsory license for operators of "coin operated phonorecord players" to compensate musical work copyright holders for the loss of substantial profits.

In 1993, Congress repealed § 116 of the Copyright Act of 1976 and replaced it with a voluntary licensing scheme between copyright holders and jukebox operators.[59] The intent of the provision is to grant PROs (ASCAP, BMI, and SESAC) the right to negotiate licenses for music played through jukeboxes with the trade group representing jukebox owners (the Amusement and Music Operators of America [AMOA]).[60]

[53] *Id.* at 95 (internal quotations and citation omitted).

[54] United States v. ASCAP, 627 F.3d 64, 76 (2d Cir. 2010) (internal quotation marks and citation omitted).

[55] *See* Future of Music Coalition, *Fact Sheet: ASCAP - BMI Consent Decrees,* Oct. 3, 2014, *at* https://www.futureofmusic.org/article/fact-sheet/ascap-bmi-consent-decrees (explaining that "PRO member agreements under the consent decrees allow for payment to songwriters under a 50-50 split in which the composer(s) half is paid to them directly and is not subject to "recoupment" or creative accounting by their publisher(s).").

[56] 17 U.S.C. § 116(d)(1).

[57] 17 U.S.C. §§ 116(d)(1)(A)-(D).

[58] 17 U.S.C. § 1(e) (1909 Act).

[59] 17 U.S.C. § 116(b)(1).

[60] Although § 116 refers only to the copyright holder's ability to negotiate, common agents, such as PROs, may negotiate on behalf of owners for the voluntary license.

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The Digital Music Licensing System

Digital vs. Analog

To understand the nature of digital music, it is helpful to have a general understanding of how analog and digital technology differ. Analog technology is characterized by an output system where the signal output is always proportional to the signal input. Because the outputs are analogous, the word "analog" is used. Basically, an analog mechanism is one where data is represented by continuously variable physical quantities like sound waves or electricity. In the context of music, analog technologies refer to traditional radio, cassettes, and vinyl, among others. These technologies may deliver imprecise signals and background noise. Thus, the duplication of analog music often erodes in quality over time.

The term "digital" derives from the word "digit," as in a counting device. Digital services represent data in a binary (using 1s and 0s) fashion. Rather than a physical quantity, a digital signal is an informational stream of code that tells a computer to compile a perfect replica of the original code stream. This means the digital code can be duplicated nearly infinitely and without any degradation of quality. In the context of music, compact discs and MP3-format song files are examples of digital music.

Amending the Licensing System: The DPRSRA

The Copyright Act did not offer any legal protection to sound recordings until 1971, when Congress enacted a law that granted exclusive rights to reproduction and distribution to sound recording copyright holders as a response to the increased amount of unauthorized duplication of records and tapes.[61] However, at that time, Congress decided not to grant sound recording copyright holders the right to control public performance, partly due to opposition by television and radio broadcasters and jukebox operators who resisted any changes to the Copyright Act that would require any additional royalty payments beyond those already mandated for songwriters and music publishers, and also because Congress considered the rights to control reproduction and distribution to be sufficient enough to address the immediate problem of record piracy.[62]

Technological advances in music transmission methods in the early 1990s helped persuade Congress to reexamine the issue of public performance rights for sound recording copyright holders. Record companies were concerned that consumers would use certain new technologies such as on-demand digital cable music services and other interactive services to listen to music and potentially record the digital audio transmissions, thereby eliminating their need to purchase physical sound recording media.[63]

In 1995, Congress enacted the Digital Performance Right in Sound Recordings Act[64] (DPRSRA) to fill the void in legislation for the protection of copyrighted works that are digitally transmitted

[61] Sound Recording Amendment, P.L. 92-140, 85 Stat. 391 (1971). By its terms, the law was effective on February 15, 1972, and applies to sound recordings made on or after that date.

[62] *Internet Streaming of Radio Broadcasts: Balancing the Interests of Sound Recording Copyright Owners with Those of Broadcasters: Hearings Before the House Subcomm. on Courts, the Internet and Intellectual Property,* 108th Cong., 2d sess. (2004) (Statement of David Carson, then-General Counsel, U.S. Copyright Office), at 3.

[63] William H. O'Dowd, *The Need for a Public Performance Right in Sound Recordings,* 31 HARV. J. LEGIS. 249, 254-59 (1993).

[64] P.L. 104-39, 109 Stat. 336 (1995).

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over the Internet. The DPRSRA addresses the licensing of digital reproduction and distribution of music works and the digital performance and distribution of sound recordings.

Traditionally, only public performances of musical works were eligible for performance royalties. The DPRSRA created a public performance right for sound recordings performed through digital audio transmissions, thereby establishing a mechanism for controlling digital deliveries that posed a threat to the sales of CDs. Because sound recording copyright holders do not have a general public performance right, the DPRSRA established an actionable right in "digital audio transmissions" for sound recorders.[65]

The Licensing of Digital Reproduction and Distribution

Under the language of § 115 prior to the DPRSRA, each distributed "mechanical" copy of a musical work entitled the musical work copyright holder to a royalty payment.[66] The DPRSRA amended the statute to encompass digital downloads under the mechanical license.

The Copyright Act refers to digital downloads as "digital phonorecord deliveries," or DPDs. A DPD is "each individual delivery of a phonorecord by a digital transmission of a sound recording which results in a specifically identifiable reproduction."[67] Thus, a downloaded digital file of a "phonorecord" is a DPD. In addition to DPDs, the § 115 mechanical license distinguishes a different royalty rate for DPDs "where the reproduction or distribution of a phonorecord is incidental to the transmission which constitutes a [DPD]."[68] However, real-time transmissions, where no reproduction of a sound recording is made for the purposes of the transmission, does not constitute a DPD.[69] Because of this exclusion, a streamed transmission is not considered a DPD. Notwithstanding this statutory distinction, however, in May 2008 musicians, publishers, record labels and high-tech companies reached an agreement that proposed, for the first time ever, to establish royalty rates and terms covering limited downloads (such as those offered by online music subscription services), interactive streaming, and "all known incidental DPDs."[70] Under the settlement agreement that was submitted to the Copyright Royalty Judges in the form of draft regulations, limited download and interactive streaming service providers would pay a mechanical royalty of 10.5% of revenue, minus any amounts owed for performance royalties.[71] In November 2008, the Copyright Royalty Judges adopted these rates and terms as final regulations, pursuant to its statutory authority under Section 801(b)(7) of the Copyright Act.[72]

Also in the same rate determination proceeding, the Copyright Royalty Judges announced that the mechanical license is available not only for physical music products (such as CDs and records)

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[65] 17 U.S.C. § 101 defines "to 'transmit' a performance" as "to communicate [a performance] by any device or process whereby images or sounds are received beyond the place from which they are sent." A "digital transmission" is a "transmission in whole or in part in a digital or other non-analog format."

[66] 17 U.S.C. § 115(a)(1).

[67] 17 U.S.C. § 115(d).

[68] 17 U.S.C. §§ 115(c)(3)(C), (D).

[69] 17 U.S.C. § 115(d).

[70] This settlement agreement was published in the Federal Register, Copyright Royalty Board, Library of Congress, *Mechanical and Digital Phonorecord Delivery Rate Determination Proceeding,* 73 Fed. Reg. 57,033 (Oct. 1, 2008).

[71] Andrew Noyes*, Royalty Agreement Might Smooth Talks In 111th Congress,* CONGRESSDAILYAM, Sept. 24, 2008.

[72] Copyright Royalty Board, Library of Congress, *In the Matter of Mechanical and Digital Phonorecord Delivery Rate Determination Proceeding: Final Determination of Rates and Terms,* available on Jan. 22, 2010, at http://www.loc.gov/crb/proceedings/2006-3/dpra-public-final-rate-terms.pdf.

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and DPDs (such as from iTunes or Amazon.com), but also for ringtones.[73] The decision to include ringtones came after the Register of Copyright had issued a memorandum opinion to the Judges declaring that ringtones qualify as DPDs.[74] The Register cautioned, however,

> [W]hether a particular ringtone falls within the scope of the statutory license will depend primarily upon whether what is performed is simply the original musical work (or a portion thereof), or a derivative work (i.e., a musical work based on the original musical work but which is recast, transformed, or adapted in such a way that it becomes an original work of authorship and would be entitled to copyright protection as a derivative work).[75]

Although the § 115 mechanical license applies to DPDs for musical work copyright holders, the license does *not* authorize the reproduction or distribution of a sound recording because that right belongs to another holder—the sound recorder.[76] The sound recording copyright holder's authorization acts as a condition for the mechanical licensing of a DPD.

Engaging in an authorized DPD requires payment to the musical work copyright holder (pursuant to the mechanical license) and the sound recording copyright holder (through a voluntary license) for the distribution or reproduction of the DPD. However, if the DPD constitutes a performance,[77] permission must separately be obtained from the musical work copyright holder (a royalty paid to a PRO) and the sound recording copyright holder (through a compulsory or voluntary license).

The Licensing of Digital Public Performances

In addition to amendments made to § 115, the DPRSRA grants sound recording copyright holders a *limited* public performance right in digital transmissions.[78] Among the *limitations* on a sound recording owner's exclusive right to digital public performance under 106(6) are

- a non-subscription broadcast transmission (i.e., traditional over-the-air radio and television broadcasts and qualified retransmission)[79] and
- internal transmissions by a business on or around its premises, including "on-hold music" transmissions via telephone to a caller waiting for a response.[80]

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[73] In this proceeding, the Copyright Royalty Board left unchanged the Section 115 rate of the larger of 9.1 cents or 1.75 cents per minute of playing time for both physical music products and digital downloads, but established a new royalty rate of 24 cents for each ringtone subject to a Section 115 license. *Id.*

[74] Copyright Office, Library of Congress, Memorandum Opinion, *In the Matter of Mechanical and Digital Phonorecord Delivery Rate Adjustment Proceeding,* 71 Fed. Reg. 64,303 (Nov. 1, 2006).

[75] *Id.* at 1.

[76] 17 U.S.C. § 115(c)(3)(H)(i)(I).

[77] 17 U.S.C. §§ 115(d), 115(c)(3)(A), and 115(c)(3)(K). For a discussion of how performances are classified digitally, see *infra*.

[78] 17 U.S.C. § 106(6).

[79] 17 U.S.C. §§ 114(1)(A), (B).

