Money for Something: Music Licensing in the 21st Century

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SUMMARY

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Money for Something: Music Licensing in the 21st Century

Songwriters and recording artists are generally entitled to receive compensation for (1) reproductions, distributions, and public performances of the notes and lyrics they create (the musical works), as well as (2) reproductions, distributions, and certain digital public performances of the recorded sound of their voices combined with instruments (the sound recordings). The amount they receive, as well as their control over their music, depends on market forces, contracts between a variety of private-sector entities, and laws governing copyright and competition policy. Who pays whom, as well as who can sue whom for copyright infringement, depends in part on the mode of listening to music.

Congress enacted several major updates to copyright laws in 2018 in the Orrin G. Hatch-Bob Goodlatte Music Modernization Act (MMA; P.L. 115-264). The MMA modified copyright laws related to the process of granting and receiving statutory licenses for the reproduction and distribution of musical works (known as "mechanical licenses"). The law set forth terms for the creation of a nonprofit "mechanical licensing collective" through which owners of copyrights in musical works could collect royalties from online music services. The law also changed the standards used by a group of federal administrative law judges, the Copyright Royalty Board, to set royalty rates for some statutory copyright licenses, as well as the standards used by a federal court to set rates for licenses to publicly perform musical works offered by two organizations representing publishers and composers, ASCAP and BMI. Both of those organizations are subject to consent decrees with the U.S. Department of Justice.

In addition, the MMA limits the liability of online music services for copyright infringement of musical works after January 1, 2018, but prior to the "license availability date" of January 1, 2021, if the services meet certain obligations. In 2019, the music publisher of the rapper and songwriter Eminem filed a lawsuit contending that this provision is an unconstitutional "taking" of the publisher's property rights. That case remains pending.

With respect to sound recordings, the MMA created new federal protections—although technically not federal copyrights—for recordings made prior to February 1972. It also formalized a system whereby recording artists can allocate a portion of their royalties to producers, sound engineers, and mixers.

Nevertheless, many issues remain unresolved. In particular, disparities remain in the treatment of owners of copyrights for sound recordings versus musical works, and the treatment of different licensees of those works. Some of those disparities have persisted for more than 70 years, while others have emerged in the 21st century with the convergence of reproduction, distribution, and public performance rights in the transmission of musical works and sound recordings online. These disparities include (1) the types of licenses and negotiations required for interactive music services compared with those for noninteractive music services, broadcast stations, venues, and retailers; and (2) the treatment of rights holders of musical works and sound recordings in statutes and antitrust oversight. For example, streaming and digital subscription services are legally required to obtain public performance licenses from owners of sound recordings, while broadcast radio stations are not.

With U.S. consumers purchasing fewer albums, overall spending on music in 2019 was half the peak level of 1999, after adjusting for inflation. Since hitting bottom in 2015, however, consumer spending on recorded music has been increasing as the number of streaming services that incorporate attributes of both radio and physical media has grown. In 2019, U.S. revenue from streaming alone, $8.8 billion, was higher than total U.S. recording industry revenue just two years earlier. During the first half of 2020, consumer spending on recorded music grew 12% compared with the first half of 2019. These changing consumption patterns have affected the income many performers, songwriters, record companies, and music publishers receive from recorded music.

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Introduction

Songwriters are generally entitled to receive compensation for reproductions, distributions, and public performances[1] of their compositions, such as the notes and lyrics they create (the musical works). Recording artists are generally entitled to receive compensation for reproductions, distributions, and certain digital performances of the recorded sounds of their performance, such as their voices combined with instruments (the sound recordings).

Yet these copyright holders do not have total control over their music. For example, the country music star Dolly Parton is both a performer owning rights to her sound recordings and a songwriter owning the copyright to the notes and lyrics of her musical works.[2] Nevertheless, other recording artists do not need her permission to rerecord, perform, reproduce, and distribute their own versions of songs she has written. Ms. Parton's ability to negotiate royalties for both her musical works and her sound recordings depends on market forces, contracts between a variety of private-sector entities, and federal laws governing copyright and competition policy.

