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# Money for Something: Music Licensing in the 21st Century

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Committees of Congress

# Summary

Songwriters and recording artists are legally entitled to get paid for (1) reproductions and public performances of the notes and lyrics they create (the musical works), as well as (2) reproductions, distributions, and certain digital performances of the recorded sound of their voices combined with instruments (the sound recordings). The amount they get paid, as well as their control over their music, depends on market forces, contracts among a variety of private-sector entities, and laws governing copyright and competition policy.

Congress first enacted laws governing music licensing in 1909, when music was primarily distributed through physical media such as sheet music and phonograph records. At the time, some Members of Congress expressed concerns that absent a statutory requirement to make musical works widely available, licensees could use exclusive access to musical works to thwart competition. The U.S. Department of Justice (DOJ) expressed similar concerns in the 1940s, when it entered into antitrust consent decrees requiring music publishers to license their musical works to radio broadcast stations.

As technological changes made it possible to reproduce sound recordings on tape cassettes in the late 1960s and in the form of digital computer files in the 1990s, Congress extended exclusive reproduction and performance rights to sound recordings as well. Many of the laws resulted from compromises between those who own the rights to music and those who license those rights from copyright holders. In some cases, the government sets the rates for music licensing, and the rate-setting standards that it uses reflect those compromises among interested parties.

As consumers have purchased fewer albums over the last 20 years, overall spending on music has declined. Nevertheless, as streaming services that incorporate attributes of both radio and physical media have entered the market, consumer spending has increased during the last two years. In 2016, for the first time ever, streaming and other digital music services represented the majority of the recorded music industry's revenues. As these services have proliferated and the number of songs released has increased, the process of ensuring that the various copyright holders are paid for their musical works and their sound recordings has grown more complex. Performers, songwriters, producers, and others have complained that in some cases current copyright laws make it difficult to earn enough money to support their livelihoods and create new music. In addition, several songwriters and publishers have sued music streaming services, claiming that the services have streamed their songs while making little effort to locate and pay the rights holders.

In April 2018, the U.S. House of Representatives voted 415-0 to pass H.R. 5447, the Music Modernization Act, as amended. The bill would, among other things, modify copyright laws related to the process of granting, receiving, and suing for infringement of mechanical licenses, would create a new nonprofit "mechanical licensing collective" through which musical work copyright owners could collect royalties from online music services, and would change the standards used by a federal agency, the Copyright Royalty Board, to set royalty rates for certain statutory music licenses.

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# Introduction

Songwriters are legally entitled to get paid for reproductions and public performances[1] of the notes and lyrics they create (the musical works). Recording artists are entitled to get paid for reproductions, distributions, and certain digital performances of the recorded sound of their voices combined with instruments in some sort of medium, such as a digital file, record, or compact disc (the sound recordings).

Yet these copyright holders do not have total control over their music. For example, although Taylor Swift and her record label, Big Machine, withdrew her music from the music streaming service Spotify in 2014,[2] a cover version of her album *1989* recorded by the artist Ryan Adams could be heard on the service.[3] Copyright law allows Mr. Adams to perform, reproduce, and distribute Ms. Swift's musical works under certain conditions as long as he pays Ms. Swift a royalty.[4] Thus, as a singer who owns the rights to her sound recordings, Ms. Swift can withdraw her own recorded music from Spotify, but as a songwriter who owns the rights to her musical works, she cannot dictate how the music service uses other recorded versions of her musical works.

The amount Ms. Swift gets paid for both her musical works and her sound recordings depends on market forces, contracts among a variety of private-sector entities, and federal laws governing copyright and competition policy. Congress wrote these laws, by and large, at a time when consumers primarily accessed music via radio broadcasts or physical media, such as sheet music and phonograph records, and when each medium offered consumers a distinct degree of control over which songs they could hear next.

With the emergence of music distribution on the internet, Congress updated some copyright laws in the 1990s. It attempted to strike a balance between combating unauthorized use of copyrighted content—a practice some refer to as "piracy"—and protecting the revenue sources of the various participants in the music industry. It applied one set of copyright provisions to digital services it viewed as akin to radio broadcasts, and another set of laws to digital services it viewed as akin to physical media. Since that time, however, music distribution has continued to evolve. In addition to streaming radio broadcasts ("webcasting") and downloading recorded albums or songs,

[1] A "public performance" right is the right to play music on the radio, through a streaming service, in concerts, or anywhere else music is heard publicly. Donald S. Passman, *All You Need to Know About the Music Business*, 9th ed. (New York: Simon and Schuster, 2015), p. 227. (Passman). See also 17 U.S.C. §101 ("The right of public performance means the exhibition, rendition, or playing of a copyrighted work, either directly or by means of any device or process") and §106 (granting copyright holders exclusive rights to control, among other things, the public performance of their copyrighted works).

[2] Steve Knopper, "Taylor Swift Pulled Music from Spotify for 'Superfan Who Wants to Invest,' Says Rep," *Rolling Stone*, November 8, 2014, http://www.rollingstone.com/music/news/taylor-swift-scott-borchetta-spotify-20141108. Reportedly, Spotify and Ms. Swift reached an impasse when Spotify wanted to include her music on its free, advertising-supported service as well as its subscription service. Ms. Swift later made her sound recordings available on Spotify. Micah Singleton, "The Armistice Between Taylor Swift and Spotify is Good for Everyone," *The Verge*, June 9, 2017, https://www.theverge.com/2017/6/9/15766804/taylor-swift-spotify-streaming-umg-catalog.

[3] Nate Scott, "Ryan Adams' '1989' is the Taylor Swift Dad-Rock Album We've Been Waiting For," *USA Today*, November 15, 2015, http://ftw.usatoday.com/2015/09/ryan-adams-1989-stream-taylor-swift-spotify-mp3.

[4] 17 U.S.C. §115. See also Adam Barnonsky, "Publishing Administration: Recording Covers and Mechanical Licenses," *Symphonic Distribution*, http://symphonicdistribution.com/recording-covers-mechanical-licenses/#.VqJPhlI3nxY. The musical notes and lyrics being covered must have already been recorded and distributed by the copyright owner, and the cover may not contain major changes to the underlying musical work.

consumers can stream individual songs on demand via music streaming services. The result, as the U.S. Copyright Office has noted, has been a "blurring of the traditional lines of exploitation."[5]

**Figure 1** illustrates the evolution of music consumption over the last 40 years. In 1999, recording industry revenues reached their peak of $21.3 billion. That same year, the free Napster peer-to-peer file-sharing service was introduced.[6]

In 2003, after negotiating licensing agreements with all of the major record labels, Apple launched the iTunes Music Store to provide consumers a legal option for purchasing individual songs online.[7] The year 2012 marked the first time the recording industry earned more from retail sales of digital downloads ($3.2 billion) than from physical media such as compact discs, cassettes, and vinyl records ($3.0 billion).[8] Apple had approximately a 65% market share of digital music downloads.[9]

After peaking in 2012, however, sales from digital downloads began to decline, as streaming services such as Spotify, which entered the U.S. market in 2011, became more popular.[10] Facing a mounting threat to its iTunes store, Apple launched its own subscription streaming music service, Apple Music, in 2015.[11]

The popularity of subscription music services has significantly altered music consumption patterns. According to the Recording Industry Association of America (RIAA), the proportion of total U.S. recording industry retail spending coming from webcasting, satellite digital audio radio services and cable services (digital subscriptions), and streaming music services increased from about 9% in 2011 (out of $7.6 billion total) to about 67% in 2017 (out of $8.5 billion total). After 11 consecutive years of declining revenues, consumer spending on music was flat between 2014 and 2015, grew 10% between 2015 and 2016, and grew 14% between 2016 and 2017.[12] Nevertheless, annual spending on music by U.S. consumers, adjusted for inflation, is still nearly two-thirds below its 1999 peak.[13] These changing consumption patterns affect how much performers, songwriters, record companies, and music publishers get paid for the rights to their music.

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[5] Maria A. Pallante, Register of Copyrights and Director et al., *Copyright and the Music Marketplace*, U.S. Copyright Office, February 2015, http://copyright.gov/docs/musiclicensingstudy/ (2015 U.S. Copyright Office Report), p. 25.

[6] Appellate courts subsequently ruled that Napster's service violated copyright laws. *A&M Records, Inc. v. Napster, Inc.*, 114 F. Supp. 2d 896 (N.D. Cal. 2000), affirmed 239 F.3d 1004 (9th Cir. 2001). Following a court order, Napster shut down its service in 2001. Richard Nieva, "Ashes to Ashes, Peer to Peer: An Oral History of Napster," *Fortune*, September 5, 2013, http://fortune.com/2013/09/05/ashes-to-ashes-peer-to-peer-an-oral-history-of-napster/.

[7] Walter Isaacson, *Steve Jobs* (New York: Simon & Schuster, 2011), pp. 394-403. In addition, Apple CEO Steve Jobs negotiated with nearly two dozen major artists who had the rights to personally control the digital distribution of their music.

[8] CRS analysis of Recording Industry Association of America database. Figures are adjusted for inflation in 2017 dollars.

[9] Glenn Peoples, "iTunes Tenth Anniversary: Leading from the Front," *Billboard*, April 23, 2013, http://www.billboard.com/biz/articles/news/1559893/itunes-10th-anniversary-leading-from-the-front.

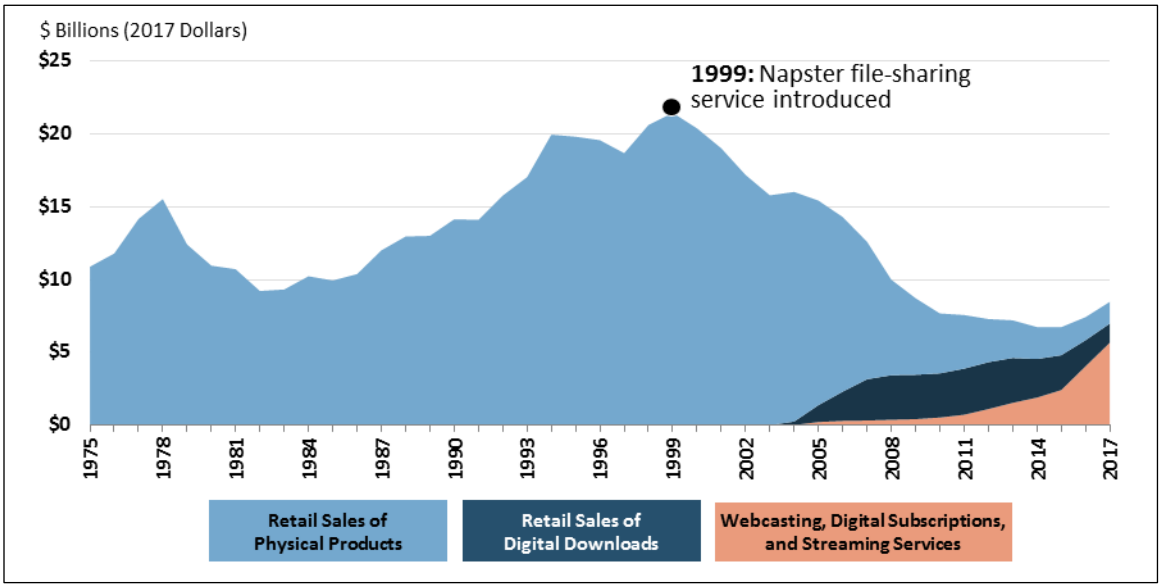
[10] Record labels earned $3.1 billion in revenues from digital downloads in 2013, compared with $3.2 billion in 2012. Figures adjusted for inflation in 2017 dollars (RIAA database).

[11] Alex Webb, "Hey, Siri, How Will Apple Keep Up with Google and Amazon?" *Bloomberg*, June 10, 2016, https://www.bloomberg.com/news/articles/2016-06-10/hey-siri-how-is-apple-going-to-keep-up-with-google-and-amazon.

[12] Joshua P. Friedlander, *News and Notes on 2017 RIAA Shipment and Revenue Statistics*, RIAA, March 22, 2018, http://www.riaa.com/wp-content/uploads/2017/03/RIAA-2016-Year-End-News-Notes.pdf. At the wholesale level, record labels generated $5.9 billion of revenue in 2017.

[13] CRS analysis of RIAA database.

**Figure 1. Trends in Consumer Spending on Music**




**Source:** CRS analysis of Recording Industry Association of America Shipment Database.

**Notes:** Inflation adjustments based on U.S. Bureau of Labor Statistics Consumer Price Index. Figures do not include consumer spending on live concerts. Revenues from digital subscriptions and streaming include wholesale revenues earned by record labels and artists from licensing, rather than retail consumer spending.

# Overview of Legal Framework

Under copyright law, creators of musical works and artists who record musical works have certain legal rights. They typically license those rights to third parties, which, subject to contracts, may exercise the rights on behalf of the composer, songwriter, or performer.

## Reproduction and Distribution Rights

Owners of musical works and owners of certain sound recordings possess, and may authorize others to exploit, several exclusive rights under the Copyright Act, including the following:[14]

- the right to reproduce the work (e.g., make multiple copies of sheet music or digital files) (17 U.S.C. §106(1))
- the right to distribute copies of the work to the public by sale or rental (17 U.S.C. §106(3))

In the context of music publishing, the combination of reproduction and distribution rights is known as a "mechanical right."[15] This term dates back to the 1909 Copyright Act, when Congress required manufacturers of piano rolls and records to pay music publishing companies for the right to mechanically reproduce musical compositions.[16] As a result, music publishers began issuing

[14] 2015 U.S. Copyright Office Report. Additional exclusive rights, a detailed description of which is beyond the scope of this report, include the right to create derivative works (e.g., a new work based on an existing composition) (17 U.S.C. §106(2)) and the right to display the work publicly (e.g., by posting lyrics on a website) (17 U.S.C. §106(5)).

[15] *Petition of Pandora Media, Inc. Related to U.S. v. ASCAP*, 6 F. Supp. 3d 317, 367 (2014).