[80] 17 U.S.C. §§ 114(d)(1)(C)(ii), (iv). Usages included within this exception are background music played in offices, retail stores, and restaurants; this activity is sometimes called "storecasting." 2 NIMMER ON COPYRIGHT § 8.22[B][3]. As the Senate Report reveals, the drafters of the DPRSRA were aware of the Copyright Act's § 110(5) performance right limitations, which relate to circumstances under which certain businesses may be eligible for publicly performing music without obtaining permission from copyright holders. The new § 106(6) right provided to sound recorders was not intended by the law's drafters to alter the performance right limitations in § 110(5); thus, establishments desiring to storecast music to their patrons may qualify for the § 110(5) exemption, regardless of whether the music is performed by digital or non-digital means. S.Rept. 104-128, 104th Congress, 1st Sess. 22-23 (1995).

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These services are *exempt* from the sound recording digital performance right and thus the transmitting entity need not obtain a license or pay royalties for digital transmissions that fall within the two categories above.

For licensed uses, the performance right for sound recorders is laid out in a three-tier system, pursuant to 17 U.S.C. § 114:

- Statutorily exempt performances of sound recordings by means of digital audio.
- Compulsory licensed performances of sound recordings by means of digital audio transmissions.
- Voluntarily licensed performances of sound recordings by means of digital audio transmissions within the confines of statutory limits on such licenses.

Generally, these digital transmissions are classified according to whether they are interactive, non-interactive, or subscription services:

- Interactive services[81] transmit digital sound recordings at a user's request. These services are within the voluntary licensing tier; they do not qualify for the § 114 statutory license.
- Non-interactive, subscription services[82] transmit digital sound recordings through streaming the audio, but for a fee. These non-interactive, subscription transmissions are subject to a statutory (compulsory) licensing fee.[83] A complex system of statutory rates for new subscription services and eligible non-subscription, non-interactive services are set by the Copyright Royalty Board.
- Non-interactive, non-subscription services are audio transmissions often delivered via streaming that are free to the consumer recipient *and* the transmitting entity.[84] Like non-digital broadcast services (AM and FM radio), these services are exempt from a licensing fee for using the sound recording.

The royalties from statutory and voluntarily negotiated licenses under the DPRSRA and the Digital Millennium Copyright Act (DMCA)[85] to make digital transmissions of sound recordings are administered on behalf of sound recording copyright holders by SoundExchange.[86]

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[81] An "interactive service" is one that enables a member of the public to receive a transmission of a program specially created for the recipient, or on his or her request, a transmission of a particular sound recording, whether or not as part of a program, that is selected by or on behalf of the recipient. The ability of individuals to request that a particular sound recording be performed for reception by the public at large, or in the case of a subscription service, by all subscribers of the service, does not make a service interactive, if the programming on each channel of the service does not substantially consist of sound recordings that are performed within one hour of the request or at a time designated by either the transmitting entity or the individual making such request. If an entity offers both interactive and non-interactive services (either concurrently or at different times), the non-interactive component shall not be treated as part of an interactive service. 17 U.S.C. § 114(j)(7).

[82] Among the requirements for a subscription service's statutory license is adherence to the "sound recording performance complement," pursuant to § 114(d)(2)(B)(i). The sound recording performance complement is a complex protocol, adapted from traditional radio broadcast practice, which limits the number of selections a subscription service can play from any one phonorecord by the same featured artist. The goal of the protocol is to prevent a pre-announced play schedule that facilitates copying of albums, or the work of individual performers, in their entirety.

[83] *See* Library of Congress, Copyright Royalty Board, *Digital Performance Right in Sound Recordings and Ephemeral Recordings,* 72 *Fed. Reg*. 24084 (May 1, 2007).

[84] Pursuant to § 115, these non-subscription services are not DPDs.

[85] The DMCA will be discussed *infra*.

[86] SoundExchange can be found at http://www.soundexchange.com.

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SoundExchange is an independent, nonprofit entity created by the Recording Industry Association of America (RIAA)[87] that collects and makes distributions to sound recording copyright holders, artists, the American Federation of Musicians (non-featured musicians),[88] and the American Federation of Television and Radio Artists (non-featured vocalists).[89] The payments are based on actual performance data furnished by subscription service providers, webcasters, and other licensees.

Amending the Licensing System: The DMCA

In 1998, in the Digital Millennium Copyright Act (DMCA),[90] Congress amended several statutory licensing statutes to provide for and clarify the treatment of different types of digital audio transmissions. The DMCA allowed two categories of digital audio services to qualify for a Section 114 compulsory license: (1) certain specified "preexisting" subscription services (which were existing at the time of the DMCA's enactment) and (2) a service that provides an "eligible nonsubscription transmission." A subscription service is one that is limited to paying customers. The DMCA defines a qualifying "preexisting" subscription service as follows:

1. A "preexisting satellite digital audio radio service" is a subscription satellite digital audio radio service provided pursuant to a satellite digital audio radio service license issued by the Federal Communications Commission on or before July 31, 1998, and any renewal of such license to the extent of the scope of the original license, and may include a limited number of sample channels representative of the subscription service that are made available on a nonsubscription basis in order to promote the subscription service.
2. A "preexisting subscription service" is a service that performs sound recordings by means of noninteractive audio-only subscription digital audio transmissions, which was in existence and was making such transmissions to the public for a fee on or before July 31, 1998, and may include a limited number of sample channels representative of the subscription service that are made available on a nonsubscription basis in order to promote the subscription service. [91]

The DMCA defines an "eligible nonsubscription transmission" to mean: "a noninteractive nonsubscription digital audio transmission ... that is made as part of a service that provides audio programming consisting, in whole or in part, of performances of sound recordings, including retransmissions of broadcast transmissions, if the primary purpose of the service is to provide to the public such audio or other entertainment programming, and the primary purpose of the service is not to sell, advertise, or promote particular products or services other than sound recordings, live concerts, or other music-related events."[92]

Thus, the DMCA permits the two satellite digital audio radio services that were existing at the time of the act's enactment, XM Satellite Radio and Sirius Satellite Radio (which later merged into one company in 2008),[93] to use a Section 114 compulsory license for their digital audio radio

[87] See http://www.riaa.com.

[88] See http://www.afm.org.

[89] See http://www.aftra.org.

[90] P.L. 105-304 (October 28, 1998).

[91] 17 U.S.C. § 114(j)(10), (11); s*ee also* 37 C.F.R. Part 260.

[92] 17 U.S.C. § 114(j)(6).

[93] Olga Kharif, *The FCC Approves the XM-Sirius Merger,* BUSINESSWEEK, July 25, 2008, *at*
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transmissions. In addition, the only "preexisting subscription services" that are allowed to use a Section 114 license are Muzak (provided over the DiSH Network), Music Choice, and DMX (both offer digital audio through cable television's "music channels").[94] As for services that provide "eligible nonsubscription transmission[s]," these are typically Internet radio broadcasters ("webcasters") that do not charge fees to their listeners and provide the music only for its entertainment value.

The Licensing of Ephemeral Recordings

Ephemeral recordings are reproductions of a work produced solely for the purpose of its transmission by an entity legally entitled to publicly perform the work. Section 112 authorizes a compulsory license to enable those who webcast a sound recording to make a temporary or "ephemeral" reproduction or copy of the recording, which is generally stored in the hard drive of computers (i.e., servers that facilitate the performance). Section 114 is concerned with the public performance right for digitally transmitted sound recordings. Thus, a statutory license under § 114 applies to a public performance, whereas the statutory license under § 112(e) applies to a reproduction. The latter covers only those ephemeral recordings of phonorecords used for transmissions in connection with a statutory license under § 114(d) or (f).[95]

Exceptions to Licensing Requirements

Although most uses of copyrighted materials require permission from the copyright holder (or compliance with a "compulsory license"), the Copyright Act provides several exceptions for the use of copyrighted material, regardless of the holder's permission. There are five particular exceptions[96] that could apply to certain uses of musical works and sound recordings: fair use,[97] teaching exemptions,[98] public performances without commercial advantage,[99] public reception of a transmission using a home receiving apparatus,[100] and eligible establishment transmissions.[101]

(...continued)

http://www.businessweek.com/stories/2008-07-25/the-fcc-approves-the-xm-sirius-mergerbusinessweek-business-news-stock-market-and-financial-advice.

[94] U.S. Copyright Office, *Designation as a Preexisting Subscription Service,* 71 Fed. Reg. 64639 (Nov. 3, 2006), *available at* http://www.copyright.gov/fedreg/2006/71fr64639.html.

[95] "In any particular case, acts implicating the reproduction or performances rights must be considered separately under sections 112[e] or 114, as applicable, and any other relevant provisions under the Copyright Act." H. Comm. on the Judiciary, 105th Cong., SECTION-BY-SECTION ANALYSIS OF H.R. 2281 AS PASSED BY THE UNITED STATES HOUSE OF REPRESENTATIVES ON AUG. 4, 1998, 52 (Comm. Print 1998).

[96] This list is not exclusive. There are numerous other narrow exceptions to a copyright holder's exclusive rights. Other notable exemptions to the copyright holder's public performance right include, among others, 17 U.S.C. § 110(3) (performance of works done in the course of religious assembly); § 110(6) (performances at agricultural or horticultural exhibitions); § 110(7) (performance of a work done by a vending establishment for the purposes of selling a phonorecord or work); and § 110(10) (performances done in the course of social functions of applicable organizations, such as veterans' organizations).

[97] 17 U.S.C. § 107. Fair use applies in both non-digital and digital music contexts.

[98] 17 U.S.C. §§ 110(1)-(2). Sections 110(1) and 110(2) apply to both non-digital and digital music.

[99] 17 U.S.C. § 110(4). Section 110(4) applies to both non-digital and digital music.

[100] 17 U.S.C. § 110(5)(A). Section 110(5)(A) applies only to non-digital music. While the text of the statute does not explicitly exempt only non-digital music, a commonly used apparatus would likely be a traditional home stereo, which receives an analog signal.

[101] 17 U.S.C. § 110(5)(B). Section 110(5)(B) applies only to non-digital music. The text of the statute exempts those (continued...)

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Fair Use

The doctrine of "fair use" recognizes the right of the public to make reasonable use of copyrighted material, in special instances, without the copyright holder's consent. For many years prior to the Copyright Act of 1976, fair use was a judicially created exception to the exclusive rights of a copyright holder to print, publish, copy, and sell a copyrighted work. The 1976 Act first codified the doctrine consistent with the treatment under case law prior to the act.