Congress wrote many of these laws 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, 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."[3]

Figure 1 illustrates the evolution of music consumption in the United States over the last 40 years. In 1999, recording industry revenues reached their peak of $22.4 billion (in 2019 dollars). That same year, two teenagers released a free peer-to-peer file-sharing service called Napster,

[1] A "public performance" right is the right to play music on the radio, through a streaming service, in concerts, stores, gyms, restaurants or anywhere else music is heard publicly. Donald S. Passman, *All You Need to Know About the Music Business*, 10th ed. (New York: Simon and Schuster, 2019), p. 213. (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") & §106 (granting copyright holders exclusive rights to control, among other things, the public performance of their copyrighted works).

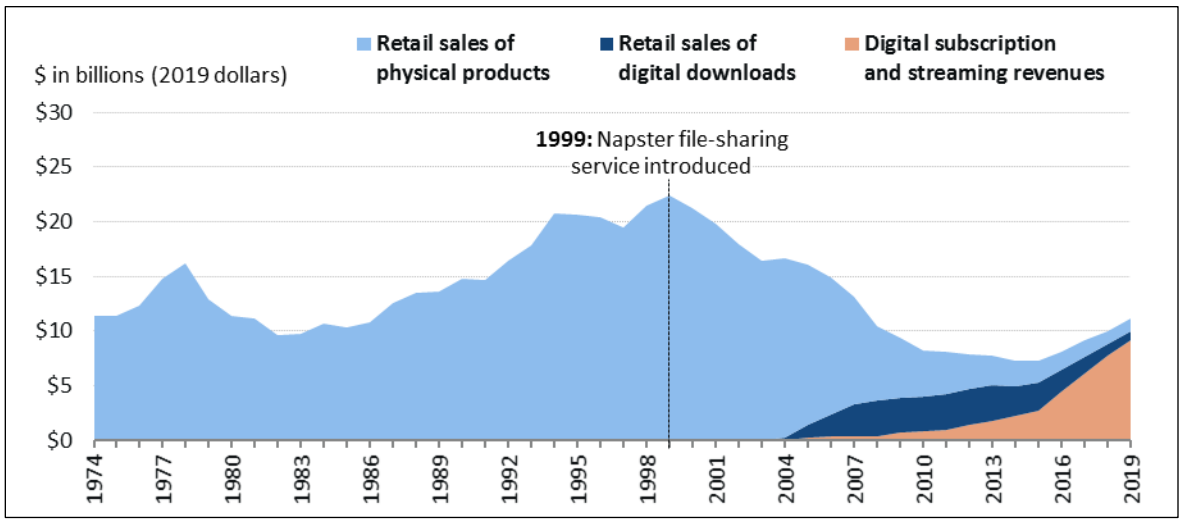
[2] Library of Congress, "Digital Collections: Dolly Parton and the Roots of Country Music, Articles and Essays, Dolly Parton and Copyright," at https://www.loc.gov/collections/dolly-parton-and-the-roots-of-country-music/articles-and-essays/dolly-parton-and-copyright/ (noting that The U.S. Copyright Office database shows 862 entries for Dolly Parton as either author or claimant). In 2019, Ms. Parton entered into an agreement with Sony/ATV Publishing to represent her catalog. SonyATV Publishing, "Dolly Parton Signs with Sony/ATV," press release, March 6, 2019, at https://dollyparton.com/life-and-career/sony-atv/15791.

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

enabling computer users to share each other's record collections throughout the world.[4] While several factors may have contributed, industry revenues fell after Napster's introduction.[5]

Figure 1. Trends in Consumer Spending on Music

Figures in $Billions (2019 Dollars)



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.

In 2003, after negotiating licensing agreements with all of the major record labels, Apple Inc. launched the iTunes Music Store to provide consumers a legal option for purchasing individual songs online. The year 2012 marked the first time the recording industry earned more from retail sales of digital downloads ($3.4 billion in 2019 dollars) than from physical media such as compact discs, cassettes, and vinyl records ($3.1 billion in 2019 dollars).[6] Apple had approximately a 65% market share of digital music downloads.[7]

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.[8] Facing a mounting threat to its iTunes Music Store, Apple launched its own subscription streaming music service, Apple Music, in 2015.[9]

[4] Courts eventually ruled that Napster's service violated copyright laws. A&M Records, Inc. v. Napster, Inc., 114 F. Supp. 2d 896 (N.D. Cal. 2000), *aff'd*, 239 F.3d 1004 (9th Cir. 2001). 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, at http://fortune.com/2013/09/05/ashes-to-ashes-peer-to-peer-an-oral-history-of-napster/.