[16] 1909 Copyright Act, Act of March 19, 1909, Ch. 320, 35 Stat. 1075 (1909 Copyright Act).

mechanical licenses to, and collecting mechanical royalties from, piano-roll and record manufacturers.[17] While the means of reproducing music have gone through numerous changes since, including the production of vinyl records, cassette tapes, compact discs (CDs), and digital copies of songs, the term "mechanical rights" has stuck.[18]

For sound recordings, federal copyright protection of reproduction and distribution rights applies only to recordings originally made permanent, or "fixed,"[19] after February 15, 1972.[20] Works that were fixed prior to this date are protected, if at all, pursuant to a patchwork of state laws and court cases until February 15, 2067,[21] but some music services have voluntarily negotiated agreements to pay royalties for use of sound recordings fixed prior to 1972.[22]

## Public Performance Rights

The Copyright Act also gives owners of musical works and owners of sound recordings the right to "perform" works publicly (17 U.S.C. §106(4) and 17 U.S.C. §106(6), respectively). However, for sound recordings, this right applies only to digital audio transmissions. Examples of digital audio transmission services include webcasting, digital subscription services (the SiriusXM satellite digital radio service and the Music Choice cable network), and music streaming services such as Pandora and Spotify. As with sound recording reproduction and distribution rights, sound recording public performance rights under federal copyright laws are granted only to recordings fixed after February 15, 1972.[23]

## Rights Required

Who pays whom, as well as who can sue whom for copyright infringement, depends in part on the mode of listening to music. Consumers of compact discs purchase the rights to listen to each song on the disc as often as they wish (in a private setting). Rights owners of sound recordings (record labels) pay music publishers for the right to record and distribute the publishers' musical works in a physical format (such as a CD, vinyl record, or digital download).[24] Retail outlets that

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[17] Kevin Zimmerman, "Songwriter 101: Understanding Mechanical Royalties," Broadcast Music, Inc., blog, March 28, 2005, https://www.bmi.com/news/entry/Understanding_MechanicalRoyalties.

[18] Al Kohn and Bob Kohn, *Kohn on Music Licensing*, 4th ed. (New York: Aspen Law & Business, 2010), p. 7. (Kohn).

[19] 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 one of the many terms of art that the Copyright Act employs with meanings that differ from ordinary usage in everyday language.

[20] 17 U.S.C. §301(c).

[21] For an extensive discussion of lawsuits and state laws related to pre-1972 sound recordings, see CRS Report RL33631, *Copyright Licensing in Music Distribution, Reproduction, and Public Performance*, by Brian T. Yeh.

[22] In 2015, RIAA reached agreements on behalf of record labels with Pandora Media, Inc. (which operates the Pandora online music service) and Sirius XM Holdings, Inc. (which operates the SiriusXM satellite service) with respect to fees for the services' uses of pre-1972 sound recordings.

[23] 17 U.S.C. §301(c). State laws apply until February 15, 2067.

[24] Ari Herstand, "Why You Haven't Been Getting Your iTunes Match Mechanical Royalties," *Digital Music News*, October 14, 2014, http://www.digitalmusicnews.com/2014/10/09/havent-getting-itunes-match-mechanical-royalties/. These types of downloads are known as "permanent digital downloads." The record labels utilize their own reproduction and distribution licenses for sound recordings. Chris Cooke, "Trends: Music Licensing—Explained at Last! (A Free Read)," *Complete Music Update*, May 29, 2015, http://www.completemusicupdate.com/article/trends-music-licensing-explained-at-last/.

sell digital files or physical copies of sound recordings pay the distribution subsidiaries of major record labels, which act as wholesalers.[25]

Radio listeners have less control over when and where they listen to a song than they would if they purchased the song outright. The Copyright Act does not require broadcast radio stations to pay public performance royalties to record labels and artists, but it does require them to pay public performance royalties to music publishers and songwriters for notes and lyrics in broadcast music. As described below in "Broadcast Radio Exception," Congress appears to have concluded in 1995 that the promotional value of broadcast radio airplay outweighs any revenue lost by record labels and artists.

Digital services must pay record labels as well as music publishers for public performance rights. Both traditional broadcast radio stations and music streaming services that limit the ability of users to choose which songs they hear next (noninteractive services) make temporary copies of songs in the normal course of transmitting music to listeners.[26] The rights to make these temporary copies, known as "ephemeral recordings," fall under 17 U.S.C. Section 112. (For more on ephemeral recordings, see "Reproduction and Distribution Licenses.")

Users of an "on demand," or "interactive," music streaming service can listen to songs upon request, an experience similar in some ways to playing a CD and in other ways to listening to a radio broadcast. To enable multiple listeners to select songs, the services download digital files to consumers' devices. These digital reproductions are known as "conditional downloads," because consumers' ability to listen to them upon request is conditioned upon remaining subscribers to the interactive services.[27] The services pay royalties to music publishers/songwriters for the right to reproduce and distribute the musical works and royalties to record labels/artists for the right to reproduce and distribute sound recordings.[28]

# How the Industry Works

The music industry comprises three distinct categories of interests: (1) songwriters and music publishers; (2) recording artists and record labels; and (3) the music licensees who obtain the right to reproduce, distribute, or publicly perform music. Some entities may fall into multiple categories.

## Songwriters and Music Publishers

Many songwriters, lyricists, and composers (referred to collectively as "songwriters" in this report) work with music publishers.[29] On behalf of songwriters, music publishers promote songs to record labels and others who use music.[30] They are also responsible for licensing the intellectual property of their clients and ensuring that royalties are collected. Under agreements between a songwriter and a publisher, the publisher may pay an advance to the songwriter against

[25] Passman, pp. 67-68.

[26] Marshall A. Leaffer, "Ch. 8.07 Limitations to the Reproduction and Adaptation Rights: Ephemeral Recordings, §112," in *Understanding Copyright Law*, 9th ed. (New Providence, NJ: Matthew Bender & Company, Inc., 2014), pp. 317-318.

[27] Passman, p. 147.

[28] 17 U.S.C. §106. See also Royalty Exchange, *Mechanical and Performance Royalties: What's the Difference*, https://www.royaltyexchange.com/learn/mechanical-and-performance-royalties-whats-the-difference/; Harry Fox Agency, "Frequently Asked Questions: Digital Definitions," https://www.harryfox.com/find_out/faq.php.

[29] Passman, pp. 235-240.

[30] National Music Publishers Association, "Music Publishing 101," http://nmpa.org/about/.

future royalty collections to help finance the songwriter's compositions. In exchange, the songwriter assigns a portion of the copyright in the compositions he or she writes during the term of the contract. The publisher's role is to monitor, promote, and generate revenue from the use of music in formats that require mechanical licensing rights, including sheet music, compact discs, digital downloads, ringtones, interactive streaming services, and broadcast radio. Publishers often contract with performing rights organizations to license and collect payment for public performances on their behalf. (See "ASCAP and BMI Consent Decree Reviews.")

Songwriters and publishers derive royalty income at each step, but may need to share this income with subpublishers and coauthors. For songwriters who are entering the music industry, the contract terms are generally standardized, with about a 50-50 division of income between the publisher and songwriter. Some songs have multiple songwriters, each with his or her own publisher, complicating the division of money.[31]

Music publishers fall into four general categories:[32]

1. **Major Publishers.** The three major publishing firms account for about 53.2% of U.S. music publishing revenue: (1) Sony/ATV Music Publishing (25.5%), (2) Universal Music Publishing Group (22.4%), and (3) Warner Music Group (5.3%).[33]
2. **Major Affiliates.** These independent publishing companies handle the creative aspects of songwriting management (matching writers with performing artists and record labels and helping them fine-tune their skills), while affiliating with a major publisher to handle the administration of royalties.
3. **Independent Publishers.** These firms administer their own catalogs of music, and are not affiliated with major publishers.
4. **Writer-Publishers.** Some songwriters control their own publishing rights. Examples are well-established songwriters who do not need help marketing their songs to performers and record labels, and songwriters who perform their own works. Writer-publishers may hire individuals, in lieu of companies, to administer their royalties.

## Recording Artists and Record Labels

Record labels are responsible for finding musical talent, recording their work, and promoting the artists and their work. In addition, the parent companies of the three largest record labels (known as "majors") reproduce and distribute physical copies of sound recordings (compact discs and vinyl records) as well as electronic copies (MP3 files).[34] The major labels have large distribution networks. Traditionally, these networks moved physical recordings from manufacturing plants into retail outlets.[35]

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[31] Ed Christman, "How 'Shake It Off' Ruled the Publishing Industry's Fourth Quarter in 2014," *Billboard*, February 20, 2015, http://www.billboard.com/articles/business/6480028/taylor-swift-shake-it-off-publishing-industry-fourth-quarter-2014.

[32] Passman, pp. 239-240.

[33] Anthony Gambardella, *Music Publishing in the US—Getting a Remix: Diversified Digital Media Outlets May Open Up New Revenue Streams*, IBISWorld Industry Report 51223, August 2017, p. 26.

[34] MP3 is an audio-compression format for the internet. It stands for Motion Picture Experts Group Layer-3. Harry Newton, *Newton's Telecom Dictionary*, ed. Steve Schoen, 26th ed. (New York: Flatiron Publishing, 2011), pp. 764-765.

[35] Passman, pp. 67-70.

The distribution role of record labels is changing. Although the decline in consumption of physical recordings has alleviated the need to operate warehouses, the labels perform many functions with respect to selling digital copies of songs. Such functions include adding data to each recording to identify the parties entitled to royalties and keeping track of payments. In addition, they negotiate with the streaming services for the rights to use the sound recordings and monitor the sales and streaming of songs.

Similar to songwriters, recording artists may contract with a record label or retain their copyrights and distribute their own sound recordings. Recording contracts generally require recording artists to transfer their copyrights to the record label for defined periods of time and defined geographic regions.[36] In return, the recording artist receives a share of royalties from sales and licenses of the sound recording. Record companies also finance recordings of music, advance funds to artists to cover expenses, and attempt to guide the artists' careers.[37] Major stars who have proven their earning potential may be able to negotiate full ownership of copyrights to future sound recordings.[38]

The three major record labels earned about 65% of the industry's U.S. revenue: (1) Sony Corporation (14.4%), (2) Universal Music Group (29.4%), and (3) Warner Music Group (21.2%).[39] Each of these labels shares a corporate parent with one of the major music publishers described in "Songwriters and Music Publishers" (Sony Corporation, Vivendi SA, and Access Industries, respectively). The publishing and recording divisions of parent companies may not necessarily both publish and record the same song.

While there are many smaller record labels specializing in genres such as country or jazz, few are truly independent, because they often rely on major record labels for the distribution of sound recordings.[40] For example, Ms. Swift has a recording contract with an independent record label, Big Machine Records, which in turn has a distribution agreement with Universal Music Group.[41]

One recording artist who retains his copyrights and successfully distributes his own music, without signing a contract with the record label, is Chance the Rapper. Generally, instead of selling his music, Chance gives it away for free and earns money from touring and selling

[36] The question of whether or not recordings artists are "employees" of the labels, under the "work for hire" doctrine, and thereby sign over the rights to their music to the labels for 95 years after initial release, instead of 35 years, has been the topic of considerable congressional debate. To the extent that sound recordings fall outside of the "work for hire" framework, recordings artists may terminate the assignment of their copyrights to the record labels. Melville B. Nimmer and David Nimmer, "Ch. 5.3 Works Made for Hire," in *Nimmer on Copyright: A Treatise on the Law of Literary, Musical, and Artistic Property, and the Protection of Ideas*, vol. 1 (New York: Matthew Bender & Company, Inc., 2015). (Nimmer). See also Jon Pareles, "Musicians Take Copyright Issue to Congress," *New York Times*, May 25, 2000, http://www.nytimes.com/2000/05/25/movies/musicians-take-copyright-issue-to-congress.html.

[37] Harold L. Vogel, *Entertainment Industry Economics: A Guide for Financial Analysis*, 9th ed. (New York: Cambridge University Press, 2014), p. 280. (Vogel)

[38] Ed Christman and Andrew Hampp, "What Will Upcoming Contract Negotiations Mean for Taylor Swift, Usher and Justin Timberlake?" *Billboard*, November 21, 2014, http://www.billboard.com/articles/business/6327443/taylor-swift-usher-justin-timberlake-label-contract-negotiations. Among newer acts, agreements with record labels to share revenue from touring, merchandise, and other fees are common.

[39] Anthony Gambardella, *Major Music Label Production in the U.S., Changing Its Tune: The Industry Is Adjusting Its Structure to Combat the Threat of Music Piracy*, IBISWorld Industry Report 51222, August 2017, p. 26.

[40] Vogel, p. 281. See also Passman, pp. 68-69.

[41] Chris Willman, "Big Machine's Scott Borchetta on Taylor Swift, the Fight Against Free and Remaining 'Bold and Disruptive' on 10-Year Anniversary," *Billboard*, October 26, 2015, http://www.billboard.com/articles/business/6738578/scott-borchetta-big-machine-10-year-anniversary-interview.

merchandise.[42] The music streaming service Apple Music reportedly paid him $500,000 in exchange for being the exclusive outlet for his streaming-only album, *Coloring Book*.[43] In May 2016, it became the first streaming-only album to rank among the 10 most popular U.S. albums during a week, as ranked by the trade publication *Billboard*.[44]

### Producers, Mixers, and Sound Engineers

A record producer is responsible for bringing the creative product into tangible form (a sound recording). This entails both creative tasks, such as finding and selecting songs and deciding on arrangements, and administrative tasks, such as booking studios and hiring musicians.[45] In the past, record labels hired producers to produce entire albums. As it became more common for recording artists to work with multiple producers on a single album, the artists, rather than the labels, entered into contracts with the producers. The artist therefore controls the terms of the producer's compensation. Producers with negotiating leverage may demand royalties.[46]

A sound engineer generally runs recording sessions, with oversight from the producer; a mixer works with the output of recording sessions to piece together polished finished products. The roles may overlap. Generally, mixers get one-time payments per track; those who are in high demand, however, may be able to insist on receiving a portion of the artist's royalties, similar to producers.[47]

# How Copyright Works

## Songwriters and Music Publishers

### Reproduction and Distribution Licenses (Mechanical Licenses)

With the 1909 Copyright Act, Congress specifically recognized the exclusive right of the copyright owner to make mechanical reproductions of music.[48] The 1909 Copyright Act applied to musical works published and copyrighted *after* the law went into effect.