Because the language of the fair use statute is illustrative, determinations of fair use are often difficult to make in advance. However, the statute recognizes fair use "for purposes such as criticism, comment, news reporting, teaching, scholarship, or research."[102] A determination of fair use considers four factors:

- The purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes.
- The nature of the copyrighted work.
- The amount and substantiality of the portion used in relation to the copyrighted work as a whole.
- The effect of the use upon the potential market for or value of the copyrighted work.[103]

The U.S. Supreme Court has previously explained that this four-factor test cannot be simplified by "bright-line rules," but rather that the doctrine of fair use calls for "case-by-case" analysis.[104]

In the context of digital music downloads and transmissions, some alleged copyright infringers have attempted to use the doctrine of fair use to avoid liability for activities such as sampling,[105] "space shifting,"[106] and peer-to-peer file sharing.[107] These attempts have not been very successful: several federal appellate courts have ruled against the applicability of the fair use doctrine for these purposes.[108] The difficulty behind any fair use determination, however, is the irresolute nature of the exception—one court's determination of fair use may be another's determination of infringement. Even to the extent of home audio recording of a broadcast or phonorecord, no litigation has settled the propriety of the issue as a fair use. However, where there is doubt regarding the applicability of the exception, the most prudent choice is always the application of a

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transmissions by entities licensed by the FCC, thus including terrestrial radio and implicitly excluding satellite and Internet radio.

[102] 17 U.S.C. § 107.

[103] 17 U.S.C. §§ 107(1)-(4).

[104] Campbell v. Acuff-Rose Music, Inc., 510 U.S. 569, 577 (1994).

[105] Sampling of this type does not refer to the dubbing of portions of previously recorded music into a new recording. In the digital music context, "sampling" is a term that refers to the supposed ability of a user to make copies of copyrighted materials prior to purchase. See A&M Records, Inc. v. Napster, Inc., 114 F.Supp. 896 (N.D. Cal. 2000), *aff'd in relevant part*, 239 F.3d at 1018 (9th Cir. 2001).

[106] *Id.* Space shifting is the process in which users access CD sound recordings for personal computer use.

[107] For more information on legal decisions regarding file sharing and peer-to-peer networks, see CRS Report R41415, *Statutory Damage Awards in Peer-to-Peer File Sharing Cases Involving Copyrighted Sound Recordings: Recent Legal Developments*, by Brian T. Yeh.

[108] *See, e.g.,* A&M Records, Inc. v. Napster, Inc., 114 F.Supp.2d 896 (N.D. Cal. 2000), *aff'd*, 239 F.3d 1004 (9th Cir. 2001); In re: Aimster Copyright Litigation, 334 F.3d 643 (7th Cir. 2003), *cert. denied,* 540 U.S. 1107 (2004).

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license from the copyright holder. (The fair use exception may strengthen the bargaining power of the applicant.)

The Teaching Exemptions

Under the Copyright Act, teachers are exempt from infringement for performing copyrighted works in certain contexts. Performance of a work done in the course of face-to-face instruction in a classroom (or a similar place devoted to instruction), or performances done as part of instructional activities of a nonprofit institution, may not be an infringement of copyright.[109] Another teaching exemption removes particular works from infringement of the performance right in the context of distance education.[110]

Public Performance Without Commercial Advantage

Although fair use provides a statutory exception to any of a copyright holder's exclusive rights, § 110(4) provides an exception to only the performance right of a copyright holder.[111] The § 110(4) exception in the Copyright Act allows public performances to take place without payment so long as the performance is done without the intent of making commercial gain.[112] In addition, the performers, promoters, and organizers must not be compensated beyond expenses. The statute does not require the performance to be free if the proceeds are used exclusively for educational, religious, or charitable purposes. If none of these purposes are available, the performance must be free for the audience. Examples of these public performances include eligible benefit concerts, school performances, and religious festivities.

The Home Receiving Apparatus

Another performance licensing exception is the communication to the public of a transmission embodying a performance using a "single receiving apparatus of a kind commonly used in private homes."[113] This is known as the "home-style" radio exception to performance licensing requirements. The single apparatus exception is subject to two statutory conditions that (1) there be no charge to hear the transmission and (2) the transmission is not further performed to the public.[114]

Eligible Establishment Transmissions

In 1998, Congress passed the Fairness in Music Licensing Act (FMLA) to clarify the performance right exemptions for eligible establishments.[115] The scope of the exemption is limited to performances "intended to be received by the general public, originated by a radio or television

[109] 17 U.S.C. § 110(1).

[110] 17 U.S.C. § 110(2). This provision is known as the Technology, Education, and Copyright Harmonization Act (TEACH Act). For more information, *see* CRS Report RL33516, *Copyright Exemptions for Distance Education: 17 U.S.C., Section 110(2), the Technology, Education, and Copyright Harmonization Act of 2002*, by Brian T. Yeh and Robin Jeweler.

[111] 17 U.S.C. § 110(4).

[112] *Id.*

[113] 17 U.S.C. § 110(5)(A). A small radio, stereo receiver, or portable boom box may fit within this definition. It is uncertain, however, whether a satellite radio would gain the benefit of this exception.

[114] 17 U.S.C. §§ 110(5)(A)(i-ii).

[115] P.L. 105-298.

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broadcast station licensed as such by the Federal Communications Commission, or, if an audiovisual transmission, by a cable system or satellite carrier."[116] The act covers transmissions embodying performances by food and drink establishments and by non-food and drink establishments.

To be eligible for a performance exemption under the FMLA, three criteria must be satisfied. The first two criteria mirror those under the home receiving apparatus exemption: there must be no direct charge to hear the transmission, and the transmission must not be further transmitted beyond the establishment where it is received.[117] The third criterion states that the transmission must be "licensed by the copyright owner of the work so publicly performed or displayed."[118] The latter criterion thus potentially creates liability if the transmitting entity (the radio station) itself broadcasts infringing content. In such a scenario, the music copyright holder would likely bring suit against the infringing radio station, rather than the establishment that played the radio.[119]

After the prior three criteria, however, the FMLA provides even further specifications for the types and sizes of establishments that are eligible for the performance right exemption. **Table 1** on the following page illustrates the specific qualifications.

[116] 17 U.S.C. § 110(5)(B). This statute does not cover webcasters, satellite radio, or other digital music services that fall outside the scope of FCC regulation. Because television programming can include musical works (e.g., movie soundtracks), an establishment may publicly perform the music on a soundtrack accompanying a motion picture that is broadcast by an FCC-licensed television station, without concern for copyright infringement liability.

[117] 17 U.S.C. §§ 110(5)(B)(iii)-(iv).

[118] 17 U.S.C. § 110(5)(B)(v).

[119] 2 MELVILLE B. NIMMER & DAVID NIMMER, NIMMER ON COPYRIGHT § 8.18[C][2][b][iv] (2006).

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Table 1. Eligibility for Performance Exemptions Pursuant to 17 U.S.C. § 110(5)(B)

Type of Establishment	Size of Establishment
Food Service/Drinking "[A] restaurant, inn, bar, tavern, or any other similar place of business in which the public or patrons assemble for the primary purpose of being served food or drink, in which the majority of the gross square feet of space that is nonresidential is used for that purpose, and in which nondramatic musical works are performed publicly."[120]	If less than 3,750 square feet (excluding parking), the exemption applies.[121] If more than 3,750 square feet (excluding parking), the exemption applies only if there are no more than six loudspeakers, of which not more than four are located in any one room or adjoining outdoor space.[122]
Other "[A] store, shop, or any similar place of business open to the general public for the primary purpose of selling goods or services in which the majority of the gross square feet of space that is nonresidential is used for that purpose, and in which nondramatic musical works are performed publicly."[123]	If less than 2,000 square feet (excluding parking), the exemption applies.[124] If more than 2,000 square feet (excluding parking), the exemption only applies if there are no more than six loudspeakers, of which not more than four are located in any one room or adjoining outdoor space.[125]

Music Licensing Issues of Recent Congressional and Judicial Consideration

In recent years, Congress has shown significant interest in issues concerning music licensing, as demonstrated by several congressional hearings held in the 114th and 113th Congresses,[126] and a variety of legislative proposals that have been introduced. In addition, in February 2015, the U.S. Copyright Office released a comprehensive study entitled "Copyright and the Music Marketplace,"[127] which contains an "exhaustive review" of the existing music licensing system and also recommends legislative action "that would bring both clarity and relief to songwriters, artists, publishers, record labels, and digital delivery services."[128] According to the Copyright Office report, the music licensing system is in need of reform because

> [t]here is a widespread perception that our licensing system is broken. Songwriters and recording artists are concerned that they cannot make a living under the existing structure, which raises serious and systemic concerns for the future. Music publishers and performance rights organizations are frustrated that so much of their licensing activity is

[120] 17 U.S.C. § 101.

[121] 17 U.S.C. § 110(5)(B)(ii).

[122] *Id.*

[123] *Id.*

[124] 17 U.S.C. § 110(5)(B)(I).

[125] *Id.*

[126] *How Much For a Song?: The Antitrust Decrees that Govern the Market for Music: Hearing Before the Senate Judiciary Comm., Subcomm. on Antitrust, Competition Policy, and Consumer Rights,* 114th Cong., 1st Sess. (2015); *Music Licensing Under Title 17, Part One: Hearing Before the House Judiciary Comm., Subcomm. on Courts, Intellectual Property and Internet,* 113th Cong. 2nd Sess. (2014); *Music Licensing Under Title 17, Part Two: Hearing Before the House Judiciary Comm., Subcomm. on Courts, Intellectual Property and Internet,* 113th Cong. 2nd Sess. (2014); *Music Licensing Part One: Legislation in the 112th Congress: Hearing Before the House Judiciary Comm., Subcomm. on Courts, Intellectual Property and Internet,* 112th Cong., 2nd Sess. (2012).

[127] Available at http://copyright.gov/docs/musiclicensingstudy/copyright-and-the-music-marketplace.pdf.

[128] U.S. Copyright Office, *Music Licensing Study, at* http://copyright.gov/docs/musiclicensingstudy/.

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> subject to government control, so they are constrained in the marketplace. Record labels and digital services complain that the licensing process is burdensome and inefficient, making it difficult to innovate.[129]

What follows is a description and analysis of four music licensing topics that have garnered legislative (and in some cases, judicial) attention in recent years.

Federal Protection for Pre-1972 Sound Recordings

As discussed earlier in this report, digital radio providers, such as satellite radio broadcaster Sirius XM and Internet radio "webcaster" Pandora, are legally obliged to pay royalty fees to both songwriters and recording artists whenever they transmit copyrighted music to their listeners. However, these digital music services apparently interpret the Copyright Act as permitting them to use popular songs that were originally recorded prior to 1972 (by bands and musicians such as the Beatles, Aretha Franklin, and the Rolling Stones) *without* having to pay copyright royalties to the recording artists or record labels (though they do pay royalties to music publishers and songwriters).[130] Such pre-1972 sound recordings constitute approximately 15% of all digital radio transmissions and would have provided about $60 billion in music royalties for recording artists in 2013, according to one industry estimate.[131] The reason that digital radio providers have not obtained licenses or paid compensation to sound recording copyright holders for their use of such "golden oldies" recordings is that songs recorded before 1972 lack federal copyright protection.