[5] Eamonn Forde, "Oversharing: How Napster Nearly Killed the Music Industry," *The Guardian*, May 31, 2019, at https://www.theguardian.com/music/2019/may/31/napster-twenty-years-music-revolution.

[6] CRS analysis of Recording Industry Association of America database. Figures are adjusted for inflation in 2019 dollars.

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

[8] 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).

[9] Alex Webb, "Hey, Siri, How Will Apple Keep Up with Google and Amazon?" Bloomberg, June 10, 2016, at

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 12% in 2011 to about 82% in 2019. After 11 consecutive years of declines, inflation-adjusted consumer spending on music was flat between 2014 and 2015 and then grew in each of the subsequent four years, including 13% between 2018 and 2019.[10] Nevertheless, the $11 billion spent on music by U.S. consumers in 2019, adjusted for inflation, is still half the $22 billion spent in the peak year of 1999.[11]

These changing consumption patterns have affected the income many performers, songwriters, record companies, and music publishers receive from recorded music. For example, average monthly revenue per user on Spotify, which offers both an advertising-supported streaming service and a subscription-based service ($5.74), is lower than that of Apple Music ($7.25), which offers only a subscription service.[12] Because record labels' royalties are based on the services' total revenues, labels'—and therefore performers'—average receipts per stream are lower from Spotify than from Apple Music.

Overview of Copyright Framework

Under copyright law, creators of musical works and artists who make sound recordings have certain legal rights. Those creators—songwriters and recording artists—typically assign those rights to music publishers and record labels, respectively, in exchange for up-front payments and other services, such as marketing and promotion. Those intermediaries, in turn, license the rights to third parties such as streaming services. In some instances, copyright law limits the exclusive rights of creators by compelling them to license those rights at rates approved by a government body called the Copyright Royalty Board (CRB). The CRB, composed of three administrative law judges appointed by the Librarian of Congress, approves and/or sets rates for these compulsory licenses. For more information about the CRB, see "Copyright Royalty Board and Rate Setting."

The following is true for works created on or after January 1, 1978 (the date the Copyright Act of 1976 took effect):

https://www.bloomberg.com/news/articles/2016-06-10/hey-siri-how-is-apple-going-to-keep-up-with-google-and-amazon.

[10] Joshua P. Friedlander, *News and Notes on 2017 RIAA Shipment and Revenue Statistics*, RIAA, March 22, 2018, at http://www.riaa.com/wp-content/uploads/2017/03/RIAA-2016-Year-End-News-Notes.pdf. Joshua P. Friedlander, *Year-End 2019 Music Revenue Report*, RIAA, February 25, 2020, at https://www.riaa.com/reports/riaa-releases-2019-year-end-music-industry-revenue-report/.

[11] CRS analysis of RIAA database.

[12] CRS analysis of data from S&P Global Market Intelligence, *Leading Digital Music Subscription Services, Global*, July 2, 2020 ;S&P Global Market Intelligence, "Spotify Technology S.A. Segment Analysis." (Excel spreadsheets available via subscription. Spotify's revenues includes revenues from both its subscription and advertising-supported services. The monthly subscription revenue per individual subscriber varies, depending on his/her subscription plan. Both Spotify Premium and Apple Music cost $9.99/month for an individual account, $14.99/month for a family plan of up to 6 accounts, and $5.99 for a student account. Spotify, "Premium: Plans," at https://www.spotify.com/us/premium/#plans. Apple, "Apple Music," at https://www.apple.com/apple-music/.