A mechanical license is a license that permits (1) the audio-only reproduction of music in copies that may be heard with the aid of "mechanical" devices such as a player piano, a phonograph

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[42] Abigail Hess, "How this Grammy-Winning Artist Made It Big by Giving His Work Away," CNBC, February 13, 2017, http://www.cnbc.com/2017/02/13/grammy-winning-artist-made-it-big-while-giving-his-work-away-for-free.html.

[43] Joe Coscarelli, "Chance the Rapper Says His Apple Music Deal Was Worth $500,000," *New York Times*, March 17, 2017, https://www.nytimes.com/2017/03/17/arts/music/chance-the-rapper-apple-deal.html.

[44] Keith Caulfield, "Chance the Rapper's 'Coloring Book' is First Streaming-Exclusive Album to Chart on the Billboard 200," *Billboard*, May 22, 2016, http://www.billboard.com/articles/columns/chart-beat/7378361/chance-the-rapper-coloring-book-first-streaming-exclusive.

[45] Passman, p. 125.

[46] Chris Richards, "The Real Rap Stars of Atlanta: a New Generation of Producers Working at the Speed of Sound," *Washington Post*, September 12, 2014, https://www.washingtonpost.com/news/style/wp/2014/09/12/the-real-rap-stars-of-atlanta-a-new-generation-of-producers-working-at-the-speed-of-sound/?utm_term=.c1a06983f573.

[47] Passman, p. 137.

[48] Act of March 4, 1909. See also 35 Stat. 1075. U.S. Congress, House Committee on Patents, *To Amend and Consolidate the Acts Respecting Copyright*, committee print, 60th Cong., 2nd sess., February 22, 1909, Rep. 2222, pp. 6-8.

record, a CD player, or a smartphone, among other devices; and (2) the distribution of such copies to the public for private use.[49]

When Congress considered the 1909 Copyright Act, some Members expressed concern about allegations that a large player-piano manufacturer, the Aeolian Company, was seeking to create a monopoly by buying up exclusive rights from music publishers.[50] Aeolian's piano rolls did not work with the player pianos of Aeolian's competitors. Therefore, in order to be able to listen to most popular music, consumers would have to purchase Aeolian player pianos.

To address this concern about a potential monopoly, Congress established the first compulsory license in U.S. copyright law.[51] A music publisher/songwriter may withhold the right to reproduce a musical work altogether. However, once a sound recording (or player-piano roll) is distributed to the public, a publisher/songwriter must allow others to make similar use of it upon payment of a specified royalty.[52] Thus, in 2015, when Ryan Adams recorded a cover version of Taylor Swift's album *1989*, Mr. Adams and his record label Pax-Americana Recording Company did not need to seek her permission. Instead, they paid her the rate set by the government for a compulsory mechanical license.[53]

The 1909 Copyright Act set the royalty rate at $0.02 per "part manufactured."[54] The rate remained in place for nearly 70 years.[55] Technological changes during the first half of the 20th century enabled record manufacturers to extend the amount of music on each side of a record from 5 minutes[56] to more than 20 minutes,[57] the number of songs per record increased, and record labels began paying mechanical royalty rates on a "per song" basis rather than per "part manufactured."[58]

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[49] Kohn, p. 719.

[50] U.S. Congress, House Committee on Patents, *To Amend and Consolidate the Acts Respecting Copyright*, committee print, 60th Cong., 2nd sess., February 22, 1900, Rep. 2222, pp. 7-8. See also Kohn, p. 733.

[51] 2015 U.S. Copyright Office Report, p. 26.

[52] According to the treatise *Nimmer on Copyright*, although Congress did not specifically grant a compulsory license to "make and distribute phonorecords" until 1976, the intent of Section 1(e) of the 1909 Copyright Act was the same. Nimmer, "Ch. 8.4 Limitations on the Reproduction Right—the Mechanical Compulsory License of Non-Dramatic Musical Works."

[53] Josh Dickey, "How Ryan Adams Was Allowed to Legally Cover an Entire Taylor Swift Album," *Mashable*, September 15, 2015, https://mashable.com/2015/09/22/ryan-adams-taylor-swift-album/#BwIIfmDrsPqp. Taylor Swift supported the endeavor. The GQ Editors, "Taylor Swift Gets Interviewed by Ryan Adams," *GQ*, October 15, 2015, https://www.gq.com/story/taylor-swift-ryan-adams-1989-interview.

[54] Copyright Act of 1909, P.L. 60-349, §1(e), 35 Stat. 1075, 1075-76. In a 1906 hearing, a representative of a piano roll manufacturer that competed with Aeolian proposed the rate of $0.02 as "some criterion to go by." U.S. Congress, Committees on Patents, Senate and House of Representatives, Conjointly, *To Amend and Consolidate the Acts Respecting Copyright*, Hearings on S. 6330 and H.R. 19853, 59th Cong., 1st sess., December 10, 1906 (Washington: GPO, 1906), pp. 298, 319.

[55] It changed in 1978, with the effective date of the Copyright Act of 1976. The report from the House Judiciary Committee stated, "While upon initial review it might be assumed that the rate established in 1909 would not be reasonable at the present time, the committee believes that an increase in the mechanical royalty must be justified on the basis of economic conditions and not on the mere passage of 67 years." U.S. Congress, House Committee on the Judiciary, *Copyright Law Revision*, committee print, 94th Cong., 2nd sess., September 3, 1976, p. 111 (1976 House Judiciary Committee report).

[56] Yale University, Irving S. Gilmore Music Library, "The History of 78 RPM Recordings," http://web.library.yale.edu/cataloging/music/historyof78rpms.

[57] Scott Hill, "June 21, 1948: Columbia's Microgroove LP Makes Albums Sound Good," *Wired*, June 20, 2010, https://www.wired.com/2010/06/0621first-lp-released/.

[58] Frederick F. Greenman Jr., and Alvin Deutsch, "The Copyright Royalty Tribunal and the Statutory Mechanical

Congress revisited the mechanical license in the Copyright Act of 1976, codifying the compulsory license as 17 U.S.C. Section 115. Congress specified that the rates would be payable for each record made *and distributed* [emphasis added], rather than each record manufactured.[59] The 1976 Copyright Act defines the term "phonorecord" to refer to audio-only recordings.[60] Since then, Congress has amended the law several times and changed the statutory rate-setting process.

### *Notice of Intention (NOI)*

The 1976 Copyright Act also set forth procedures, codified in regulations promulgated by the head of the U.S. Copyright Office, the Register of Copyrights, for licensees of music to obtain mechanical licenses. The licensee must serve a notice of intention (NOI) to license the music on the copyright owner, or, if the copyright owner's address is unknown, the Copyright Office.[61] The licensee must file the NOI within 30 days of making the new recording or before distributing it. Licensees that cannot locate copyright owners set aside a pool of money owed until they can locate and pay the owners.[62]

The 1976 Copyright Act made it easier for copyright owners to sue in the following two respects:

1. It removed any limitation on liability and provided that a potential licensee who fails to provide the required NOI is ineligible for a compulsory license. If the potential licensee fails to obtain a negotiated license, its making and distribution of records of musical works constitutes infringement under 17 U.S.C. Section 501 and is subject to remedies provided by Sections 502-506.[63]
2. It removed the requirement that copyright holders file a "notice of use" in the Copyright Office in order to recover against an unauthorized record manufacturer.[64] Instead, a copyright holder's failure to identify itself to the Copyright Office precludes the holder only from receiving royalties under a compulsory license.[65] Thus, under current law, there may be no public record of the fact that the copyright owner made and distributed a copyrighted work and thereby triggered the NOI requirements.[66]

In contrast to the performance rights licenses, reproduction and distribution licenses are not issued on a blanket basis.[67] As discussed in "Developments and Issues," NOIs and the Copyright

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Royalty: History and Prospect," *Cardozo Arts & Entertainment Law Journal*, vol. 1, no. 1 (1982), pp. 1, 12, n. 50.

[59] P.L. 94-553 (17 U.S.C. §115(c)(2)). According to the report of the House Judiciary Committee, " ... it is unjustified to require a compulsory licensee to pay licenses fees on records which merely go into inventory." 1976 House Judiciary Committee report, p. 110.

[60] Copyright Act of 1976, P.L. 94-553, §101. 17 U.S.C. §101.

[61] 17 U.S.C. §115(b)(1).

[62] Stuart Dredge, "Spotify Songwriter Lawsuits: What, Why and What Happens Next?" Music Ally blog, January 25, 2016, https://www.bmi.com/news/entry/Understanding_MechanicalRoyalties.

[63] U.S. Congress, Senate Committee on the Judiciary, *Copyright Law Revision*, report to accompany S. 22, 94th Cong., 1st sess., November 20, 1975, S. Rept. 94-473 (Washington: GPO, 1975), p. 90.

[64] Ibid. Nimmer, "Ch. 8.04(G)(3) The Effect of Failure of Notification by Both the Copyright Owner and Putative Licensee."

[65] 17 U.S.C. §115(c)(1).

[66] Nimmer, "Ch. 8.04(G)(2)(a) Notification by the Copyright Holder," n. 142.

[67] Richard D. Rose, "Connecting the Dots: Navigating the Laws and Licensing Requirements of the Internet Music Revolution," *IDEA—the Journal of Law and Technology*, vol. 42, no. 3 (2002), pp. 313, 337.

Office's present database of musical works have led to controversy between rights holders and licensees.

### *Copyright Royalty Board and Ratesetting*

In their 1982 article reviewing the history of the mechanical royalty, Frederick F. Greenman Jr. and Alvin Deutsch state that the idea of adjusting the statutory mechanical royalty rate periodically stemmed from a suggestion by a representative of the National Music Publishers Association (NMPA) in a 1967 hearing, who added that such adjustments should reflect the "accepted standards of statutory ratemaking."[68] In testimony in 1975, then Register of Copyrights Barbara Ringer suggested that the complexity of administering the proposed compulsory licenses in addition to the mechanical license could be simplified by establishing a separate royalty tribunal, which would use standards established by Congress to set royalty rates.[69]

Congress created such a tribunal, consisting of five commissioners appointed by the President, in the 1976 Copyright Act.[70] It also set forth in 17 U.S.C. Section 801(b)(1) four policy objectives for the tribunal to consider when determining the rates for mechanical licenses. These objectives include

1. maximizing the availability of public works to the public,
2. affording copyright owners a fair return on their creative works and copyright users a fair income under existing economic conditions,
3. reflecting the relative contributions of the copyright owners and users in making products available to the public, and
4. minimizing any disruptive impact on the structure of the industries involved and on generally prevailing industry practices.[71]

After replacing the tribunal with an arbitration panel (known as the Copyright Arbitration Royalty Panel) in 1993,[72] Congress established the Copyright Royalty Board (CRB) in 2004.[73] The CRB, composed of three administrative judges appointed by the Librarian of Congress, sets mechanical and certain other licensing rates (described in "Noninteractive Services") every five years.[74] While copyright owners and users are free to negotiate voluntary licenses that depart from the statutory rates and terms, the CRB-set rate effectively acts as a ceiling for what an owner may charge.[75]

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[68] Frederick F. Greenman Jr. and Alvin Deutsch, "The Copyright Royalty Tribunal and the Statutory Mechanical Royalty: History and Prospect," *Cardozo Entertainment and Law Journal*, vol. 1, no. 1 (1982), pp. 1, 21-22. (Greenman and Deutsch). See also Testimony of Executive Secretary of National Music Publishers Association Leonard Feist, in U.S. Congress, Senate Committee on the Judiciary, Subcommittee on Patents, Trademarks, and Copyrights, *Copyright Law Revision*, hearing on S. 597, 90th Cong., 1st sess., H.Rept. 2512, Part 2, March 20, 1967, (Washington, DC: GPO, 1967), pp. 373, 377.

[69] Testimony of Register of Copyrights Barbara Ringer, in U.S. Congress, House Committee on the Judiciary, Subcommittee on Courts, Civil Liberties, and the Administration of Justice, *Copyright Law Revision*, hearing on H.R. 2223, 94th Cong., 1st sess., H. Rept. 521-33, Part 3, December 4, 1975 (Washington, DC: GPO, 1976), pp. 1901, 1914.

[70] P.L. 94-553, §§801-810.

[71] 17 U.S.C. §801(b)(1).

[72] Copyright Royalty Tribunal Reform Act of 1993, P.L. 103-198.

[73] 17 U.S.C. §§801-805; Copyright Royalty and Distribution Reform Act of 2004, P.L. 108-419.

[74] 17 U.S.C. §§801(b)(1) and 804(b)(4).

[75] According to the CRB, "virtually no one uses section 115 to license reproductions of musical works, yet the parties in this proceeding are willing to expend considerable time and expense to litigate its royalty rates and terms. The

### *Digital Copies and Streaming Services*

In 1995, Congress passed the Digital Performance Right in Sound Recordings Act (DPRA).[76] Among other provisions, this act amended 17 U.S.C. Section 115 to expressly cover the reproduction and distribution of musical works by digital transmission (digital phonorecord deliveries, or DPDs).[77] Congress directed that rates and terms for DPDs should distinguish between "(i) digital phonorecord deliveries where the reproduction or distribution of a phonorecord is incidental to the transmission which constitutes the digital phonorecord delivery, and (ii) digital phonorecord deliveries in general."[78] This distinction prompted an extensive debate about what constitutes an "incidental DPD." For several years, the Copyright Office deferred moving forward on a rulemaking, urging that Congress resolve the matter. In July 2008, the Copyright Office proposed new rules, determining that "[while] it seems unlikely that Congress will resolve these issues in the foreseeable future ... the Office believes resolution is crucial in order for the music industry to survive in the 21st Century."[79]

### *CRB Rates*

In September 2008, after nearly seven years of administrative hearings and litigation, groups representing music publishers, the recording industry, songwriters, and music streaming services reached a landmark agreement regarding the applicability of mechanical licenses to streaming.[80] Music publishers had feared that as consumers shifted from purchasing music to streaming music on-demand, the revenues they received from mechanical royalties would decline.[81] Based on the agreement, in the form of draft regulations to the CRB, music streaming services would pay publishers a percentage of their revenues for interactive streams and limited downloads. In addition, pursuant to the agreement, noninteractive, audio-only streaming services (e.g., Pandora) would not need to obtain mechanical licenses. The CRB adopted a modified version of this agreement in 2009, to apply through 2012.[82]

In 2012, groups representing music publishers, the recording industry, songwriters, and online music services reached a new agreement, subject to formal approval by the CRB, setting mechanical royalty rates and standards for five additional categories of music streaming

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Judges are, therefore, seemingly tasked with setting rates and terms for 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." Copyright Royalty Board, Library of Congress, "Mechanical and Digital Phonorecord Delivery Rate Determination Proceeding," 74 *Federal Register* 4510, 4513, January, 26, 2009.