Musical compositions have enjoyed federal copyright protection since 1831. However, the Copyright Act did not offer sound recordings any form of protection until 1971. In that year, Congress passed a law[132] that granted exclusive rights of reproduction and distribution to sound recording copyright holders as a response to the increased amount of unauthorized copying of records and tapes due to the popularity of the audiotape recorder. By its terms, the law was prospective only and provided limited federal copyright protection to sound recordings made on or after the effective date of the law, February 15, 1972. For sound recordings made prior to that date, their creators must seek legal relief in state courts for an unlawful use of their works.

Many states have enacted laws to protect pre-1972 sound recordings in an effort to combat sound recording piracy. These state laws generally fall within one of three categories—(1) criminal record piracy statutes, (2) common law rights involving unfair competition and misappropriation, and (3) civil laws that grant ownership rights. The state laws vary in their scope of protection and therefore lack the nationwide uniformity that is provided by the federal copyright law. In *Goldstein v. California*,[133] the defendant, convicted of criminal record piracy under California state law, challenged the constitutionality of the state's penal statute on the grounds that it conflicted with the Copyright Clause and the Supremacy Clause of the U.S. Constitution and the federal copyright act. The U.S. Supreme Court held that California's protection for pre-1972 sound recordings was not preempted by federal copyright law or the Constitution.

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[129] U.S. COPYRIGHT OFFICE, COPYRIGHT AND THE MUSIC MARKETPLACE (Feb. 2015), at 1.

[130] *See U.S. Music Labels Sue Pandora Over Royalties for Golden Oldies*, REUTERS, April 17, 2014, *available at* http://www.reuters.com/article/2014/04/17/pandora-lawsuit-idUSL2N0N923320140417.

[131] Laura Ryan, *Congress Has Entered the Fight Between Pandora and Old-School Artists,* NATIONAL JOURNAL, May 29, 2014.

[132] P.L. 92-140, 85 Stat. 391.

[133] 412 U.S. 546 (1973).

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Section 301(c) of the Copyright Act[134] provides that state common law protection for sound recordings, if available under state statute or state common law (rights derived from state judicial decisions), will end on February 15, 2067, after which time they will enter the public domain. The Register of Copyrights issued a report in December 2011[135] recommending that Congress extend federal copyright protection to all sound recordings created before February 15, 1972. The Copyright Office repeated this recommendation in its 2015 music licensing report.[136] (To date, Congress has not considered any legislation that would grant such retroactive copyright protection.)

Litigation

Frustrated with what they believe is an unfair "free" use of their creative works, recording artists and record companies who created pre-1972 sound recordings filed lawsuits against Sirius XM and Pandora (in 2013[137] and 2014,[138] respectively) in an effort to recover damages and injunctive relief. In early 2015, sound recording copyright holders filed several lawsuits against Apple, Google, and Sony, for their use of pre-1972 sound recordings in the online radio services that they operate.[139] Then in August 2015, similar litigation was initiated against three large broadcast radio station operators, CBS Radio, iHeartMedia, and Cumulus.[140] These lawsuits are currently working their way through the courts, but recording artists have so far enjoyed some early success.

In lawsuits brought against Sirius XM Radio by Flo & Eddie, Inc., a company that owns the rights to sound recordings made in the 1960s by the band The Turtles, federal district courts in California[141] and New York[142] found that the satellite radio operator must pay royalties to the Turtles for playing their songs without compensation or authorization in violation of, respectively, California's copyright statute and New York common law. Both of these cases are currently on appeal to the Ninth and Second Circuit Courts of Appeals.

Flo & Eddie filed a similar lawsuit against Pandora, seeking damages of at least $25 million, shortly after its win against Sirius in the California federal court.[143] The district court denied Pandora's motion to dismiss the complaint in February 2015 and also affirmed that California state law grants the owner of a pre-1972 recording with "exclusive ownership therein," which includes the right to publicly perform a recording.[144] Pandora immediately appealed the ruling to

[134] 17 U.S.C. § 301(c).

[135] U.S. COPYRIGHT OFFICE, FEDERAL COPYRIGHT PROTECTION FOR PRE-1972 SOUND RECORDINGS (Dec. 2011), *available at* http://copyright.gov/docs/sound/pre-72-report.pdf.

[136] U.S. COPYRIGHT OFFICE, COPYRIGHT AND THE MUSIC MARKETPLACE (Feb. 2015), at 140.

[137] Hannah Karp, *Sirius Is Sued Over Music Royalties for Pre-1972 Recordings,* WALL ST. JOURNAL, Aug. 26, 2013.

[138] Ben Sisario, *Big Labels Take Aim at Pandora on Royalties*, NEW YORK TIMES, April 17, 2014.

[139] Kory Grow, *Apple, Sony, Google Named in Lawsuits for Playing Pre-1972 Music,* ROLLINGSTONE, Jan. 23, 2015.

[140] Eriq Gardner, *Radio Giants Facing Bicoastal Legal Demands to Stop Playing Pre-1972 Songs,* THE HOLLYWOOD REPORTER, Aug. 27, 2015.

[141] Flo & Eddie Inc. v. Sirius XM Radio Inc., 2014 U.S. Dist. LEXIS 139053 (C.D. Cal. Sept. 22, 2014).

[142] Flo & Eddie, Inc. v. Sirius XM Radio, Inc., 62 F. Supp. 3d 325 (S.D.N.Y. 2014).

[143] Flo & Eddie Inc. v. Pandora Media Inc. et al., No. 2:14-cv-07648 (C.D. Cal. October 2, 2014); *see also* Hannah Karp, *The Turtles Next Legal Foe: Pandora*, WALL ST. JOURNAL, Oct. 3, 2014.

[144] Flo & Eddie Inc. v. Pandora Media Inc. et al., No. 2:14-cv-07648 (C.D. Cal. Feb. 23, 2015); *see also* Jon Healey, *Federal Judge SLAPPs Down Pandora's 1st Amendment Defense,* LOS ANGELES TIMES, Feb. 24, 2015.

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the Ninth Circuit Court of Appeals. The district court litigation has been stayed pending the Ninth Circuit's review.[145]

In October 2014, several major record labels (including Capitol Records, Sony Music Entertainment, and Warner Music Group) won a victory against Sirius XM in California state court for its use of sound recordings made before 1972.[146] In June 2015, the parties entered into an agreement to settle the lawsuit,[147] in which Sirius XM agreed to pay $210 million in exchange for the right to use the plaintiffs' pre-1972 sound recordings until December 31, 2017. The settlement also gives Sirius XM the right to negotiate a license with the record labels to reproduce, perform, and broadcast the recordings from January 1, 2018, through December 31, 2022. As noted in Sirius XM's regulatory filing with the U.S. Securities and Exchange Commission, the settlement applies to "approximately 80% of the pre-1972 recordings we have historically used."[148] The settlement does not apply to the federal court actions in New York and California brought by Flo & Eddie, however.

> In June 2015, a federal district judge in Florida granted Sirius XM's motion for summary judgment against Flo & Eddie,[149] explaining that unlike New York and California, "neither Florida legislation nor Florida case law answers the question of whether Florida common law copyright includes an exclusive right of public performance."[150] The opinion refused to take a position on the issue, noting that[i]f this Court adopts Flo & Eddie's position, it would be creating a new property right in Florida as opposed to interpreting the law. The Court declines to do so. … The Court finds that the issue of whether copyright protection for pre-1972 recordings should include the exclusive right to public performance is for the Florida legislature.[151]

In an amicus brief filed in *Flo & Eddie, Inc., v. Pandora Media Inc.,* currently on appeal to the Ninth Circuit, a group of intellectual property law professors expressed their concerns about the court decisions above that have found a public performance right under state law. As these law professors argued,

> Imposing an obligation to pay [pre-1972 sound recording performance] royalties now, retroactively, on a state-by-state basis, would be incredibly disruptive to the broadcast industry, and would improperly extend California law outside of the borders of California. If such a drastic change in the status quo is to occur, it should be done prospectively, on a nationwide basis, by Congress… Plaintiffs' frustration with Congressional inaction is not a sufficient reason to recognize public performance rights under California law retroactively, eight decades after broadcasting was invented.[152]

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[145] Flo & Eddie Inc. v. Pandora Media Inc., No. 15-55287 (9th Cir.).

[146] Capitol Records LLC et al. v. Sirius XM Radio Inc., No. BC-520981 (Cal. Super. Ct. Oct. 14, 2014).

[147] Jonathan Stempel, *Sirius XM to Pay Record Companies $210 Million for Pre-1972 Songs,* Reuters, June 26, 2015.

[148] U.S. Securities and Exchange Commission, Form 8-K (June 26, 2015), Commission File # 001-34295, Registrant: Sirius XM Holdings, Inc., *available at* http://www.sec.gov/Archives/edgar/data/908937/000093041315002915/c81845_8k.htm.

[149] Jonathan Stempel, *Sirius XM Wins a Court Ruling Over Pre-1972 Songs,* Reuters, June 22, 2015.

[150] Flo & Eddie, Inc. v. Sirius XM Radio, Inc., et al., No. 1:2013cv23182 (S.D. Fla. June 22, 2015), at *8.

[151] *Id.* at *9.

[152] Flo & Eddie Inc. v. Pandora Media Inc., No. 15-55287 (9th Cir.) (intellectual property professors' amicus brief filed September 9, 2015, at *20), a*vailable at* https://www.eff.org/document/ip-professors-amicus-flo-eddie-v-pandora-9th-cir.

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Legislation

Introduced on April 13, 2015, the Fair Play Fair Pay Act of 2015 (H.R. 1733) would require any entity, including AM/FM radio, satellite radio, cable radio, and Internet radio, to pay royalties to recording artists and record labels for the transmission of sound recordings made prior to February 15, 1972.[153] The legislation would impose an obligation on any "transmitting entity" to pay royalties for such older recordings, but it does not confer federal copyright protection on the pre-1972 recordings.[154] Thus, while the legislation would provide creators of pre-1972 sound recordings the right to bring a federal civil action to obtain royalties for the public transmission of their recordings,[155] the legislation does not give them a right to sue for copyright infringement. [156]

In the 113th Congress, legislation was introduced (but not enacted), the Respecting Senior Performers as Essential Cultural Treasures, or RESPECT, Act (H.R. 4772) that would have required companies transmitting pre-1972 sound recordings via satellite, Internet, and digital cable television to pay performance royalties to recording artists. (Note that, unlike the Fair Play Fair Pay Act of 2015, the RESPECT Act would NOT have applied to traditional AM/FM radio broadcasts of such older recordings). Similar to the Fair Play Fair Pay Act, the RESPECT Act would have created an obligation to pay royalties, but would not have provided copyright protection to pre-1972 sound recordings.