1. The term of copyright protection generally begins at the time of creation and lasts for the life of author plus 70 years.[13]
2. For joint works with multiple authors, the term lasts for seventy years after the last surviving author's death.[14]
3. For works "made for hire"[15] and anonymous or pseudonymous works, the duration of copyright is 95 years from publication or 120 years from creation, whichever is shorter.[16]

For works created before 1978 that *were not* published or registered as of January 1, 1978, the term of copyright is generally the same as for works created on or after January 1, 1978. For works created before 1978 that *were* published or registered as of that date, the term lasts 28 years from the date of publication or registration, with an option to renew for an additional 67 years (for a total of 95 years). Thus, all musical works and sound recordings created more than 95 years ago are in the public domain and no longer protected by copyright.[17]

Reproduction and Distribution Rights

Owners of musical works and owners of sound recordings possess, and may authorize others to exploit, several exclusive rights under the Copyright Act, including the following:[18]

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

In the context of music publishing, industry participants refer to the combination of reproduction and distribution rights as a "mechanical right."[19] This term dates back to the 1909 Copyright Act, when Congress required manufacturers of piano rolls and records to pay music publishers for the right to reproduce musical compositions mechanically.[20] As a result, music publishers began issuing mechanical licenses to, and collecting mechanical royalties from, piano-roll and record

[13] 17 U.S.C. §302(a).

[14] 17 U.S.C. §302(b).

[15] A "work for hire" can be created in one of two ways. The first method is by an employee within the scope of employment. The second is when it meets the following criteria: (1) it is commissioned (created at the request of someone); (2) it is created under a written agreement that specifies that it is a work for hire; and (3) it is created for use in one of the following: (a) a motion picture or other audiovisual work; (b) a collective work (collection of individual works, each of which is independently capable of copyright); (c) a compilation; (d) a translation of a foreign work; (e) as an instructional text, as a test, as answer material for a test; (f) an atlas; or (g) a supplemental work (e.g., an introduction to a book). 17 U.S.C. §101. See also, Passman, pp. 308-309.

[16] 17 U.S.C. §302(c).

[17] Duke University, Center for the Study of Public Domain, "Public Domain Day 2020, January 1 is Public Domain Day: Works from 1924 Are Open to All," at https://web.law.duke.edu/cspd/publicdomainday/2020/.

[18] 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)).

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

[20] 1909 Copyright Act, Act of March 19, 1909, Ch. 320, 35 Stat. 1075 (1909 Copyright Act).

manufacturers.[21] The means of reproducing music have undergone numerous changes since then, but the term "mechanical rights" has endured.[22]

In contrast to songwriters and music publishers, who own the copyrights to notes and lyrics, recording artists and record labels did not have the ability to obtain copyrights to sound recordings until 1972. With the enactment of the 1971 Sound Recording Act (P.L. 92-140), Congress permitted creators of sound recordings fixed on or after February 15, 1972 to sue others who reproduce and distribute sound recordings without permission. The Classics Protection and Access Act, Title II of the Orrin G. Hatch-Bob Goodlatte Music Modernization Act (MMA; P.L. 115-264), effectively created federal copyright-like protection, including reproduction and distribution rights, for sound recordings fixed before February 15, 1972.[23]

What Does "Fixed" Mean?

17 U.S.C. §101 defines a fixed work as one "in a tangible medium of expression when its embodiment in a copy or [material object that embodies sound], 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." For example, a musical work may be fixed in a recording or in written notation (a score), and a sound recording may be fixed in a compact disc or a digital file. Fixation is one of the many terms of art that the Copyright Act employs with meanings that differ from ordinary usage in everyday language.

Public Performance Rights

The Copyright Act also gives owners of musical works and owners of sound recordings the exclusive right to "perform" their works publicly (17 U.S.C. §106(4) and 17 U.S.C. §106(6), respectively). For sound recordings, however, this right applies only to digital audio transmissions. The MMA defines a "digital audio transmission" as "a digital transmission as defined in section 101, that embodies the transmission of a sound recording."[24] In turn, Section 101 of the Copyright Act defines a "digital transmission" as "a transmission in whole or in part in a digital or other non-analog format."[25] 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.

Title II of the MMA gives rights owners of sound recordings fixed prior to February 15, 1972, the same rights to collect public performance royalties for digital audio transmissions as owners of copyright in sound recordings fixed on or after February 15, 1972.[26] Title II of the MMA applies to public performances made on or after the date of enactment, October 11, 2018.