[76] P.L. 104-39.

[77] U.S. Congress, Senate Committee on the Judiciary, *Digital Performance Right in Sound Recordings Act of 1995*, committee print, 104th Cong., 1st sess., August 4, 1995, S.Rept. 104-128 (Washington: GPO, 1995), p. 10.

[78] 17 U.S.C. §115(c)(3)(D).

[79] 2008 NPRM, p. 40806.

[80] National Music Publishers' Association, "Major Music Industry Groups Announce Breakthrough Agreement," press release, September 23, 2008, https://secure.harryfox.com/public/userfiles/file/PressReleases/RateAgreement9-23-08.pdf.

[81] Kohn, pp. 754-755.

[82] Copyright Royalty Board, Library of Congress, "Mechanical and Digital Phonorecord Delivery Rate Determination Proceeding; Review of Copyright Royalty Judges Determination; Final Rule and Notice," 74 *Federal Register* 4510, January 26, 2009. Copyright Royalty Board, Library of Congress, "Mechanical and Digital Phonorecord Delivery Rate Determination Proceeding; Final Rule," 74 *Federal Register* 6832, February 11, 2009.

services.[83] The CRB subsequently adopted the terms of the agreement to cover rates from 2013 through 2017.[84]

In January 2018, the CRB issued its initial determination of mechanical royalty rates and terms for the 2018-2022 period.[85] For physical phonorecord deliveries (e.g., compact discs and vinyl records) and permanent digital downloads, licensees pay a flat rate (e.g., either 9.1 cents per song or 1.75 cents per minute of playing time or fraction thereof, whichever amount is larger).[86]

For interactive streaming, the rates are based on a set of formulas, taking into account the music service's revenues or total costs of licensing content (including the cost of licensing sound recording). Using the formulas, the services calculate the pool of money available for distribution to publishers for mechanical royalty payments. The amount of money each publisher receives for each song is based on another set of formulas. The rate formulas also set minimum per-subscriber payments, depending on the category of interactive music service. During free trial periods (e.g., during a three-month trial subscription to Apple Music), the mechanical royalty rate is zero.

## Musical Work Public Performance Royalties

Depending on who collects public performance royalties on behalf of publishers and songwriters, the rates are either subject to oversight by the U.S. District Court for the Southern District of New York or are based on marketplace negotiations between the publishers and licensees.

Congress granted songwriters the exclusive right to publicly perform their works in 1897.[87] Thus, in order to legally publicly perform songwriters' works, establishments that featured orchestras and bands, operas, concerts, and musical comedies needed to obtain permission from songwriters and/or publishers.[88] While this right represented a way for copyright owners to profit from their musical works, the sheer number and fleeting nature of public performances made it impossible for copyright owners to individually negotiate with each user for every use or to detect every case of infringement.[89]

To address the logistical issue of how to license and collect payment for public performances in a wide range of settings, several composers formed the American Society of Composers, Authors

[83] National Music Publishers' Association, "Major Music Industry Groups Reach Historic Agreement on Royalty Rates and Standards," press release, April 11, 2012, http://nmpa.org/press_release/major-music-industry-groups-reach-historic-agreement-on-royalty-rates-and-standards/.

[84] Copyright Royalty Board, Library of Congress, "Adjustment of Determination of Compulsory License Rates for Mechanical and Digital Phonorecords," 78 *Federal Register* 67938, November 13, 2013.

[85] Copyright Royalty Board, Library of Congress, *Determination of Royalty Rates and Terms for Making and Distributing Phonorecords (Phonorecords III)*, March 19, 2018, https://www.crb.gov/. The determination is subject to statutory review by the Register of Copyrights. In addition, the judges have under advisement motions for rehearing and clarification of the initial determination.

[86] For ringtones, the rate is $0.24.

[87] Act of March 3, 1897, Ch. 392, 29 Stat. 694. Congress declined to grant exclusive performance rights when it first amended copyright law to expressly protect musical works in 1831, because it considered performances as promotional vehicles to spur sales of sheet music. 2015 U.S. Copyright Office Report, p. 17.

[88] Marcus Cohn, "Music, Radio Broadcasters and the Sherman Act," *Georgetown Law Journal*, vol. 29, no. 4 (January 1941), pp. 407, 410. (Cohn). The author wrote a major portion of the article as a thesis while earning his LLM at Harvard Law School. After working at the Federal Communications Commission in the 1940s, he subsequently became a founder of the law firm Cohn and Marks. Cohn & Marks LLP, http://www.cohnmarks.com/broadcast.htm.

[89] *Broadcast Music, Inc., et al. v. Columbia Broadcasting System, Inc., et al.*, 441 U.S. 1, 4-5 (1979); see also *Alden-Rochelle, Inc., et al. v. American Society of Composers, Authors and Publishers et al.*, F. Supp. 888, 891 (S.D.N.Y. 1948).

and Publishers (ASCAP) in 1914.[90] ASCAP is known as a performance rights organization (PRO). Songwriters and publishers assign PROs the public performance rights secured by copyright law; the PROs in turn issue public performance licenses on behalf of songwriters and publishers.[91] Most commonly, licensees obtain a blanket license, which allows the licensee to publicly perform any of the musical works in a PRO's catalog for a flat fee or a percentage of total revenues. After charging an administrative fee, PROs split the public performance royalties they collect among the publishers and songwriters.

In 1930, an immigrant musician founded a competing PRO, SESAC (originally called the Society of European Stage Authors and Composers), to help European publishers and writers collect royalties from U.S. licensees.[92] As broadcast radio grew more popular in the United States, SESAC expanded its representation to include U.S. composers as well.

Growth in radio, as well as declining sales in sheet music and other traditional revenue sources for publishers, also prompted action from ASCAP.[93] In 1932, ASCAP negotiated a public performance license with radio broadcasters that, for the first time, established rates based on a percentage of each station's advertising revenues.[94] To strengthen their bargaining power vis-à-vis ASCAP, broadcasters in 1939 founded and financed a third PRO, Broadcast Music, Inc. (BMI), with the goal of attracting new composers as members and securing copyrights of new songs. In addition, BMI successfully convinced publishers previously affiliated with ASCAP to switch.[95] (A fourth PRO, Global Music Rights [GMR], was established in 2013.)

ASCAP and BMI originally acquired the exclusive right to negotiate on behalf of their members (music publishers and songwriters) and forbade members from entering into direct licensing agreements.[96] Both offered music services only blanket licenses covering all songs in their respective catalogs. When the five-year licensing agreement between ASCAP and radio stations affiliated with the CBS and NBC radio networks expired in December 1940, three-quarters of the 800 radio stations then in existence adopted a policy prohibiting the broadcast of songs by composers affiliated with ASCAP due to disagreement over royalty rates.[97]

### *DOJ Consent Decrees*

The dispute between the broadcast stations and the PROs led the U.S. Department of Justice (DOJ) to investigate whether the PROs were violating antitrust laws.[98] To avert an antitrust

[90] Cohn, pp. 410-411; Library of Congress, "Great War & Jazz Age (1914-1928)," http://www.americaslibrary.gov/jb/jazz/jb_jazz_ascap_1.html.

[91] 2015 Copyright Office Report, p. 33.

[92] "Billboard Spotlight: SESAC," *Billboard*, November 6, 1976, p. C-20.

[93] Cohn, p. 414.

[94] Kohn, pp. 14-15.

[95] Cohn, pp. 420, 421, n. 79.

[96] The following is a summary of the 2015 Copyright Office Report, pp. 35-42.

[97] Cohn, p. 407; "Radio Puts Ban on 1,500,000 Songs Tonight," *New York Herald Tribune*, December 31, 1941.

[98] "U.S. Will Sue ASCAP, BMI, N.B.C., C.B.S.," *New York Herald Tribune*, December 27, 1940. The Assistant Attorney General claimed that through BMI, the broadcast radio networks had adopted policies similar to those of ASCAP, with the goal of eliminating competition and creating a monopoly over the supply of pubic performance rights to musical compositions.

lawsuit threatened by DOJ, BMI agreed to enter a consent decree in 1941.[99] After DOJ filed an antitrust lawsuit against ASCAP, ASCAP also agreed to enter a consent decree in 1941.[100]

Although the ASCAP and BMI consent decrees are not identical, they share many of the same features. Among those features are requirements that the PROs may acquire only nonexclusive rights to license members' public performance rights; must grant a license to any user that applies on terms that do not discriminate against similarly situated licensees; and must accept any songwriter or music publisher that applies to be a member, as long as the writer or publisher meets certain minimum standards. ASCAP and BMI are also required to offer alternative licenses to the blanket license. Prospective licensees that are unable to agree to a royalty rate with ASCAP or BMI may seek a determination of a reasonable license fee from one of two federal district court judges in the Southern District of New York.

In contrast to the mechanical right, the public performance of musical works is not bound by compulsory licensing under the Copyright Act. While the rates charged by ASCAP and BMI are subject to oversight by the federal district court judges, pursuant to their respective consent decrees, the rates charged by SESAC and GMR are based on marketplace negotiations.

When approving of rates charged by ASCAP and BMI, the federal district court must determine that the PROs have demonstrated that the rates are "reasonable."[101] According to the U.S. Court of Appeals for the Second Circuit, the federal district court must also consider that ASCAP and BMI exercise "disproportionate power over the market for music rights."[102]

Current law, 17 U.S.C. Section 114(i), prohibits the judges from considering rates paid by digital services to record labels and artists for public performances of sound recordings when setting or adjusting public performance rates payable to music publishers and songwriters. This provision was included when Congress created a public performance right for sound recordings transmitted by digital services with the 1995 passage of the DPRA. (See "Sound Recording Public Performance Royalties.")[103] According to a report of the House Judiciary Committee, Congress sought to "dispel the fear that license fees for sound recordings may adversely affect music performance royalties."[104] *Billboard* magazine described the concern among writers and publishers as the "pie theory": once digital services began to pay a public performance licensing fee for sound recordings, they might claim that they have less money available to pay for public performances of musical works.[105]

Since entering into these consent decrees, DOJ has periodically reviewed their operation and effectiveness. The ASCAP consent decree was last amended in 2001, and the BMI consent decree was last amended in 1994. As described in "ASCAP and BMI Consent Decree Reviews," DOJ completed a review of the consent decrees in 2016. In 2017, the Second Circuit Court of Appeals upheld BMI's challenge to DOJ's interpretation of the consent decrees.

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[99] "BMI Averts Suit by Consent Decree," *New York Times*, January 28, 1941, p. 22.

[100] "ASCAP Accepts Consent Decree, Clearing Path for Radio Peace," *New York Herald Tribune*, February 20, 1941, pp. 1, 10.

[101] ASCAP Consent Decree §IX; BMI Consent Decree §XIV.

[102] BMI v. DMX, 683 F. 3d 32, 45 (2d Cir. 2012).

[103] The DPRA used the §801(b)(1) standard exclusively to set sound recording public performance royalty rates.

[104] U.S. Congress, House Committee on the Judiciary, *Digital Performance Right in Sound Recordings Act of 1995*, report to accompany H.R. 1506, 104th Cong., 1st sess., October 11, 1995, H.Rept. 104-274 (Washington: GPO, 1995), p. 24.

[105] Peter L. Felcher, "Performance Right Protects Songwriters," *Billboard*, August 12, 1995, p. 6.

# Recording Artists and Record Labels

## Reproduction and Distribution Licenses

Congress first created copyright laws that specifically applied to sound recordings with enactment of the 1971 Sound Recording Act, P.L. 92-140. The prevalence of audiotapes and audiotape recorders in the 1960s made it easier for the public to create and sell unauthorized duplications of sound recordings.[106] According to the House Judiciary Committee report, the best solution for combating the trend was to amend federal copyright laws.[107]

The 1971 Sound Recording Act applied to sound recordings fixed on or after February 15, 1972. The following year, the U.S. Supreme Court held that neither federal copyright law nor the Constitution preempted California's record piracy law, as it applied to pre-1972 sound recordings.[108] Subsequently, several states passed their own antipiracy laws. In 1975, in a hearing leading up to passage of the 1976 Copyright Act, the U.S. Department of Justice recommended that federal copyright laws exclude pre-1972 sound recordings to preserve the antipiracy laws then in effect.[109] The House Judiciary Committee also noted that absent such exclusion, many works would have automatically come into the "public domain." A work of authorship is in the "public domain" if it is no longer under copyright protection and therefore may be used freely without the permission of the former copyright owner.

The 1976 Copyright Revision Act preempted state laws that provided rights equivalent to copyright, but exempted the pre-1972 works from federal protection.[110] States may continue to protect pre-1972 sound recordings until 2067, at which time all state protection is to be preempted by federal law and pre-1972 sound recordings are to enter the public domain if they have not previously done so in accordance with state law.[111]

Recognizing that noninteractive digital services may need to make ephemeral server reproductions of sound recordings, in 1998 Congress established a related license under Section 112 of the Copyright Act specifically to authorize the creation of these copies. The rules governing licenses for temporary reproductions of sound recordings are somewhat analogous to those governing incidental reproduction and distribution of musical works described in Section 115(c)(3)(C)(i).[112] The rates and terms of the Section 112 license are established by the CRB. Through SoundExchange, described in "Sound Recording Public Performance Royalties,"

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[106] Maria A. Pallante, Register of Copyrights and Director of the U.:S. Copyright Office, *Federal Copyright Protection for Pre-1972 Sound Recordings*, U.S. Copyright Office, December 2011, https://www.copyright.gov/docs/sound/ (2011 U.S. Copyright Office Report), pp. 10-11.