Though legislation such as the Fair Play Fair Pay Act and the RESPECT Act is intended to provide royalty income to older recording artists, it could also have the effect of dissuading digital music services from including the "golden oldies" in their music catalogs. In a filing with the U.S. Securities and Exchange Commission,[157] Pandora warned that it might be forced to remove all pre-1972 sound recordings from its service[158] if it is required (through legislation or by the courts) to pay royalties for the reproduction and performance of such music.

Extending the Performance Right in Sound Recordings to AM/FM Radio Broadcasts

As described earlier in this report, Congress in 1995 passed the Digital Performance Right in Sound Recordings Act,[159] which for the first time ever granted copyright owners of sound recordings an exclusive right to perform their works publicly—although the right was limited only to *digital* audio transmission of their sound recordings. However, the law specifically *exempted* traditional over-the-air radio broadcasts from the newly created right to control digital public performances of sound recordings.[160] Thus, public performance of sound recordings through *non-digital* audio transmissions does *not* trigger any obligation on the part of the radio broadcaster to pay royalties to the sound recording copyright holder. Performers or recording

[153] H.R. 1733, § 7(a), *adding new* 17 U.S.C. § 114(f)(3)(D)(i).

[154] *Id., adding new* 17 U.S.C. § 114(f)(3)(D)(iv).

[155] *Id., adding new* 17 U.S.C. § 114(f)(3)(D)(ii).

[156] *Id., adding new* 17 U.S.C. § 114(f)(3)(D)(iii).

[157] U.S. Securities and Exchange Commission, Form 10-K (for fiscal year ending Dec. 31, 2014), Commission File # 001-35198, Registrant: Pandora Media, Inc., *available at* http://services.corporate-ir.net/SEC.Enhanced/SecCapsule.aspx?c=227956&fid=9910400.

[158] Dustin Voltz, *Here Are 1,400 Songs You Might Never Hear Again on Your Pandora Station*, NATIONAL JOURNAL, April 21, 2014.

[159] P.L. 104-39, 109 Stat. 336 (1995).

[160] Section 3 of P.L. 104-39.

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artists have no legal entitlement to receive any compensation from terrestrial (AM/FM) radio stations that broadcast their sound recordings.

The Register of Copyrights, testifying in March 2013 before the House Judiciary Committee, Subcommittee on Courts, Intellectual Property, and the Internet, urged Congress to provide a "full" public performance right for sound recordings.[161] (The Copyright Office's 2015 music licensing report repeated that recommendation.[162]) In July 2013, the U.S. Department of Commerce's Internet Policy Task Force issued a report in which it recommended that Congress "extend[] the public performance right for sound recordings to cover broadcasting."[163]

Sound recording copyright holders have advanced several arguments in support of expanding their performance right. First, they argue that recording artists deserve to be compensated for public performance of their works by broadcast radio just as songwriters and music publishers are currently being paid for such activity.[164] Second, they claim that the promotional value offered by terrestrial radio for the performance of their sound recordings has been diminished by listeners seeking out alternative sources of music distribution such as satellite radio and Internet music services.[165] Third, they observe that all developed countries in the world except the United States require their radio broadcasters to compensate performers and record labels.[166] However, because the United States does not require U.S. radio broadcasters to compensate foreign performers when they play their sound recordings, reciprocity allows foreign broadcasters to deny paying royalties to U.S. performers when they play their works in their countries.[167] Industry estimates suggest that the loss to U.S. artists in potential foreign performance royalties is about $100 million.[168]

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[161] *The Register's Call for Updates to U.S. Copyright Law: Hearings Before the House Subcomm. on Courts, Intellectual Property, and the Internet,* 113th Cong., 1st sess. (2013) (testimony of Maria A. Pallante, Register of Copyrights, U.S. Copyright Office), *available at* http://www.gpo.gov/fdsys/pkg/CHRG-113hhrg80067/html/CHRG-113hhrg80067.htm ("[W]e do not have a full public performance [right] for sound recordings. We are quite alone in the world in that regard. And from a copyright policy perspective, it is indefensible. It is really indefensible.").

[162] U.S. COPYRIGHT OFFICE, COPYRIGHT AND THE MUSIC MARKETPLACE (Feb. 2015), at 138.

[163] U.S. Dep't of Commerce, Internet Policy Task Force, *Copyright Policy, Creativity, and Innovation in the Digital Economy* (July 2013), at 100, *available at* http://www.uspto.gov/news/publications/copyrightgreenpaper.pdf ("While broad public performance rights are enjoyed by owners of sound recordings in most other countries, U.S. sound recording owners and performers have been unable to collect remuneration for the broadcasting of their works in those countries, due to the lack of reciprocal protection here.").

[164] *Exploring the Scope of Public Performance Rights: Hearings Before the Senate Comm. on the Judiciary,* 110th Cong., 1st sess. (2007)(Statement of Lyle Lovett) ("[T]he songwriter who created the song deserves to be compensated when that work generates value for another business, as it does for radio. I'm proud to be an ASCAP member, and grateful for the performance royalties that have helped me to earn my living as a songwriter. But the musicians and singers who perform the song are also creators and deserve to be compensated as well.").

[165] Future of Music Coalition, *Public Performance Right for Sound Recordings: Fact Sheet,* Nov. 5, 2013, *available at* http://futureofmusic.org/article/fact-sheet/public-performance-right-sound-recordings; *see also* Hannah Karp, *Radio's Answer to Spotify? Less Variety,* WALL ST. JOURNAL, Jan. 16, 2014 ("Faced with growing competition from digital alternatives, traditional broadcasters have managed to expand their listenership with an unlikely tactic: offering less variety than ever. ... [R]adio stations [are] more reluctant than ever to pull well-known hits from their rotations, extending the time artists must wait to introduce new songs.").

[166] *H.R. 848, the "Performance Rights Act:" Hearings Before the House Comm. on the Judiciary,* 111th Cong., 1st sess. (2009) (Statement of Mitch Bainwol, Chairman and CEO of the Recording Industry Association of America), at 1.

[167] *Id.*

[168] Jennifer Bendall, *Commentary: Musicians Deserve to Be Paid for Use of Their Work,* WASH. POST, April 26, 2010, *available at* http://www.washingtonpost.com/wp-dyn/content/article/2010/04/23/AR2010042305059.html.

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The broadcast radio industry has defended its existing statutory exemption from paying sound recording copyright holders by arguing that radio broadcasts serve as free publicity and promotion of the music,[169] and that performers and producers of sound recordings are compensated through sales of compact discs or MP3 music download files, concert tickets, and merchandise.[170] Furthermore, radio broadcasters observe that the broadcaster exemption reflects a balanced, symbiotic economic relationship between the broadcasting, music, and sound recording industries, which Congress has chosen not to disturb for over 80 years despite repeated appeals by the recording industry to alter the existing performance royalty system.[171] The broadcasters are also concerned that any new royalty fees will adversely impact financially strapped radio stations' ability to provide non-music services such as local news reporting, weather information, and public service announcements, or even force them to cease operations entirely.[172]

In response to a congressional request, the Government Accountability Office (GAO) released a report in August 2010 that, among other things, examined the benefits received by the recording and broadcast radio industries from their current relationship.[173] One of the GAO findings is that

> The broadcast radio industry benefits from its relationship with the recording industry by using sound recordings to attract listeners which, in turn, generates advertising revenue for commercial radio stations. Advertising is the primary source of revenue for commercial radio stations, and the average annual revenues of music stations are $225,000 higher than the average annual revenues of nonmusic stations. The recording industry may benefit by receiving broadcast radio airplay, which can promote music sales.[174]

However, the GAO noted that it was unable to quantify the promotional benefit to the recording industry from broadcast radio airplay, in part due to "the complex and changing nature of the relationship between the recording and broadcast radio industries."[175] The report explained this relationship as follows:

> Broadcast radio remains the most common place to discover new music. However, this reliance is decreasing and younger audiences now rely primarily on the Internet to learn about new music. Thus, the Internet and other platforms, such as television, are contributing to the promotion of sound recordings. However, due to the complexities of the industries, it is not clear to what degree, if any, these other promotional outlets impact

[169] A 2013 Nielsen study found that, despite many available alternate sources online and via satellite, traditional over-the-air radio is still the way that most Americans listen to music. Nielsen, *A Look Across Media: The Cross-Platform Report Q3 2013,* Dec. 3, 2013, *available at* http://www.nielsen.com/us/en/reports/2013/a-look-across-media-the-cross-platform-report-q3-2013.html ("The average American radio listener tunes in to radio over two hours per day (or 14 hours per week), making it the second-most consumed form of media after TV.").

[170] *Ensuring Artists Fair Compensation: Updating the Performance Right and Platform Parity for the 21st Century: Hearings Before the House Subcomm. on Courts, the Internet, and Intellectual Property,* 110th Cong., 1st sess. (2007) (Statement of Charles M. Warfield, Jr., President, ICBC Broadcast Holdings, Inc.), at 2.

[171] National Association of Broadcasters, *A Performance Tax Puts Local Jobs at Risk, at* http://www.nab.org/advocacy/issue.asp?id=1889 ("For more than 80 years, record labels and performers have thrived from radio airplay - which is essentially free advertising - from local radio broadcasters. Free, broadcast radio touches more than 240 million listeners a week, a number that dwarfs the reach of Internet and satellite radio.").

[172] National Association of Broadcasters, *Stop the Performance Tax: The Impact, at* http://www.noperformancetax.org/impact.asp.

[173] U.S. Gov't Accountability Office, GAO-10-862, *Telecommunications: The Proposed Performance Rights Act Would Result in Additional Costs for Broadcast Radio Stations and Additional Revenue for Record Companies, Musicians, and Performers* (2010).

[174] *Id.* at 12.

[175] *Id.* at 20.

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> sales in conjunction with one another, in conjunction with broadcast radio airplay, or independently.[176]

Legislation

The Fair Play Fair Pay Act of 2015 (H.R. 1733) would eliminate the Copyright Act's existing distinctions between the different types of radio services—Internet, satellite, cable, and AM/FM radio—with regard to their legal obligations to obtain public performance licenses and pay royalties to sound recording copyright holders.[177] Thus, the legislation would establish a more robust, general public performance right for sound recordings such that any entity that publicly transmits a sound recording, whether in a digital, analog, or other format, must pay recording artists and record labels for such an action. H.R. 1733 would also amend Section 114 of the Copyright Act to allow terrestrial (AM/FM) broadcasters to rely on the statutory license to transmit sound recordings (the Section 114 license is currently used by many digital radio providers).[178] The bill also would require that the Copyright Royalty Board initiate ratemaking proceedings "as soon as practicable after" the enactment of H.R. 1733, to determine (using the "willing buyer/willing seller" standard) royalty rates and terms for nonsubscription broadcast transmissions of sound recordings.[179] In addition, H.R. 1733 provides special royalty rates for the transmission of certain radio broadcasts using the Section 114 license:

1. "Small" commercial broadcasters, defined by the bill as a terrestrial broadcasting entity that has annual revenues of less than $1 million, shall be allowed to pay $500 per year.
2. A public broadcasting station (that has been licensed as such by the Federal Communications Commission) shall pay $100 in annual royalties.
3. Nonsubscription broadcast transmissions of services at a place of worship or other religious assembly have no royalty obligation for performing sound recordings.
4. An incidental use of a sound recording also incurs no royalty obligation.[180]

The Protecting the Rights of Musicians Act (H.R. 1999) would require television broadcasters that also own radio stations to pay compensation to recording artists, as a condition of collecting television signal retransmission consent payments.

A legislative measure opposing the expansion of performance rights has been introduced, the Supporting the Local Radio Freedom Act (H.Con.Res. 17, S.Con.Res. 4), which expresses that Congress should not impose any new performance fees or royalties for over-the-air broadcasts of sound recordings by local radio stations. This concurrent resolution has been supported by the National Association of Broadcasters, which has characterized any legislation that would impose new performance royalty obligations on radio stations as a "performance tax."[181] As of the date of this report, 211 Members of the House have signed onto the non-binding resolution as co-sponsors, and there are 20 co-sponsors of the Senate resolution.

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[176] *Id.* at 20-21 (internal citations omitted).

[177] H.R. 1733, § 2(a), *amending* 17 U.S.C. § 106(6) by deleting the qualifying word "digital" before "transmission."

[178] *Id.*, § 2(b), *amending* 17 U.S.C. § 114(d)(2).

[179] *Id.,* § 3, *adding new* 17 U.S.C. § 804(b)(3)(D).

[180] *Id.*, §5.

[181] National Association of Broadcasters, *A Performance Tax Puts Local Jobs at Risk, at* http://nab.org/advocacy/issue.asp?id=1889&issueid=1002.

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In the 113th Congress, the Free Market Royalty Act (H.R. 3219, 113th Congress) would have, among other things, eliminated the performance royalty exemption that applies to traditional radio stations that broadcast copyrighted sound recordings.[182] The legislation was not enacted into law.

Standards for Setting Royalty Rates for Public Performance of Sound Recordings

As discussed earlier in this report, the public performance of sound recordings through certain qualified digital transmission is subject to a compulsory license found in Section 114 of the Copyright Act. Webcasters, satellite radio companies, and cable television providers need not negotiate with recording artists for permission to digitally transmit their sound recordings; they only have to comply with the terms of the Section 114 compulsory license and pay the royalty rate prescribed by the Copyright Royalty Board. (Entities that do not meet the statutory qualifications for using the Section 114 license—such as those that offer "interactive" services like allowing the listener to select and play certain songs—must instead negotiate permission to use the sound recordings directly with the copyright holder). Similarly, terrestrial radio stations that "simulcast" their broadcast signals over the Internet may use the Section 114 compulsory license to pay performers royalties. Collection of royalty payments under the compulsory license for digital transmissions of sound recordings is handled on behalf of sound recording copyright holders by SoundExchange.

The Copyright Royalty Board (CRB) calculates the royalty rate applicable to the Section 114 license by applying a standard that is specified in the Copyright Act. The DMCA established different standards for the Section 114 license depending on the type of digital audio service *and* whether such service existed at the time of the DMCA's enactment. As a direct consequence of these different standards, Internet radio companies generally are required to pay considerably more in royalty fees to copyright holders than satellite radio and cable television providers.

The Willing Buyer/Willing Seller Standard

For a service that provides an "eligible nonsubscription transmission," as well as any new subscription digital audio transmission services that are launched after the DMCA's enactment (e.g., Internet radio broadcasters such as Pandora), the DMCA requires that the CRB apply a market–based standard for setting royalty rates for the Section 114 statutory license: that is, the rates and terms are to be set to reflect those that "would have been negotiated in the marketplace between a willing buyer and a willing seller"[183] in an arm's length transaction. In determining such rates and terms, the CRB is required to base its decision on economic, competitive and programming information presented by the copyright holders and copyright users, including

> (A) whether use of the service may substitute for or may promote the sales of sound recordings or otherwise may interfere with or may enhance the sound recording copyright owner's other streams of revenue from its sound recordings; and

[182] *See* Ben Sisario, *Congressman Proposes New Rules for Music Royalties,* NEW YORK TIMES, Sept. 30, 2013. Other legislation introduced in previous Congresses, including the Performance Rights Act (S. 379 and H.R. 848, 111th Congress), to eliminate the disparity in royalty obligation between traditional radio stations and entities that transmit music digitally, are discussed in CRS Report RL34411, *Expanding the Scope of the Public Performance Right for Sound Recordings: A Legal Analysis of the Performance Rights Act (H.R. 848 and S. 379)*, by Brian T. Yeh.

[183] 17 U.S.C. § 114(f)(2)(B).

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(B) the relative roles of the copyright owner and the transmitting entity in the copyrighted work and the service made available to the public with respect to relative creative contribution, technological contribution, capital investment, cost, and risk.[184]

The 801(b) Factors

For the subscription services that were preexisting at the time the DMCA was enacted in 1998 (e.g., XM, Sirius, and the specified cable television digital music channel providers), the CRB is required to set the performance royalty rate by taking into account four statutory elements that are listed in 17 U.S.C. § 801(b)(1).[185] This provision requires that the rates for the Section 114 license that is used by preexisting subscription services and preexisting satellite digital audio radio services shall be calculated by the CRB to achieve the following objectives, which are colloquially referred to as the "801(b) factors":

(A) To maximize the availability of creative works to the public.

(B) To afford the copyright owner a fair return for his or her creative work and the copyright user a fair income under existing economic conditions.

(C) To reflect the relative roles of the copyright owner and the copyright user in the product made available to the public with respect to relative creative contribution, technological contribution, capital investment, cost, risk, and contribution to the opening of new markets for creative expression and media for their communication.

(D) To minimize any disruptive impact on the structure of the industries involved and on generally prevailing industry practices.

Generally, the 801(b) standard as applied by the CRB has resulted in significantly lower rates for performance royalties paid by satellite radio and digital cable radio services, compared to the higher royalty fees that have been established by the CRB for Internet radio broadcasters under the "willing buyer/willing seller" standard.[186] The conference report accompanying H.R. 2281, the Digital Millennium Copyright Act, explained that the legislative purpose for "grandfathering" existing satellite radio companies under the 801(b) royalty standard was to minimize disruption of their existing operations and to account for their substantial capital investments and operating costs:

> The purpose of distinguishing preexisting subscription services making transmissions in the same medium as on July 31, 1998, was to prevent disruption of the existing operations by such services. There was [sic] only three such services that exist: DMX

[184] *Id.*

[185] 17 U.S.C. § 114(f)(1)(B).

[186] For satellite radio companies, *see* Library of Congress, Copyright Royalty Board, *Determination of Rates and Terms for Preexisting Subscription Services and Satellite Digital Audio Radio Services*, 78 Fed. Reg. 23053 (April 17, 2013) (establishing an escalating rate for the 2013-2017 licensing period, starting at 9% of the satellite radio company's gross revenues in 2013 and rising to 11% by 2017); for Internet radio broadcasters, *see* Library of Congress, Copyright Royalty Board, *Digital Performance Right in Sound Recordings and Ephemeral Recordings,* 76 Fed. Reg. 13025 (March 9, 2011) (setting an escalating rate for the 2012-2015 license period, starting at $0.0021 per performance in 2012 and rising to $0.0023 by 2014. In this context, a "performance" means one song played to one listener. These "per performance" royalty rates for Internet broadcasters may not be easily compared to the percentage of revenue rate that is applicable to satellite radio services because a webcaster's royalty rate depends on the number of songs transmitted and the number of listeners. However, as an example, the large webcaster Pandora reported that in its fiscal year ending January 31, 2013, it spent 55.9% of its total revenue on "SoundExchange related content acquisition costs." Pandora Media, Inc., Annual Report (Form 10-K), at 22 (March 13, 2013), *available at* http://investor.pandora.com/phoenix.zhtml?c=227956&p=proxy.).

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> (operated by TCI Music), Music Choice (operated by Digital Cable Radio Associates), and the DiSH Network (operated by Muzak). As of July 31, 1998, DMX and Music Choice made transmissions via both cable and satellite media; the DiSH Network was available only via satellite. The purpose of distinguishing the preexisting satellite digital audio radio services is similar. The two preexisting satellite digital audio radio services, CD Radio and American Mobile Radio Corporation, have purchased licenses at auction from the FCC and have begun developing their satellite systems.[187]

In addition, in a satellite digital audio radio services (SDARS) rate-setting proceeding in 2008, the Copyright Royalty Board explained that "the primary type of expenditure incurred by the SDARS that does distinguish them from other digital distributors of music is their expenditure for satellite technology."[188] In addition, the CRB found that SDARS demonstrated the "need to continue to make substantial new investments to support the satellite technology necessary to continue to provide" satellite radio services, and that "new satellite investment, unlike other costs, cannot be postponed without a serious threat of disruption to the service the SDARS provide."[189] The CRB decided that, with respect to the SDARS royalty rate at issue, it was "appropriate to adopt a rate from the zone of reasonableness for potential marketplace benchmarks that is lower than the upper boundary most strongly indicated by marketplace data."[190] The CRB justified this adoption by citing two reasons:[191]

1. "[A]n immediate increase to the upper boundary of the zone of reasonableness (i.e., 13%) would be disruptive inasmuch as the SDARS have not yet attained a sufficient subscriber base nor generated sufficient revenues to reach consistent Earnings Before Interest, Taxes, Depreciation and Amortization ("EBITDA") profitability or positive free cash flow."
2. "[W]e are persuaded that still another factor that requires attention is any undue constraint on the SDARS' ability to successfully undertake satellite investments planned for the license period. A failure to complete these investments as scheduled clearly raises the potential for disruption of the current consumer service."