[107] U.S. Congress, House Committee on the Judiciary, *Prohibiting Piracy of Sound Recordings*, report to accompany S. 646, 92nd Cong., 1st sess., September 22, 1971, H. Rept. 92-487 (Washington: GPO, 1971), pp. 9-10.

[108] *Goldstein v. California*, 412 U.S. 546 (1973).

[109] U.S. Congress, House Committee on the Judiciary, *Copyright Law Revision*, committee print, prepared by Government Publishing Office, 94th Cong., 2nd sess., September 3, 1976, 94-1476 (Washington: GPO, 1976), p. 133.

[110] The federal laws took effect in 1978. 1976 Copyright Act, §301 (17 U.S.C. §301).

[111] See, e.g., Cal. Civ. Code §980(a)(2) (The "author of ... a sound recording initially fixed prior to February 15, 1972, has an exclusive ownership therein until February 15, 2047.... "); Colo. Rev. Stat. §18-4-601(1.5) ("[N]o common law copyright shall exist for a period longer than fifty-six years after an original copyright accrues to an owner.").

[112] 17 U.S.C. §112(e)(1); U.S. Congress, House Committee on the Judiciary, *Digital Millennium Copyright Act*, committee print, 106th Cong., 2nd sess., October 8, 1998, H.Rept. 105-796, pp. 89-90.

copyright owners of sound recordings (usually the record labels) receive Section 112 fees. Recording artists who do not own the copyrights, however, do not.[113]

## Sound Recording Public Performance Royalties

### *Noninteractive Services*

Until the 1990s, the Copyright Act did not afford public performance rights to record labels and recording artists for their sound recordings. Record labels and artists primarily earned income from retail sales of physical products such as CDs. With the inception and public use of the internet in the early 1990s, the recording industry once again became concerned that existing copyright law was insufficient to protect the industry from music piracy.[114] Two amendments to the Copyright Act, the Digital Performance Right in Sound Recordings Act (DPRA) in 1995 and the Digital Millennium Copyright Act (DMCA) in 1998, addressed this concern.[115]

In the DPRA, Congress granted record labels and recording artists an exclusive public performance right for their sound recordings, but limited this right to certain digital audio services. The DPRA also created a compulsory license that compelled copyright owners to license sound recordings for certain subscription services (e.g., Music Choice's music channels available to cable television subscribers).[116] According to *Billboard* magazine, music publishers and writers were apprehensive that if record companies had the ability to withhold licenses of sound recordings from multiple outlets, they could effectively thwart the ability of publishers and writers to earn their own public performance royalties.[117] The provision thus represented a compromise between trade groups representing music publishers and record labels.[118]

Within two years after the DPRA's enactment, the Recording Industry Association of America and nonsubscription, advertising-supported, noninteractive streaming service providers debated whether or not (1) the compulsory license applied to those services, and (2) whether the services were obligated to pay public performance royalties for sound recordings.[119] After RIAA and a group representing digital music services, Digital Music Association, reached a compromise, Congress adopted the DMCA.

The DMCA expanded the statutory licensing provisions in Section 114 to cover noninteractive online music services.[120] It also set up the following bifurcated system of rate-setting standards for the CRB:

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[113] Copyright Office, Library of Congress, "Review of Copyright Royalty Judges Determination, Notice," 73 *Federal Register* 9143, 9146, February 19, 2008. This is in contrast to 17 U.S.C. §114(g), which specifically allocates 45% of performance royalties to recording artists, even when they are not the copyright holders.

[114] *Arista Records, LLC v. Launch Media, Inc.*, 578 F.3d 148, 153 (2d Cir. 2009), cert. denied, 559 U.S. 929 (2010). ("Launch Media").

[115] Nimmer, "Ch. 8.21 Digital Performance."

[116] P.L. 104-39, §3(2).

[117] Peter Felcher, "Public Performance Right Protects Songwriters," *Billboard*, August 12, 1995, p. 6.

[118] Bill Holland, "Agreement Paves Way for Senate Perf. Right Bill," *Billboard*, July 8, 1995, p. 1.

[119] Brett Atwood, "Webcasters Face New Royalty," *Billboard*, May 17, 1997, p. 8.

[120] P.L. 105-304. Sound recording public performance royalty rates for interactive services such as Spotify and Apple Music remain subject to marketplace negotiations.

- Services that *existed as of July 31, 1998*, prior to the enactment of the DMCA (SiriusXM satellite digital radio service as well as the Music Choice and Muzak subscription services), remained subject to the Section 801(b)(1) standard.
- Webcasters and other noninteractive music streaming services (including both subscription and advertising-supported music streaming services) that entered the music marketplace *after July 31, 1998*, are subject to rates and terms "that most clearly represent the rates and terms that would have been negotiated in the marketplace between a willing buyer and a willing seller."[121]

One key difference between the two rate-setting standards is the Section 801(b)(1) standard's inclusion of the policy goal of "minimizing any disruptive impact on the structure of the industries involved and on generally prevailing industry practices." According to a 2010 report from the Government Accountability Office, this standard led to lower copyright royalty rates in one proceeding, but the overall effect is generally difficult to predict.[122] The conference report stated the purpose of applying the Section 801(b)(1) rate-setting standard services in existence prior to July 31, 1998, was to prevent disruption of the services' existing operations.[123]

### *Interactive Services*

The DPRA enabled owners of the rights to sound recordings to negotiate directly with interactive music streaming services for public performance rights at marketplace-determined rates. The term "interactive service" covers only services that enable an individual to arrange for the transmission or retransmission of a specific recording.

The Senate Judiciary Committee in 1995 explained that

> [C]ertain types of subscription and interactive audio services might adversely affect sales of sound recordings and erode copyright owners' ability to control and be paid for use of their work.... Of all of the new forms of digital transmission services, interactive services are the most likely to have a significant impact on traditional record sales, and therefore pose the greatest threat to the livelihoods of those whose income depends on revenues derived from traditional record sales.[124]

### *Broadcast Radio Exception*

Congress does not require broadcast radio stations to obtain public performance licenses from owners of sound recordings. The Senate Judiciary Committee explained in 1995 that it was attempting to strike a balance among many interested parties. Specifically, the committee stated that

> the sale of many sound recordings and the careers of many performers have benefitted considerably from airplay and other promotional activities provided by ... free over-the-air broadcast ... [and] the radio industry has grown and prospered with the availability and use

[121] 17 U.S.C. §114(f)(2)(B).

[122] U.S. Government Accountability Office, *In a Previous Rate-Setting Proceeding for Some Sound Recordings, the Standard Addressing the Disruptive Impact of the Industries Contributed to a Lower Copyright Royalty Rate, but the Effect of Its Proposed Removal is Unclear*, 10-828R, August 4, 2010, https://www.gao.gov/products/GAO-10-828R.

[123] U.S. Congress, House Committee on the Judiciary, *Digital Millennium Copyright Act*, Conference report to accompany H.R. 2281, 105th Cong., 2nd sess., October 8, 1998, H.Rept. 105-796 (Washington: GPO, 1998), pp. 80-81.

[124] U.S. Congress, Senate Committee on the Judiciary, *Digital Performance Right in Sound Recordings Act of 1995*, committee print, 104th Cong., 1st sess., August 4, 1995, S.Rept. 104-128, pp. 14-16, 18.

> of prerecorded music. This legislation should do nothing to change or jeopardize [these industries'] mutually beneficial relationship.[125]

The Senate Judiciary Committee further distinguished broadcast radio from other services by stating that "free over-the-air broadcasts ... provide a mix of entertainment and non-entertainment programming and other public interest activities to local communities to fulfill a condition of the broadcasters' licenses."[126]

### *Copyright Royalty Board Rate Proceedings*

The CRB sets statutory rates through rate determination proceedings.[127] Participants generally include copyright users, copyright holders, and trade or other groups representing their respective interests.[128] The proceedings include an initial three-month period during which parties may engage in voluntary negotiations. In the absence of an agreement during that period, participants submit written statements, conduct discovery, and attempt again to reach a negotiated settlement.

At any time during the rate-setting proceeding, some or all participants may reach agreements regarding what they consider to be appropriate statutory rates. They then submit the proposed rates to the CRB, which in turn publishes the proposed rates to allow potentially affected parties to comment. The CRB may adopt and codify the proposed rates but also has the option to "decline to adopt the agreement as a basis for statutory terms and rates for participants that are not parties to the agreement."[129]

If the parties do not reach an agreement, the CRB generally hears live testimony at an evidentiary hearing, and subsequently issues a determination published in the *Federal Register*. Participants who disagree with the outcome can request a rehearing, which the CRB may choose to grant or deny. In addition, participants may challenge CRB determinations through an appeal filed with the U.S. Court of Appeals for the District of Columbia Circuit.

In 2000, RIAA established SoundExchange as a designated common agent for the record labels to receive and distribute royalties. In 2003, RIAA spun off SoundExchange as an independent entity. Prior to distributing royalty payments, SoundExchange deducts costs incurred in carrying out its responsibilities.

### *Webcaster Settlement Acts*

In general, using the "willing buyer-willing seller" standard, the CRB has adopted "per-performance" rates for public performances of sound recordings by online music services. In contrast, using the Section 801(b)(1) standard, the CRB has adopted percentage-of-revenue rates for public performances of sound recordings by preexisting subscription services (Music Choice and Muzak) and satellite digital audio services (SiriusXM).[130]

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[125] U.S. Congress, Senate Committee on the Judiciary, *Digital Performance Right in Sound Recordings Act of 1995*, committee print, 104th Cong., 1st sess., August 4, 1995, S.Rept. 104-128, pp. 14-15.

[126] Ibid., p. 15.

[127] 17 U.S.C. §803.

[128] John Villasenor, *Digital Music Royalties: The Case for a Level Playing Field*, Center for Technology Innovation at Brookings, Washington, DC, August 2012, pp. 5-6, https://www.brookings.edu/research/digital-music-broadcast-royalties-the-case-for-a-level-playing-field/. (Villasenor). The following discussion about rate proceedings is based in part on excerpts from this publication.

[129] 17 U.S.C. §801(b)(7)(A)(ii).

[130] "A key reason for rejecting the percentage-of-revenue approach was the [Copyright Arbitration Royalty Panel]'s

Following complaints by some music streaming services and webcasters that the per-performance rates ordered by the CRB were excessive, Congress has repeatedly passed legislation (collectively, the "Webcaster Settlement Acts") giving SoundExchange temporary authority to negotiate alternative royalty schemes binding on all copyright owners in lieu of the CRB-set rates.[131]

The agreements enabled the music streaming services to pay royalties based on a percentage of their revenue in lieu of a "per-performance" rate. The most recent agreements reached pursuant to this temporary negotiating authority expired on December 31, 2015.[132]

### *CRB Rates*

In April 2015, the CRB began the hearing phase of its proceeding to set the royalty rates paid by noninteractive music streaming services for the years 2016-2020.[133] In 17 U.S.C. Section 114(f)(5)(C), the CRB was barred from taking into consideration the provisions of agreements negotiated pursuant to the Webcaster Settlement Acts. During the CRB's rate proceeding, questions arose about the proper interpretation of this provision. Pandora Media, Inc., Clear Channel (now known as iHeartMedia, Inc.), and SoundExchange disagreed over whether the direct agreements, which were based in part on the Pureplay settlement, could be introduced as evidence in the CRB rate proceeding. SoundExchange argued that Congress enacted a "very broad rule of exclusion" to prevent the terms of a Webcaster Settlement Act agreement from being used against a settling party in subsequent proceedings. Pandora Media and Clear Channel contended that SoundExchange's interpretation would require disregarding every benchmark agreement proposed by parties, as all agreements are to some degree affected by the prevailing rates and terms negotiated pursuant to the 2009 Webcaster Settlement Act agreement.[134] The CRB determined that these questions were novel material questions of substantive law and, as required by the Copyright Act, referred them to the Register of Copyrights for resolution.[135] In September

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determination that a per performance fee is directly tied to the right being licensed. The [Copyright Arbitration Royalty Panel] also found that it was difficult to establish the proper percentage because business models varied widely in the industry, such that some services made extensive music offerings while others made minimal use of the sound recordings. The final reason and perhaps the most critical one for rejecting this model was the fact that many webcasters generate little revenue under their current business models. As the Panel noted, copyright owners should not be 'forced to allow extensive use of their property with little or no compensation.'" Copyright Office, Library of Congress, "Determination of Reasonable Rates, Final Rule and Order," 67 *Federal Register* 45240, 45249, July 8, 2002. Prior to Congress's establishment of the CRB, the Librarian of Congress, based on recommendations from the Copyright Office and the Copyright Arbitration Royalty Panel, made the final determination of royalty rates for compulsory licenses, subject to appeal in the federal courts.

[131] P.L. 110-435. Previously, Congress had passed the Small Webcaster Settlement Act of 2002, P.L. 107-321; the Webcaster Settlement Act (WSA) of 2008, P.L. 110-435; and the Webcaster Settlement Act of 2009, P.L. 111-36. The 2009 WSA extended the window of time during which parties were authorized to reach settlements under the 2008 WSA.

[132] 17 U.S.C. §114(f)(5).

[133] David Oxenford, "Copyright Royalty Board Begins Hearings on Webcasting Royalty Rates for 2016-2020—When Will We See a Decision?" *Broadcast Law Blog*, April 29, 2015, http://www.broadcastlawblog.com/2015/04/articles/copyright-royalty-board-begins-hearings-on-webcasting-royalty-rates-for-201-2020-when-will-we-see-a-decision/.

[134] Maria A. Pallante, Register of the Copyrights and Director of the U.S. Copyright Office, "Determination of Royalty Rates and Terms for Ephemeral Recordings and Webcasting Digital Performance of Sound Recordings (Web IV)," U.S. Copyright Office, Library of Congress, Memorandum Opinion on Novel Material Questions of Law, September 18, 2015, pp. 5, 8, http://www.loc.gov/crb/web-iv/memorandum-opinion-%20on-novel-material-questions-of-law.pdf. (2015 Copyright Office Web IV Memo).