Legislation

The Fair Play Fair Pay Act of 2015 (H.R. 1733) would require the Copyright Royalty Board to set performance royalty rates for satellite radio and cable music providers by applying the same "willing buyer/willing seller" standard that the CRB currently uses in determining Internet radio webcasters' royalty rates, instead of using the 801(b) standard.[192] The sponsors of the legislation stated that by requiring the CRB to use the same royalty rate standard, the bill would "[b]ring true platform parity to radio—so that all forms of radio, regardless of the technology they use—pay fair market value for music performances."[193] However, by substituting the existing 801(b)

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[187] Joint Explanatory Statement of the Comm. of Conference, H.R. Rep. No. 105-796 (105th Cong., 2d Sess., 1998), at 80-81. Note that CD Radio and American Mobile Radio Corporation later changed their names to XM and Sirius satellite radio. See Matt Jackson, *From Broadcast to Webcast: Copyright Law and Streaming Media,* 11 TEX. INTELL. PROP. L.J. 447, 457 (2003).

[188] Copyright Royalty Board, *Determination of Rates and Terms for Preexisting Subscription Services and Satellite Digital Audio Radio Services*, 73 Fed. Reg. 4080, 4096 (Jan. 24, 2008).

[189] *Id.* at 4096.

[190] *Id.* at 4097.

[191] *Id.*

[192] H.R. 1733, § 4(a)(1), *amending* 17 U.S.C. § 114(f) (1)(B).

[193] Press Release, Reps. Nadler and Blackburn Introduce the Fair Play Fair Pay Act of 2015, Apr. 13, 2015, *available at*
(continued...)

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standard with the "willing buyer/willing seller" standard, H.R. 1733 would likely have the effect of the CRB establishing royalty rates that are significantly higher than what satellite and cable radio providers currently pay, possibly approaching the rates paid by Internet radio webcasters.

In the 113th Congress, the Free Market Royalty Act (H.R. 3219, 113th Congress) would have repealed the Section 114 license. Without the statutory license, broadcast radio stations and certain digital music services would need to privately negotiate royalty rates and licensing terms with SoundExchange.

Legislation introduced in the 112th Congress would have, among other things, changed the standard that the CRB uses in determining the royalty fees applicable to the Section 114 performance license upon which many Internet webcasters rely to transmit sound recordings. The Internet Radio Fairness Act (IRFA) of 2012 (H.R. 6480, S. 3609, 112th Congress) was introduced in order to "level[] the playing field for Internet radio services" and reform the current royalty rate calculation system.[194] The IRFA would have taken the opposite approach of the Fair Play Fair Pay Act of 2015, by amending Section 114(f) of the Copyright Act to eliminate the current standard for webcasting performance royalty rates (willing buyer/willing seller) and inserting a new standard—the same 801(b) factors that are currently used by the CRB to determine the royalty rates for satellite and cable music providers. According to one of the sponsors of the legislation:

> While Internet radio services compete directly with all audio platforms for listeners in every place you find music – at home, in the car, at the office, and on the go – they are subject to a surprisingly disproportionate royalty burden compared to these other formats. These rules discriminate against Internet radio, hamper innovation, and frustrate the goals of the Copyright system. As a result Internet radio companies today pay more than 55% of revenue in royalty rates when other forms of digital radio such as cable and satellite pay between 7 and 16% of revenue for performance royalties.[195]

On the other hand, SoundExchange opposed the legislation, by arguing that

> At its core, this bill is an attempt by Pandora and other webcasters to reduce the royalty fees that you are paid for their use of your sound recordings on digital radio. Right now, the law requires the webcasting rates to be set under a "willing buyer, willing seller" standard – that is, the fair market value of your recording. Pandora, however, wants the law to be changed so that the rate could be set at less than fair market value, potentially much less. We believe in digital radio and its future, but we do not believe there is any reason that webcasters and broadcasters should pay less than fair market value when the music that we all enjoy, your creative contributions, are the main content of a digital radio service.
>
> And while these services complain about a supposed lack of "parity" among different platforms, the bill utterly fails to address the most glaring inequity of all—the fact that AM/FM broadcasters still pay nothing in performance royalties to recording artists and record labels.[196]

(...continued)

http://nadler.house.gov/press-release/reps-nadler-and-blackburn-introduce-fair-play-fair-pay-act-2015.

[194] Press Release, *Reps. Chaffetz and Polis Introduce Bi-Partisan Internet Radio Act,* Sept. 21, 2012, available at http://chaffetz.house.gov/press-release/reps-chaffetz-and-polis-introduce-bi-partisan-internet-radio-act.

[195] *Id.*

[196] SoundExchange, *Internet Radio Fairness Act: Not So Fair,* Sept. 28, 2012, *at* http://www.soundexchange.com/internet-radio-fairness-act-not-so-fair/.

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Modification of Consent Decrees Governing Songwriter Performance Royalties

As explained earlier in this report, broadcast radio station, webcaster, or satellite radio company must pay license fees to the performing rights organizations (PROs) such as ASCAP, BMI, and/or SESAC, for the right to broadcast or transmit to the public copyrighted musical works made by composers, songwriters, and music publishers who are represented by those organizations. Other businesses that play "background" music to their customers (such as restaurants, bars, hotels, and retail stores) or allow live music to be performed on their premises, must obtain licenses from the PROs in order to compensate songwriters for such public performance of their musical works. Royalty fees for public performance of musical works are established by license agreements that are the product of voluntary, private negotiations between the PROs and the entities that desire to perform the music. A volunteer organization of broadcasters known as the Radio Music License Committee (RMLC) represents radio stations in these negotiations with the PROs,[197] while other entities (such as webcasters) negotiate directly with the PROs.

ASCAP is subject to an antitrust consent decree with the U.S. Department of Justice,[198] last modified on June 11, 2001, that constrains its behavior when licensing music users. Under the consent decree, among other terms,

- ASCAP must admit to membership any songwriter and any music publisher;
- ASCAP cannot obtain exclusive rights from its writer and publisher members, so music users may obtain licenses directly from the copyright owners and need not deal with ASCAP;
- ASCAP must make available to any music user a blanket license that covers all the works in its repertory, and also must make available per-program and per-segment licenses, subject to being able to track and monitor usage of the latter;
- ASCAP may not discriminate in license fees, terms, or conditions among similarly situated users;
- If a user requests an ASCAP license in writing, ASCAP must grant the request – if, for example, there is an impasse over the rate for the license fee, the requester has access to the music while the impasse is being resolved rather than being denied access as a copyright infringer;
- If the user and ASCAP cannot agree on a license fee, the user may apply to the U.S. District Court for the Southern District of New York, which has jurisdiction over the consent decree, for a determination of a reasonable license fee, with the burden on ASCAP to prove the reasonableness of its fee proposal;
- ASCAP is required to provide users full information—both in traditional and online form – about the works in the ASCAP repertory;
- ASCAP is prohibited from licensing rights other than the public performance of musical works; thus, it may not issue mechanical licenses for the reproduction or distribution of musical works;

[197] *See* http://www.radiomlc.org/.

[198] United States District Court for the Southern District of New York, *United States of America v. American Society of Composers, Authors and Publishers,* Civ. Action No. 41-1395 (WCC), Second Amended Final Judgment, June 11, 2001.

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The consent decree governing BMI,[199] last amended in 1994, contains many of the same provisions as the ASCAP consent decree.

Between 2011 and 2013, several major music publishers, including Sony, EMI, Universal, and BMG, sought to partially withdraw certain public performance rights from ASCAP and BMI, specifically the right to license their compositions to digital music services. These publishers were concerned that they were receiving below-market rates for public performance licenses issued to digital media companies such as the Internet radio provider Pandora. They stated that a partial withdrawal from ASCAP and BMI would allow them to directly negotiate higher rates with music streaming services. ASCAP and BMI responded by modifying their rules to allow music publishers the right to separately license their public performance rights for digital media uses. In November 2012, Pandora challenged the publishers' partial withdrawal of "new media licensing rights" from ASCAP before the "rate court" that enforces the consent decrees (the U.S. District Court for the Southern District of New York). The district court granted summary judgment in favor of Pandora,[200] holding that the ASCAP consent decree did not allow for partial withdrawals, a decision upheld by the U.S. Court of Appeals for the Second Circuit in May 2015.[201] As the appellate court explained,

> The licensing of works through ASCAP is offered to publishers on a take-it-or-leave-it basis. As ASCAP is required to license its entire repertory to all eligible users, publishers may not license works to ASCAP for licensing to some eligible users but not others.[202]

Another federal case involving the BMI consent decree and Pandora reached a similar conclusion.[203]

In June 2014, the U.S. Department of Justice's Antitrust Division announced that it would initiate a review process to examine the operation and effectiveness of these consent decrees, after ASCAP, BMI and other parties in the music industry raised concerns that the consent decrees have been unable "to account for changes in how music is delivered to and experienced by listeners."[204] In testimony presented before Congress, the president of ASCAP explained that the consent decrees require modification in order to "keep pace" with new digital music services:

> ASCAP traditionally negotiated licenses with industry committees or associations representing entire classes of licensees. For example, ASCAP negotiates with the Television Music Licensing Committee ... to reach license agreements for the entire local broadcast television industry. ...
>
> In today's marketplace, however, digital services without a history of negotiating licenses and paying fees, and often without any proven business model, utilize the Decree license process to their benefit. As ASCAP licenses are compulsory and fees can be set retroactively, certain music users have strategically delayed or extended the negotiating

[199] United States District Court for the Southern District of New York, *United States of America v. Broadcast Music Inc.,* 64 Civ. 3787, Order Modifying the 1966 Consent Decree, November 18, 1994.

[200] In re Pandora Media, Inc., 2013 U.S. Dist. LEXIS 133133 (S.D.N.Y. Sept. 17, 2013).

[201] Pandora Media, Inc. v. Am. Soc'y of Composers, Authors & Publrs., 785 F.3d 73 (2d Cir. 2015).

[202] *Id.* at 77.

[203] Broadcast Music, Inc. v. Pandora Media, Inc., 2013 U.S. Dist. LEXIS 178414 (S.D.N.Y. Dec. 18, 2013)("[T]he BMI Consent Decree requires BMI to offer Pandora a license to perform all of the compositions in its repertory. When BMI no longer is authorized by music publisher copyright holders to license their compositions to Pandora and New Media Services, those compositions are no longer eligible for inclusion in BMI's repertory. BMI can no longer license them to Pandora or any other applicant.").

[204] U.S. Dep't of Justice, *Antitrust Consent Decree Review*, *at* http://www.justice.gov/atr/cases/ascap-bmi-decree-review.html.

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> process, choosing to remain applicants or interim licensees indefinitely—in some cases a decade or longer—without paying fees to ASCAP or providing ASCAP with the information necessary to determine a reasonable final fee.[205]

However, an organization representing major hospitality, technology, and broadcast radio entities sent a letter in August 2015 to Attorney General Loretta Lynch, urging the Justice Department to refrain from making significant changes to the consent decrees. The letter argues that any loosening of the current conditions placed on ASCAP and BMI could harm consumers and songwriters:

> Our organizations firmly believe that the existing consent decrees governing ASCAP and BMI are as relevant and necessary today as they were when they were first entered into. The consent decrees promote fair music licensing while protecting music users, venues where music is played, and various music platforms, from the market power and potential anti-competitive behavior that is inherent to the PROs and their large music publisher affiliates.
>
> The consent decrees also enable efficient licensing and payment to songwriters and publishers for the performances of their musical works, with the intent of ensuring balanced and non-discriminatory rates and terms. Without the protections of the consent decrees, licensees would be subject to individual negotiations with potentially hundreds of thousands of licensors, almost all of which possess significant market power over non-substitutable musical works. This would harm all stakeholders involved, including not only consumers, but also the individual songwriters who benefit from the efficient and competitive marketplace that the consent decrees ensure.[206]

Legislation

The Songwriter Equity Act (SEA) of 2015 (H.R. 1283, S. 662) has been introduced in the 114th Congress to help increase performance royalty income for songwriters. One provision of the SEA would allow the rate court (the U.S. District Court for the Southern District of New York) to take into account the licensing fees that are currently payable for the digital public performance of sound recordings, during the court's proceedings that set the rate for public performance of musical works. Section 114(i) of the Copyright Act prohibits the rate court from considering such evidence; consequently, according to supporters of this legislation, license fees for musical works are lower because the court cannot consider evidence of the higher performance fees paid for the digital performance of sound recordings.[207] The Copyright Office has observed that this statutory prohibition, enacted in 1995 as part of the creation of the digital public performance right for sound recordings, was "[o]riginally designed as a protective measure to benefit songwriters and

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[205] *Music Licensing Under Title 17, Part Two: Hearing Before the House Judiciary Comm., Subcomm. on Courts, Intellectual Property and Internet,* 113th Cong. 2nd Sess. (2014) (Statement of Paul Williams, President and Chairman of the Board, ASCAP), at 8-9.

[206] MIC (Music.Innovation.Consumers) Coalition Letter to Attorney General Lynch, Aug. 17, 2015, *available at* http://www.scribd.com/doc/274916121/MIC-Coalition-Letter-to-DOJ; *see also* Gary Shapiro, *Why Consent Decrees Protect Artists, Fans and Music Distributors Alike,* TheHill.com, May 22, 2015 ("Removing the protections of the consent decrees would create chaos and instability in the music marketplace, harm small artists and independent publishers, and stifle innovation.")

[207] *See* Ed Christman, *Songwriter Equity Act Re-Introduced to Congress*, BILLBOARD, Mar. 3, 2015 (quoting BMI president Michael O'Neill: "Through the Songwriter Equity Act, songwriters will no longer be disadvantaged by the fact that courts cannot legally consider all relevant benchmark deals – key evidence in determining fair market rates. ... [T]his bill will also help address ongoing concerns about the impact of a rate disparity that values the performances of sound recordings at a level approximately 12 times greater than the actual musical compositions from which they are created.").

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publishers [but] appears to be having the opposite effect."[208] The other major provision of the SEA would require the Copyright Royalty Judges, in establishing the royalty rates for Section 115 mechanical licenses, to use a "willing buyer, willing seller" standard instead of the current statutory "801(b)(1)" factors, in order to increase royalties for songwriters whenever their works are reproduced or distributed (such as when their musical works are recorded by artists, streamed online through Pandora, or sold through iTunes).

The Fair Play Fair Pay Act of 2015 (H.R. 1733) has a section, entitled "No harmful effects on songwriters," that prohibits the *lowering* of songwriter royalties due to the bill's establishment of new performance royalties for sound recordings:

> License fees payable for the public performance of sound recordings.... shall not be cited, taken into account, or otherwise used in any administrative, judicial, or other governmental forum or proceeding, .. to set or adjust the license fees payable to copyright owners of musical works ... for the public performance of their works, **for the purpose of reducing or adversely affecting such license fees.**"[209]

It would appear, however, that evidence of license fees paid for public performance of sound recordings could be introduced and considered in a ratemaking proceeding to set or adjust performance fees for musical works, if the purpose of using such evidence is to *increase* or otherwise *positively* affect the license fees.

[208] U.S. COPYRIGHT OFFICE, COPYRIGHT AND THE MUSIC MARKETPLACE (Feb. 2015), at 157.

[209] H.R. 1733, § 8(a), *amending* 17 U.S.C. § 114(i) (emphasis added).

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Appendix A. Types of Licenses Required For Copyright Holders in Non-Digital and Digital Music Contexts

	Non-Digital Music		Digital Music	
Music Copyright Holder	**License for Reproduction and Distribution**	**License for Public Performance**	**License for Reproduction and Distribution**	**License for Public Performance**
Musical work holder	Mechanical (compulsory)	Voluntary (ASCAP & BMI regulated by consent decrees)	Mechanical (compulsory)	Voluntary (ASCAP & BMI regulated by consent decrees)
Sound recording holder	Voluntary	No performance right	Voluntary	For interactive services, voluntary licenses apply. For non-interactive subscription services, compulsory licenses apply. For eligible non-interactive, non-subscription services, compulsory licenses apply. For non-subscription, non-interactive broadcasts, statutory exemptions apply.

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Appendix B. Glossary

Note: This glossary uses definitions supplied in 17 U.S.C. §§ 101, 114, 115.

A **broadcast** transmission is a transmission made by a terrestrial broadcast station licensed as such by the Federal Communications Commission.

Copies are material objects, other than phonorecords, in which a work is fixed by any method now known or later developed, and from which the work can be perceived, reproduced, or otherwise communicated, either directly or with the aid of a machine or device. The term "copies" includes the material object, other than a phonorecord, in which the work is first fixed.

A **digital audio transmission** is a digital transmission as defined in section 101 that embodies the transmission of a sound recording. This term does not include the transmission of any audiovisual work.

A **digital phonorecord delivery** (DPD) is each individual delivery of a phonorecord by digital transmission of a sound recording that results in a specifically identifiable reproduction by or for any transmission recipient of a phonorecord of that sound recording, regardless of whether the digital transmission is also a public performance of the sound recording or any non-dramatic musical work embodied therein. A digital phonorecord delivery does not result from a real-time, non-interactive subscription transmission of a sound recording where no reproduction of the sound recording or the musical work embodied therein is made from the inception of the transmission through to its receipt by the transmission recipient in order to make the sound recording audible.

To **display** a work means to show a copy of it, either directly or by means of a film, slide, television image, or any other device or process or, in the case of a motion picture or other audiovisual work, to show individual images consequentially.

An **eligible non-subscription transmission** is a non-interactive, non-subscription digital audio transmission not exempt under subsection 114(d)(1) that is made as part of a service that provides audio programming consisting, in whole or in part, of performances of sound recordings, including retransmission of broadcast transmissions, if the primary purpose of the service is to provide to the public such audio or other entertainment programming, and the primary purpose of the service is not to sell, advertise, or promote particular products or services other than sound recordings, live concerts, or other music-related events.

An **establishment** is a store, shop, or any similar place of business open to the general public for the primary purpose of selling goods or services in which the majority of the gross square feet of space that is nonresidential is used for that purpose, and in which non-dramatic musical works are performed publicly.

A work is **fixed** in a tangible medium of expression when its embodiment in a copy or phonorecord, by or under the authority of the author, is sufficiently permanent or stable to permit it to be perceived, reproduced, or otherwise communicated for a period of more than transitory duration. A work consisting of sounds, images, or both being transmitted is "fixed" for purposes of this title if a fixation of the work is being made simultaneously with its transmission.

A **food service or drinking establishment** is a restaurant, inn, bar, tavern, or any other similar place of business in which the public or patrons assemble for the primary purpose of being served food or drink, in which the majority of the gross square feet of space that is nonresidential is used for that purpose, and in which non-dramatic musical works are performed publicly.

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

To **perform** a work means to recite, render, play, dance, or act it, either directly or by means of any device or process or, in the case of a motion picture or other audiovisual work, to show its images in any sequence or to make the sounds accompanying it audible.

A **performing rights society** is an association, corporation, or other entity that licenses the public performance of non-dramatic musical works on behalf of copyright owners of such works, such as the American Society of Composers, Authors and Publishers (ASCAP), Broadcast Music, Inc. (BAI), and SEASICK, Inc.

Phonorecords are material objects in which sounds, other than those accompanying a motion picture or other audiovisual work, are fixed by any method now known or later developed, and from which the sounds can be perceived, reproduced, or otherwise communicated, either directly or with the aid of a machine or device. The term "phonorecords" includes the material object in which the sounds are first fixed.

To perform or display a work **publicly** means—

(1) to perform or display it at a place open to the public or at any place where a substantial number of persons outside of a normal circle of a family and its social acquaintances is gathered; or

(2) to transmit or otherwise communicate a performance or display of the work to a place specified by clause (1) or to the public, by means of any device or process, whether the members of the public capable of receiving the performance or display receive it in the same place or in separate places and at the same time or at different times.

A **retransmission** is a further transmission of an initial transmission, and includes any further retransmission of the same transmission. Except as provided in this section, a transmission qualifies as a "retransmission" only if it is simultaneous with the initial transmission. Nothing in this definition shall be construed to exempt a transmission that fails to satisfy a separate element required to qualify for an exemption under section 114(d)(1).

Sound recordings are works that result from the fixation of a series of musical, spoken, or other sounds, but not including the sounds accompanying a motion picture or other audiovisual work, regardless of the nature of the material objects, such as disks, tapes, or other phonorecords, in which they are embodied.

A **subscription** transmission is a transmission that is controlled and limited to particular recipients, and for which consideration is required to be paid or otherwise given by or on behalf of the recipient to receive the transmission or a package of transmissions including the transmission.

A **transmission** is either an initial transmission or a retransmission.

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To **transmit** a performance or display is to communicate it by any device or process whereby images or sounds are received beyond the place from which they are sent.

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