[135] 17 U.S.C. §802(f)(1)(b). Copyright Royalty Board, "Current Developments," https://www.crb.gov/rate/.

2015, the Register ruled that the CRB may consider directly negotiated licenses that incorporate or otherwise reflect provisions in a Webcaster Settlement Act agreement.[136]

On December 16, 2015, the CRB issued its decision regarding rates for the 2016-2020 period.[137] For 2016, streaming services (including those of broadcast radio stations as well as Pandora) must pay $0.17 per 100 streams on nonsubscription services.[138] In a break from its past practice of setting rate increases in advance, the CRB tied the annual rate increases from 2017 through 2020 to the Consumer Price Index. Rather than setting forth ephemeral recording fees separately, the CRB includes them with the Section 114 royalties. For the 2016-2020 period, the CRB set ephemeral royalties fees at 5% of the total Section 114 royalties paid by streaming services.

On December 14, 2017, the CRB issued its rate decision for preexisting digital subscription services and satellite digital audio radio services covering the 2018-2022 period.[139] **Table 1** describes how public performance rates vary, depending on the type of music service and when it began operating, and the rate-setting standard used by CRB.

### *Allocation of Royalty Distributions*

The Copyright Act specifies how royalties collected under Section 114 are to be distributed: 50% goes to the copyright owner of the sound recording, typically a record label; 45% goes to the featured recording artist or artists; 2.5% goes to an agent representing nonfeatured musicians; and 2.5% goes to an agent representing nonfeatured vocalists.[140]

The act does not, however, include record producers in the statutorily defined split of royalties for public performances of sound recordings by noninteractive digital services. In order for producers to be compensated for these public performances via SoundExchange, the artist must provide a letter of direction to SoundExchange, directing SoundExchange to send a portion of the artist's royalties to the producer instead. (For information about proposed legislation addressing how producers get compensated for their work, see "Bills Introduced in the 115th Congress.")

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[136] 2015 Copyright Office Web IV Memo, p. 10.

[137] Copyright Royalty Board, *Web IV Determination, Exhibit A*, December 16, 2015, http://www.loc.gov/crb/web-iv/web-iv-terms.pdf. The CRB subsequently amended the regulatory language codifying the terms of the decision. Copyright Royalty Board, *Web IV Determination, Exhibit A*, December 24, 2015, http://www.loc.gov/crb/web-iv/amended-web-iv-terms.pdf. See also 37 C.F.R. §380.10.

[138] Although the rate is more than the $0.11 per 100 streams on its free service sought by Pandora, it is less than the $0.25 per 100 streams or 55% of Pandora's revenue, whichever was greater, sought by SoundExchange. In 2015, pursuant to the agreement it had reached with SoundExchange, Pandora paid the greater of $0.14 per 100 streams on free service or 25% of its revenue.

[139] Copyright Royalty Board, Library of Congress, *Rates and Terms for Transmissions of Sound Recordings by Preexisting Subscription Services and Preexisting Satellite Digital Audio Radio Services for the Making of Ephemeral Reproductions to Facilitate Those Transmissions, Appendix A*, December 14, 2017, https://www.crb.gov/rate/.

[140] 17 U.S.C. §114(g)(2). See also U.S. Congress, House Committee on the Judiciary, *Digital Performance Right in Sound Recordings Act of 1995*, committee print, 104th Cong., 1st sess., October 11, 1995, 104-274, pp. 23-24. "In the absence of the work made for hire doctrine of the copyright law, record companies ... are joint authors of a sound recording. However, the work made for hire doctrine often applies to sound recordings. Under this doctrine, upon creation of the sound recording, record companies ... are the sole rightsholders.... The Committee intends the language of section 114(g) to ensure that a fair share of digital sound recordings goes to performers under the terms of their contracts."

**Table 1. Royalty Rates Payable to Record Labels for Public Performance Rights**

Applies to Selected Digital Noninteractive Music Services

| Music Service Type | % or Flat Fees | Monthly Fees | Notes |
|---|---|---|---|
| Preexisting subscription service as of July 31, 1998 (Music Choice and Muzak) | 7.5% of gross revenues | Not applicable | Rate set by CRB based on 17 U.S.C. §801(b)(1) standard.<br>Rate effective as of January 1, 2018. |
| Preexisting satellite digital audio radio service as of July 31, 1998 (SiriusXM) | 15.5% of gross revenues | Not applicable | Rate set by CRB based on 17 U.S.C. §801(b)(1) standard.<br>Rate effective as of January 1, 2018. |
| Services providing audio-only digital music programming via residential televisions using cable or satellite television providers in operation after 1998 | Annual minimum fee = $100,000 | Services operating with stand-alone contracts: $0.019 per subscriber<br>Services operating with bundled contracts with cable or satellite operator: $0.0317 per subscriber | Rate set by CRB based on willing seller/willing buyer standard.<br>Rate effective as of January 1, 2018. |
| Commercial webcasters (including broadcasters simulcasting an AM or FM transmission and/or "internet-only" webcasters) | Minimum fee of $500 per channel or station, with maximum aggregate minimum fee of $50,000<br>Ephemeral reproduction rates = 5% of total fee payable | $0.0018 per performance for nonsubscription services; $0.0023 per performance for subscription services | Rate set by CRB based on willing seller/willing buyer standard.<br>CRB bases royalty fees increases from 2017 through 2020 on the Consumer price Index.<br>Rate effective as of January 1, 2018. |

**Sources:** 37 C.F.R. §380.10; Copyright Royalty Board, "Current Developments," https://www.crb.gov/; SoundExchange, "Service Provider: 2018 Rates," https://www.soundexchange.com/service-provider/rates/.

# Developments and Issues

## "Interactive" Versus "Noninteractive" Music Services

The distinction between interactive and noninteractive services has been a matter of debate.[141] For the purposes of defining the process by which owners of sound recordings can set rates for public performance rights, 17 U.S.C. Section 114 provides that an interactive service is one that enables a member of the public to receive either "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."[142] As discussed in "Reproduction and Distribution Licenses (Mechanical Licenses)," 17 U.S.C. Section 115 does not distinguish between interactive and noninteractive services for the purposes of specifying when a

[141] 2015 Copyright Office Report, pp. 48-49.

[142] 17 U.S.C. §114(j)(7).

digital service must obtain mechanical rights from music publishers. The CRB has adopted these distinctions in setting or approving rates for mechanical licenses.[143]

In 2009, the U.S. Court of Appeals for the Second Circuit ruled that a music streaming service that relies on user feedback to play a personalized selection of songs that are within a particular genre or similar to a particular song or artist the user selects is not an "interactive" service.[144] Noting that Congress's original intent in making the distinction was to protect sound recording copyright holders from cannibalization of their record sales, the court's decision rested on the following analysis:

> If a user has sufficient control over an interactive service such that she can predict the songs she will hear, much as she would if she owned the music herself and could play each song at will, she will have no need to purchase the music she wishes to hear. Therefore, part and parcel of the concern about a diminution in record sales is the concern that an interactive service provides a degree of predictability—based on choices made by the user—that approximates the predictability the music listener seeks when purchasing music.[145]

The court noted that the LAUNCHcast online radio service offered by the defendant, Launch Media, Inc., which at the time was owned by Yahoo!, Inc., created unique playlists for each of its users.[146] Nevertheless, the court reasoned that uniquely created playlists do not ensure predictability. Therefore, the court determined, LAUNCHcast was a noninteractive service.[147]

In addition, in order to be eligible for compulsory licensing, noninteractive services (other than broadcast radio, SiriusXM, Music Choice, and Muzak) must limit the features they offer consumers, pursuant to the Copyright Act. For example, these services are prohibited from announcing in advance when they will play a specific song, album, or artist. Another example is the "sound recording performance complement," which limits the number of tracks from a single album or by a particular artist that a service may play during a three-hour period.[148]

The *Launch Media* decision affirmed that personalized music streaming services such as Pandora and iHeartRadio could obtain statutory licenses as noninteractive services for their public performances of sound recordings.[149] The CRB-established rates do not currently distinguish between such customized services and other services that simply transmit undifferentiated, radio-style programming over the internet.

Spotify's services, on the other hand, allow users access to specific albums, songs, and artists on demand. For no charge, consumers can have limited access to songs if they use the site on their personal computers and see or hear an advertisement every few songs. In exchange for paying a

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[143] The Copyright Office has stated, however, that it "would not dispute a finding [from the CRB] that non-interactive and interactive streams have different economic value, or even that a rate of zero might be appropriate for [digital phonorecord deliveries] made in the course of non-interactive streams." Library of Congress, Copyright Royalty Board, "Adjustment of Determination of Compulsory License Rates for Mechanical and Digital Phonorecords," *78 Federal Register* 63798, 63941, n.14, November 13, 2013.

[144] *Arista Records, LLC v. Launch Media, Inc.*, 578 F.3d 148, 153 (2d Cir. 2009), cert. denied, 559 U.S. 929 (2010).

[145] Ibid., p. 164.

[146] LAUNCHcast subsequently ceased operations.

[147] Ibid., pp. 161-162, 164. "LAUNCHcast listeners do not even enjoy the limited predictability that once graced the AM airwaves on weekends in America when 'special requests' represented love-struck adolescents' attempts to communicate their feelings to 'that special friend.'"

[148] 17 U.S.C. §114(d)(2)(B)(i), (d)(2)(C)(i), (j)(13). For a more detailed discussion, see Nimmer, "Ch. 5.03 Works Made for Hire."

[149] 2015 Copyright Office Report, p. 164.

monthly fee of about $10, users can listen to songs without advertisement interruption, use Spotify on mobile devices as well as personal computers, or listen to music offline.

## Designated Agents, Collectives, and Competition

In 1995, Congress first provided antitrust exemptions to statutory licensees and to copyright owners of sound recordings, such as record labels, so that they could designate "common agents" to negotiate collectively with SiriusXM and preexisting subscription services over royalty rates for public performance rights on a nonexclusive basis.[150] However, according to the House Judiciary Committee report, "The exemption is only available if any common agents designated are nonexclusive, thus preserving the ability to negotiate directly with and seek to secure a statutory license from a copyright owner directly. This should prevent copyright owners from using any common agent to demand supracompetitive rates from operators."[151]

With respect to licensing for interactive services (i.e., nonstatutory licensing), the DPRA does not create an antitrust exemption for the purpose of negotiating rates. However, copyright owners and entities wanting to perform sound recordings "may use common agents only to perform a clearinghouse function and not for rate-setting."[152]

In 1998, when Congress enacted the DMCA, it added Section 112 to address ephemeral server reproductions by webcasters and noninteractive online services; it also provided an antitrust exemption for copyright owners and licensees to designated common agents to negotiate, pay, and receive royalty payments for ephemeral recordings.[153] In contrast to Section 114(e)(1), however, Section 112(e)(2) does not specify that the designation must be on a nonexclusive basis. The House Judiciary Committee report does not explain the omission; it states that "this subsection closely follows the language of existing antitrust exemptions in copyright law."[154]

When Congress created the CRB in 2004 with the enactment of the Copyright Royalty and Distribution Reform Act of 2004, P.L. 108-419, it included the following provisions regarding the obligation of licensees to make payments: "whenever royalties ... are paid to a person other than the Copyright Office, *the entity designated by the Copyright Royalty Judges* [emphasis added] to which such royalties are paid by the copyright user ... shall ... return any excess amounts previously paid."[155]

This marked the first time that Congress specified that a government entity could designate an entity (i.e., agent) to receive royalties. The House Judiciary Committee report noted that this provision ensured that parties subject to statutory licensing, but who may claim that they have insufficient funds to pay royalties decided by the CRB, continue to make payments while they appeal the CRB's decision, until the final rates have been established (either by the CRB via a rehearing or the U.S. Court of Appeals for the D.C. Circuit via judicial review).[156]

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[150] 17 U.S.C. §114(e)(1). See also DPRA, Section 3(e).

[151] U.S. Congress, House Committee on the Judiciary, *Digital Performance Rights in Sound Recordings Act of 1995*, report to accompany H.R. 1506, 104th Cong., 1st sess., October 11, 1995, H.Rept. 104-274 (Washington: GPO, 1995), pp. 22-23.

[152] Ibid., p. 23.

[153] 17 U.S.C. §112(e); DMCA, §405(3)(e).

[154] U.S. Congress, House Committee on the Judiciary, *Digital Millennium Copyright Act*, conference report to accompany H.R. 2281, 105th Cong., 2nd sess., October 8, 1998, H.Rept. 107-796 (Washington: GPO, 1998), p. 91.

[155] 117 U.S.C. §§803(c)(E)(iii); 803(d)(2)(C)(ii).

[156] U.S. Congress, House Committee on the Judiciary, *Copyright Royalty and Distribution Act of 2003*, report to

## SoundExchange as Sole Collective: Efficiency vs. Competition

In 2006, the CRB, on an interim basis, designated SoundExchange as the sole "collective,"[157] which it defined as a "collection and distribution organization that is designated under the statutory license by ... determination of the Copyright Royalty Judges under section 114(f)(1)(B) or section 114(f)(1)C)."[158]

Subsequently, Royalty Logic, a for-profit subsidiary of Music Reports, Inc. requested that the CRB recognize it as a collective as well.[159] Royalty Logic claimed that in order to compete with SoundExchange, it was necessary for the CRB to recognize it as a "designated agent."[160] It also contended that competition between it and SoundExchange would benefit sound recording copyright owners.

The CRB countered that pursuant to Sections 112(e) and 114(e) of the Copyright Act, it is copyright owners and performers who are designated agents, and therefore Royalty Logic need not be formally recognized by the CRB for it to have any involvement in the royalty distribution process.[161] Moreover, the CRB contended that "While Royalty Logic's argument that multiple Collectives promote competition on pricing may make some sense in the direct licensing context where rates and terms are set by private agreement, it does not make sense where the rates and terms are governed by statutory licenses."[162]

In sum, the CRB found that consistent with the "willing buyer/willing seller" royalty rate-setting standard, the selection of a single collective represented the "most economically and administratively efficient system for collecting royalties under the blanket license framework created by the statutory licenses."[163]

In 2009, the U.S. Court of Appeals for the D.C. Circuit concurred with the CRB's decision.[164] In that case, Royalty Logic argued that Congress's use of the word "nonexclusive" in 17 U.S.C. §114(e)(1) meant that the CRB could not give a single entity the exclusive ability to receive payments.[165] In addition, Royalty Logic argued that by giving the CRB the authority to set "terms of royalty payments" in 17 U.S.C. §114(f)(2)(A), Congress intended the CRB only to determine how and when payments are made.

The court countered that the phrase "the entity designated by the Copyright Royalty Judges to which such payments are made" in 17 U.S.C. §§803(c)(2)(E)(iii), 803(d)(2)(C)(iii) presupposes that in setting rates and terms for the statutory license, the CRB will "designate" a "single" entity

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accompany H.R. 1417, 108th Cong., January 30, 2004, H.Rept. 108-408 (Washington: GPO, 2004), p. 35.

[157] Copyright Royalty Board, Library of Congress, "Procedural Regulations for the Copyright Royalty Board," 71 *Federal Register* 59010, 59013, October 6, 2006.

[158] Ibid., p. 59015. The interim regulations governing music services' recordkeeping were effective from October 6, 2006, after the newly formed CRB completed the proceeding, until May 1, 2007, when its royalty rates for public performances of sound recordings went into effect.

[159] Copyright Royalty Board, Library of Congress, "Digital Performance Right in Sound Recordings and Ephemeral Recordings," 72 *Federal Register* 24084, 24102.

[160] Ibid., p. 24103.

[161] Ibid., p. 24103.

[162] Ibid., p. 24104.

[163] Ibid.

[164] *Intercollegiate Broad. Sys. v. Copyright Royalty Bd.*, 574 F. 3rd 748 (D.C. Cir. 2009).

[165] Ibid., pp. 770-771.

to receive royalty payments.[166] The court concluded that Royalty Logic's reading of the word "terms" in Section 114(f)(2)(A) was too narrow, and that by selecting SoundExchange as the sole collective, the CRB fulfilled Congress's expectation that the CRB would designated a single entity to receive royalty payments from licensees.

The CRB also designated SoundExchange as the sole collective for the period 2011-2014.[167] In making its determination, the CRB stated that no party had requested the designation of multiple collectives, and SoundExchange was the only party requesting to be a collective. CRB also noted that previously it had determined that a sole collective was the most economically and administratively efficient system for collecting royalties under the statutory licenses' blanket licensing framework.

In 2015, SoundExchange reached agreements with public radio stations and college radio stations covering the rates paid to webcast sound recordings. The CRB approved the agreements and made them binding on all copyright owners and performers, including those who are not SoundExchange members.[168] Once again, the CRB designated SoundExchange as the sole collective for purposes of collecting, monitoring, managing, and distributing sound recording royalties for the rate period January 1, 2016-December 31, 2020.[169] The CRB stated that no one had objected to SoundExchange continuing its role as the collective, and that over its years of service SoundExchange had developed an administrative and technical knowledge base.

### *Harry Fox Agency and Music Reports, Inc.*

Congress also created an antitrust exemption for owners and licensees of musical works to designate common agents to negotiate, collect, and distribute mechanical licenses for DPDs.[170] In 2004, Congress extended the provision to negotiations and agreements related to traditional mechanical licenses.[171] Congress also added the provision that owners and licenses must designate the common agents on a nonexclusive basis as a technical amendment.[172]

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[166] Ibid., p. 771.

[167] Copyright Royalty Board, Library of Congress, "Determination of Royalty Rates for Digital Performance Right in Sound Recording and Ephemeral Recordings," 76 *Federal Register* 13026, 13042-13043, March 9, 2011 (2011 CRB Decision); Copyright Royalty Board, Library of Congress, "Determination of Royalty Rates for Digital Performance Right in Sound Recording and Ephemeral Recordings," 79 *Federal Register* 23102, 23124, April 25, 2014 (following a remand from the U.S. Court of Appeals for the District of Columbia).

[168] Copyright Royalty Board, Library of Congress, "Digital Performance Right in Sound Recordings and Ephemeral Recordings," 80 *Federal Register* 59588, October 2, 2015. Library of Congress, Copyright Royalty Board, "Digital Performance Right in Sound Recordings and Ephemeral Recordings," 80 *Federal Register* 58201, September 28, 2015. 17 U.S.C. §801(b)(7)(A) codifies the CRB's authority to do so.

[169] Copyright Royalty Board, Library of Congress, "Digital Performance Right in Sound Recordings and Ephemeral Recordings," 80 *Federal Register* 26316, 26400, May 2, 2016. 37 C.F.R. §380.2(a).

[170] DPRA, §4(3) (B).

[171] U.S. Congress, House Committee on the Judiciary, *Copyright Royalty and Distribution Reform Act of 2003*, report to accompany H.R. 1417, 108th Cong., 2nd sess., January 30, 2004, H.Rept. 108-408 (Washington: GPO, 2004), pp. 42-43.

[172] DPRA, §5(d)(1)(B); 17 U.S.C. §115(c)(3)(B).

In the United States, music publishers collect mechanical royalties from recorded music companies and streaming services via third-party administrators. One major administrator is the Harry Fox Agency. After charging an administrative fee, this agency distributes the mechanical royalties to the publishers, which in turn distribute them to songwriters. In September 2015, the performing rights organization Society of European Stage Authors and Composers (SESAC) acquired the Harry Fox Agency from the National Music Publishers Association trade organization.[173] (For a description of SESAC and other performing rights organizations, see "Musical Work Public Performance Royalties.") Music publishers may also issue and administer mechanical licenses themselves.[174]

In its mechanical licensing rate proceedings, the CRB has not specified an agent (or collective) for the purpose of administering mechanical licenses.[175] In 2006, Royalty Logic, Inc. raised the issue of competition among agents for the licensing of musical works and/or the collection and distribution of mechanical royalties.[176] Royalty Logic and copyright owners stipulated that Royalty Logic would not participate unless the issue regarding competition among collectives was raised by other parties in that rate proceeding; it was not raised.

## Equity Interests in Music Services

Noncash considerations may be involved in determining the price interactive services pay for access to music. For example, the major labels acquired a reported combined 18% equity stake in Spotify in a transaction that reportedly hinged on their willingness to grant Spotify rights to use their sound recordings on its service.[177] When Spotify began trading its shares on the New York Stock Exchange in April 2018, Sony sold a portion of its stake, and announced that it would share a portion of its proceeds with artists and the independent labels whose music Sony distributes.[178]

As described in "Reproduction and Distribution Licenses (Mechanical Licenses)," the rates that interactive services pay music publishers are tied to the rates that the services pay record labels for performance rights, which are negotiated in the free market. This means that if a record label's deal includes an equity stake in an interactive digital music service provider or a guaranteed allotment of advertising revenues, those items are assigned a value when estimating the total cost, thereby enabling music publishers to participate in such deals when negotiating for mechanical royalties.[179] In contrast, copyright law *prohibits* rates paid for public performances of musical

[173] The purchase enabled SESAC to become the first organization to handle both performing and mechanical licenses, giving it an advantage over rivals BMI and ASCAP. Nate Rau, "SESAC Shows the Way for Music Licensing, Music Row Land Use," *The Tennessean*, August 14, 2015, http://www.tennessean.com/story/entertainment/music/2015/08/14/sesac-shows-way-music-licensing-music-row-land-use/31742119/.

[174] Passman, p. 251.

[175] Copyright Royalty Board, Library of Congress, *Determination of Royalty Rates and Terms for Making and Distributing Phonorecords (Phonorecords III)*, March 19, 2018, https://www.crb.gov/.

[176] Copyright Royalty Board, Library of Congress, "Mechanical and Digital Phonorecord Delivery Rate Determination Proceeding," 74 *Federal Register* 4510, n. 3, January 26, 2009.

[177] Helienne Lindvall, "Behind the Music: The Real Reason Why the Major Labels Love Spotify," *The Guardian*, August 17, 2009, http://www.theguardian.com/music/musicblog/2009/aug/17/major-labels-spotify.

[178] Ben Sisario, "As Spotify Goes Public, Sony Cashes In," *New York Times*, April 4, 2018, https://www.nytimes.com/2018/04/04/business/media/as-spotify-goes-public-sony-cashes-in.html.

[179] In the settlement reached with record labels and digital services for mechanical license rates, music publishers reportedly negotiated a provision that enabled them to participate in equity stakes that record labels have with the digital services. Ed Christman, "Copyright Royalty Board To Set Mechanical Royalty Rates For Digital Music Services," *Billboard*, April 10, 2012, http://www.billboard.com/biz/articles/news/publishing/1098005/copyright-royalty-board-to-set-mechanical-royalty-rates-for.

works from being tied to rates paid for public performances of sound recordings (see "DOJ Consent Decrees").

Organizations representing songwriters and recording artists have expressed concern that payments received by music publishers and record labels from digital music services as part of direct deals are not being shared fairly, potentially resulting in lower payments than they might receive under statutory licensing schemes.[180]

## ASCAP and BMI Consent Decree Reviews

Together, ASCAP and BMI, which operate on a not-for-profit basis, represent about 90% of songs available for licensing in the United States.[181] SESAC appears to have about a 5% share of songs, but it may be higher. Global Music Rights handles performance rights licensing for a limited number of songwriters.[182] Music publishers may affiliate with multiple PROs; songwriters, however, may choose only one.[183]

Publishers have alleged that they have not received a fair share of the performance royalty revenues from streaming services, claiming that the ASCAP and BMI consent decrees (discussed in "DOJ Consent Decrees") inhibited their ability to negotiate market rates.[184] Beginning in 2011, publishers began pressuring ASCAP and BMI to allow them to withdraw their digital rights from their blanket licenses so that they could negotiate deals directly with digital services.[185]

### *Attempts to Partially Withdraw Public Performance Rights*

In 2011 and 2013, respectively, ASCAP and BMI each responded by amending their rules to allow music publishers the right to license their public performance rights for "new media" uses—that is, both interactive and noninteractive digital streaming services, so they could negotiate with digital streaming services at market prices in lieu of rates subject to oversight by the federal district court. Pandora Media, Inc., however, challenged the publishers' partial withdrawal of rights before both the ASCAP and BMI rate courts in the Southern District of New York. In each case—though applying slightly differing logic—the courts ruled that under the terms of the consent decrees, music publishers could not withdraw selected rights; rather, a publisher's song catalog must be either "all in" or "all out" of the PRO.[186]

After the rulings, the major music publishers and PROs asked the Department of Justice to join them in proposing modifications to the consent decrees.[187] Specifically, both ASCAP and BMI

[180] 2015 Copyright Office Report, pp. 128-130.

[181] Ibid., p. 33.

[182] Ben Sisario, "New Venture Seeks Higher Royalties for Songwriters," *New York Times*, October 28, 2014, http://www.nytimes.com/2014/10/30/business/media/new-venture-seeks-higher-royalties-for-songwriters.html.

[183] SESAC, "FAQs: Becoming a SESAC Affiliate," http://www.sesac.com/WritersPublishers/faq.aspx.

[184] Billboard Staff, "Universal Music Publishing Plots Exit from ASCAP, BMI," *Billboard*, February 1, 2013.

[185] Ed Christman, "Pandora vs. BMI's Court Battle Reveals Long-Term Strategies, Licensing Arms," *Billboard*, February 17, 2015, http://www.billboard.com/articles/business/6473027/pandora-vs-bmg-strategies-licensing-aims.

[186] *Pandora Media, Inc. related to United States of America, v. American Society of Composers, Authors, and Publishers*, 12 Civ. 8035 (S.D.N.Y. 2013), *Pandora Media, Inc. related to United States of America, v. American Society of Composers, Authors, and Publishers*, No. 41 Civ. 1395 (S.D.N.Y. 2013); *BMI v. Pandora Media, Inc*., No. 13 Civ. 4037 (LLS) (S.D.N.Y. 2013).

[187] Ed Christman, "U.S. Department of Justice to Review ASCAP and BMI Consent Decrees," *Billboard*, June 4, 2014, https://www.billboard.com/biz/articles/news/legal-and-management/6106492/us-dept-of-justice-to-review-ascap-and-bmi-consent.

sought to modify the consent decrees to permit partial grants of rights, to replace the current rate-setting process with expedited arbitration, and to allow ASCAP and BMI to provide bundled licenses that include multiple rights (e.g., mechanical as well as public performance of musical works). DOJ announced in June 2014 that it would evaluate the consent decrees.

As part of that review, it solicited comments in 2015 about "100% licensing" versus "fractional licensing."[188] Industry practice has been that when a song has several writers, each writer's publisher licenses only a portion of a song, a practice known as "fractional licensing." If, as DOJ proposed, the consent decrees required 100% licensing, any writer or rights holder of a musical work could issue a performance license without the consent of the other rights holders.[189]

### *DOJ Interpretation of Consent Decrees and Lawsuits*

On August 4, 2016, DOJ completed its review and announced that, pursuant to its interpretation, the consent decrees required the two PROs to issue 100% licenses to all of the songs in their catalogs.[190] DOJ argued that this requirement promotes competition. It declined to propose modifications to the consent decrees, but called on Congress to reconsider how copyright law is applied to the music industry. It noted that the consent decrees are "limited in scope," and contended that "a more comprehensive legislative solution may be possible and preferable."[191]

The same day that DOJ issued its interpretation, BMI filed a lawsuit in the Southern District of New York, where Judge Louis Stanton is on permanent assignment overseeing the BMI consent decree.[192] In September 2017, Judge Stanton ruled that contrary to the DOJ's interpretation, BMI's consent decree permits fractional licensing. The U.S. Court of Appeals for the Second Circuit upheld Judge Stanton's decision in December 2017.[193]

## NOIs, Mechanical Licensing Databases, and Lawsuits

As discussed in "Notice of Intention (NOI)," a licensee must serve an NOI to the copyright holder before or within 30 days after making, and before distributing, any phonorecords, and pay the applicable royalties.[194] If the Copyright Office's records do not identify the copyright owner and include an address at which the NOI can be served, then filing the NOI with the Copyright Office is sufficient.

On April 12, 2016, the Copyright Office announced new procedures to allow licensees to file Notices of Intention to reproduce and distribute musical works under Section 115 (NOIs) with the

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[188] U.S. Department of Justice, "ASCAP and BMI Consent Decree Review Requests for Comments 2015: Antitrust Division Requests Comments on PRO Licensing of Jointly Owned Works," http://www.justice.gov/atr/ASCAP-BMI-comments-2015. Specifically, the DOJ asked, "Assuming the Consent Decrees currently require ASCAP and BMI to offer full-work licenses, should the Consent Decrees be modified ... ?"

[189] Chris Cooke, "Sony/ATV Chief Writes to Nashville Songwriters About Tricky Development in Consent Decree Reform," *Complete Music Update*, September 9, 2015, http://www.completemusicupdate.com/article/sonyatv-chief-writes-to-nashville-songwriters-about-a-tricky-development-in-consent-decree-reform/.

[190] U.S. Department of Justice, *Statement of the Department of Justice on the Closing of the Antitrust Division's Review of the ASCAP and BMI Consent Decrees*, August 4, 2016, https://www.justice.gov/atr/antitrust-consent-decree-review-ascap-and-bmi-2015.

[191] Ibid., p. 22.

[192] Paula Parisi, "BMI Battles Department of Justice Over Song Licensing," *Variety*, August 17, 2017, http://variety.com/2017/music/news/bmi-department-of-justice-brief-song-licensing-1202531666/.

[193] *United States v. Broad. Music, Inc.*, No. 16-3830-cv, 2017 U.S. App. LEXIS 25545 (2d Cir. December 19, 2017).

[194] 17 U.S.C. §115(b).

Copyright Office in bulk electronic form.[195] By allowing licensees to file an NOI for up to 100 songs at once, the procedural change significantly reduced the filing costs (from $2 per song to $0.10 per song, in addition to an upfront fee of $75 for each NOI).

One week after the Copyright Office changed its NOI filing procedures, licensees, including Spotify, Amazon, and Google, began to file NOIs in bulk.[196] In several NOIs, the licensees affirm that "with respect to the nondramatic musical work named in such row of this Notice of Intention, the registration records or other public records of the Copyright Office have been searched and found not to identify the name and address of the copyright owners of such work."

According to the trade publication *Billboard*, digital music service companies contacted the U.S. Copyright Office in late 2015, arguing that digitizing the compulsory licensing process would ensure that songwriters and publishers receive proper compensation.[197] Prior to that point, several songwriters and publishers filed lawsuits charging Spotify and other online music services with illegally streaming their copyrighted musical works.[198] Some of these lawsuits have been settled; others remain pending.[199]

# Bills Introduced in the 115th Congress

## Music Modernization Act (H.R. 5447)

In April 2018, the House of Representatives voted 415-0 to pass H.R. 5447, the Music Modernization Act, as amended. This bill encompasses provisions of several other bills introduced in the House, including H.R. 4706, H.R. 1836, H.R. 3301, and H.R. 881.

The bill would create a new nonprofit "mechanical licensing collective," funded by online music services, that would offer and administer broad blanket mechanical licenses for online music services. It also would change the process of suing for infringement of mechanical licenses, the standards used to set royalty rates for musical works used by preexisting subscription services (Music Choice and Muzak) and satellite digital audio services (SiriusXM), and the process by which judges in the federal district court for the Southern District of New York are assigned to oversee cases related to the ASCAP and BMI consent decrees. The bill would extend limited federal copyright protection to sound recordings made prior to February 15, 1972, and would create procedures by which producers, mixers, and sound engineers can receive royalty payments for sound recordings, subject to contracts with the featured artists of those recordings.

[195] U.S. Copyright Office, "Section 115 NOIs May Now Be Filed With Office In Bulk Form," *NewsNet Issue 618*, April 13, 2016, https://www.copyright.gov/newsnet/2016/618.html.

[196] U.S. Copyright Office, "Section 115 NOIs Filed With the Copyright Office," https://www.copyright.gov/licensing/115/noi-submissions.html.

[197] Ed Christman, "Say You Want a Revolution? U.S. Copyright Office Modernizes Key Part of Digital Licensing," *Billboard*, June 24, 2016, http://www.billboard.com/articles/news/7416438/us-copyright-office-music-reports-compulsory-licensing-digital-notice-of-intent.

[198] Ethan Smith, "Songwriters Lose Out on Royalties," *Wall Street Journal*, October 14, 2015, https://www.wsj.com/articles/songwriters-lose-out-on-royalties-1444864895.

[199] Ed Christman, "Spotify Hit With $150 Million Class Action Over Unpaid Royalties," *Billboard*, December 29, 2015, http://www.billboard.com/biz/articles/news/legal-and-management/6828096/spotify-hit-with-150-million-class-action-over-unpaid; Eriq Gardner, "Spotify Hit with $1.6B Copyright Lawsuit Over Tom Petty, Weezer, Neil Young Songs," *The Hollywood Reporter*, January 2, 2018, https://www.hollywoodreporter.com/thr-esq/spotify-hit-16-billion-copyright-lawsuit-tom-petty-weezer-neil-young-songs-1070960.

## Mechanical Licensing Collective (MLC) and Digital Licensee Coordinator

Pursuant to the bill, online music services could pay for a broad blanket mechanical license.

Within nine months after enactment, the Register of Copyrights would be required to designate (1) a new nonprofit entity created by copyright owners as a "Mechanical Licensing Collective" (MLC) and (2) a new nonprofit entity representing digital music services as a "digital licensee coordinator," subject to certain criteria. Every five years, the Register would be required to solicit the views of copyright owners and licensees concerning whether the existing designations should continue.

The MLC would have a 17-member board of directors (including 14 voting members and 3 nonvoting members). Online music services would fund the MLC by paying an assessment established by the CRB. CRB would review assessment rates every five years.

Among the authorized duties of the MLC would be the following: maintaining a musical works database; offering and administering blanket licenses, including the collection of usage reports from online music services; engaging in efforts to identify musical works embodied in particular sound recordings and locating the copyright owners of those works; administering a process by which copyright owners can claim ownership of musical works; and initiating and participating in proceedings before the Copyright Office and the CRB. The MLC would be authorized to provide administrative services with respect to voluntary licenses that include the right of public performance in musical works. The MLC would be responsible for collecting and distributing royalties from online music services to rights holders. Songwriters would receive at least 50% of all royalties for unmatched works.

The MLC would be prohibited from negotiating royalty rates or royalty terms and conditions on behalf of any party, and would not be permitted to grant licenses for the right of public performances of musical works. In addition, the MLC would be prohibited from engaging in government lobbying activities.

Among the authorized duties of the digital licensing coordinator would be the following: establishing a governance structure, membership criteria, and any dues to be paid by its members; engaging in efforts to enforce notice and payment obligations with respect to the administrative assessment; initiating and participating in proceedings before the CRB to establish the administrative assessment rates; initiate and participate in proceedings before the Copyright Office with respect to the coordinators' activities; maintain records of its activities. The digital licensing collective would be prohibited from engaging in any government lobbying activities.

Failure to provide monthly usage reports or royalties would put an online music service in default of the blanket license. An online music service could seek review in federal district court, if the service believed the collective improperly terminated a blanket license. A person could bring a claim in a federal district court for an issue not adequately resolved by the MLC's board of directors or an MLC committee.

## Mechanical Licensing Infringement Lawsuits

Copyright owners of musical works would be prohibited from suing an online music service that obtains and complies with the terms of a valid blanket license for infringing their reproduction and distribution rights.

If a musical works copyright owner filed a lawsuit filed after January 1, 2018, against an online music service that has allegedly engaged in unauthorized reproduction or distribution of a musical work *prior to* the blanket "license availability date" (defined by the legislation as the next January

1 following the expiration of the two-year period beginning on the enactment date of the Music Modernization Act), the copyright owner could recover only royalties owed under the new system. The copyright owner could not recover damages or other remedies that are normally available for infringement, provided that the online music service could show that it has complied with certain specified requirements, such as the use of good-faith, commercially reasonable efforts to identify and locate the copyright owner of musical work(s).

### Rate-Setting Standards

The CRB would be required to use the "willing buyer/willing seller" standard rather than the Section 801(b)(1) factors in setting royalty rates for the reproduction and distribution of musical works and the public performance of sound recordings by preexisting subscription services (Music Choice and Muzak) and satellite digital audio services (SiriusXM).

Judges in the Southern District of New York, when setting rates for public performances of musical works by online services, satellite digital audio services, and other digital subscription services (e.g., MusicChoice and Muzak), would be allowed to consider rates for public performances of sound recordings. The inclusion of sound recording public performance rates would not apply, however, to the setting of rates for public performances of music works by broadcast radio stations.

### Assignment of Judges to ASCAP and BMI Cases

The current system of assigning judges in the Southern District of New York to oversee cases related to the ASCAP and BMI consent decrees would change. Currently, one judge is permanently assigned to all ASCAP cases, and another is assigned to all BMI cases. In lieu of the current system, the district court would use a random process to determine which judge shall hear rate setting cases. However, the original judge(s) who oversees the interpretation of consent decree(s) would not be permitted to oversee any rate proceedings. According to the House Judiciary Committee report, this change is not a reflection of any past actions by the Southern District of New York, but a reflection of the committee's belief that the rate decisions should be assigned on a random basis to judges not involved in the underlying consent decrees.[200]

### Pre-1972 Sound Recordings

Creators of sound recordings made prior to February 15, 1972, but on or after January 1, 1923, would be entitled to receive payments from digital music services that publicly perform those sound recordings, in addition to other legal remedies such as damages, injunctions, and attorney's fees. This entitlement under federal law would be in addition to any remedies available under state copyright law protections for these recordings, which would remain unchanged. In order to be entitled to receive statutory damages or attorney's fees for pre-1972 sound recordings, rights owners must file certain information with the Copyright Office that identifies the sound recordings. The Copyright Office must also issue regulations regarding the form, content, and procedures for the filing of (1) sound recording identification information by rights owners (within 180 days after the bill's enactment) and (2) contact information by licensees of sound recording public performance (within 30 days of the bill's enactment). This federal protection for pre-1972 sound recordings would apply until February 15, 2067.

[200] U.S. Congress, House Committee on the Judiciary, *Music Modernization Act*, report to accompany H.R. 5447, 115th Cong., 2nd sess., April 25, 2018, H.Rept. 115-651 (Washington: GPO, 2018), p. 15.

### Producers, Mixers, and Sound Engineers

Producers, mixers, and sound engineers would have statutory right to seek payment of their royalties via a nonprofit collective designated by the CRB when they have a letter of direction from a featured artist. The entity in charge of the distributions must be a nonprofit collective designated by the CRB. The collective must adopt and reasonably implement a policy that provides for such distributions. It also modifies 17 U.S.C. §114(g) by striking "agent" and substituting "nonprofit collective designated by the [CRB]." As discussed above, the CRB in 2007 stated that a collective need not be formally recognized by the CRB as a designated collective before it can have any involvement in the royalty distribution process. The CRB added that pursuant to Sections 112(e) and 114(e), copyright owners and performers may designate collectives for the receipt of royalties.

## Additional Bills

Legislators have introduced several additional measures related to the music industry.

In January 2017, Senator John Barrasso introduced S.Con.Res. 6 and Representative Michael Conaway introduced H.Con.Res. 13, Supporting the Local Radio Freedom Act. The resolutions declare that Congress should not impose any new performance fee, tax, royalty, or other charge relating to the public performance of sound recordings on a local radio station for over-the-air transmissions, or on any business for such public performance of sound recordings.

In April 2017, Representative Issa introduced the Performance Royalty Owners of Music Opportunity to Earn Act of 2017 (PROMOTE Act of 2017), H.R. 1914. The bill would give copyright owners of sound recordings the exclusive right to withdraw their music from broadcast radio stations. Broadcast radio stations may publicly perform sound recordings without copyright owners' permission if (1) they pay royalties identical to those paid under the statutory license rates determined by the CRB for eligible nonsubscription transmission services that apply to radio streaming and webcasts; (2) the broadcast is of a religious service, by an educational terrestrial radio station, or by a low-power FM radio station; or (3) the broadcast is an incidental use.

Also in July 2017, Representative Jim Sensenbrenner introduced the Transparency in Music Licensing and Ownership Act, H.R. 3350. The bill would direct the Register of Copyrights to create and maintain a searchable database for musical works and sound recordings. The bill would also restrict remedies available to copyright owners if they fail to provide or maintain the minimum information required in the database.

In October 2017, Representative Hakeem Jeffries introduced the Copyright Alternative in Small-Claims Enforcement (CASE) Act of 2017, H.R. 3945. The bill would establish a Copyright Claims Board, an alternative forum to U.S. district courts, for copyright owners to protect their work from infringement. Participation would be voluntary. The board would be housed within the Copyright Office with jurisdiction limited to civil copyright cases capped at $30,000 in damages.

In May 2018, Senator Ron Wyden introduced the Accessibility for Curators, Creators, Educators, Scholars, and Society (ACCESS) to Recordings Act, S. 2933. The bill would provide federal copyright protection for sound recordings made prior to February 15, 1972, enabling rights holders to, among other things, receive payments from digital services that publicly perform their works, while preempting state copyright protection. During a limited three-year window beginning on the effective date of the bill, in order to receive statutory damages or attorney's fees for infringement of their copyright, pre-1972 sound recording copyright owners would have to provide timely notice to the alleged infringer of the sound recording's federal copyright registration and the alleged infringement of such copyright. However, if the alleged infringement

has ceased as of the date on which the copyright owners bring such action, the owners would not be entitled to receive statutory damages or attorney's fees. Similar to sound recordings created after February 15, 1972, sound recordings made prior to this date would enter the public domain either 95 years after they were released or 120 years after they were recorded, whichever comes first. Works recorded between 1923 and 1930 would be protected until December 31, 2025, only if "the copyright owner engages in normal commercial exploitation" of the sound recording, complies with certain regulations that the Register of Copyrights may issue, and notifies the Register of such compliance and commercial exploitation; if these requirements are not satisfied, such recordings enter the public domain.

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