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

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

[23] 17 U.S.C. §301(c). As the Senate Committee on the Judiciary explained, "The CLASSICS Act does not provide a term of copyright for pre-1972 recordings; rather, it provides a special federal *sui generis* form of protection for digital performances that aligns with the term of other state law pre-1972." U.S. Congress, Senate Committee on the Judiciary, Music Modernization Act, committee print, prepared by the Government Printing Office, 115th Cong., 2nd sess., September 17, 2018, 115-339 (Washington: GPO, 2018), p. 18.

[24] 17 U.S.C. §114(j)(5).

[25] 17 U.S.C. §101.

[26] In the music industry, the term "master" refers to the original sound recording made in a studio, from which all reproductions are made. It can also refer to a recording of one particular song; another term for an individual recording is a "cut," because of the historical process of cutting grooves into vinyl for each song. Passman, pp. 78-79.

Rights Required for Music Products and Services

Who pays whom, as well as who can sue whom for copyright infringement, depends in part on the mode of listening to music. Rights owners of sound recordings (e.g., record labels) pay music publishers for the right to record and distribute the publishers' musical works in a physical format.[27] Retail outlets that sell digital files or physical reproductions of sound recordings pay the distribution subsidiaries of major record labels, which act as wholesalers.[28] Purchasers of a lawfully made reproduction, such as a compact disc or a digital file, may listen to that song as often as they wish in a private setting.

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 the use of notes and lyrics in broadcast music.

In addition to mechanical rights, digital services must pay both record labels and 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) may make temporary reproductions of songs in the normal course of transmitting music to listeners.[29] The rights to make these temporary reproductions, known as "ephemeral reproductions," fall under 17 U.S.C. Section 112 (see "Ephemeral Reproductions").

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 compact disc 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" or "tethered" downloads, because consumers' ability to listen to them upon request is conditioned upon remaining subscribers to the interactive services.[30] The services pay royalties to music publishers or songwriters for the right to reproduce and distribute the musical works, and pay royalties to record labels or artists for the right to reproduce and distribute sound recordings.[31] Thus, while record labels reproduce and distribute their own sound recordings in physical form,

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[27] Ari Herstand, "Why You Haven't Been Getting Your iTunes Match Mechanical Royalties," *Digital Music News*, October 14, 2014, at 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, at http://www.completemusicupdate.com/article/trends-music-licensing-explained-at-last/.

[28] Passman, p. 82. The record labels and artists receive a percentage of the wholesale price of physical products as royalties. In the case of physical products, record labels do not license reproduction and distribution rights to third parties; they reproduce and sell their own sound recordings. Passman, p. 75. Congress enacted P.L. 92-140, known as the Sound Recording Act of 1971, which gave sound recording owners copyright protections for the first time, in response to widespread piracy.

[29] 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.

[30] Passman, p. 149.

[31] 17 U.S.C. §106. See also Royalty Exchange, *Mechanical and Performance Royalties: What's the Difference*, at https://www.royaltyexchange.com/learn/mechanical-and-performance-royalties-whats-the-difference/; Harry Fox Agency, "Frequently Asked Questions: Digital Definitions," at https://www.harryfox.com/#/faq.

they license such rights to interactive digital streaming services when the music is in digital form.[32]

How the Music Industry Works

The music industry comprises several distinct categories of interests, including (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. Publishers today have three major roles: promoting the use of the songs by artists and other users (e.g., producers of movies, television programs, and commercials); administering copyrights and royalty payments; and supporting songwriters with the creative process by helping them to improve their skills and paring them with cowriters.[33] Generally, music publishers are much smaller than record labels; this sector of the music industry has a higher number of independent firms than the recording sector. Music publishers therefore generally have less bargaining power with respect to songwriters than record labels have with respect to recording artists.

Music publishers fall into three general categories:[34]

1. **Major Publishers.** The three major publishing firms accounted for about 57.6% of the $5.6 billion in global music publishing revenue in 2019: (1) Sony/ATV Music Publishing (25%), (2) Universal Music Publishing Group (21%), and (3) Warner Music Group (11.6%).[35]
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 unaffiliated with major publishers.

The types of contracts that songwriters have with publishers depend on the services that the publishers offer.

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[32] Because, in contrast to music publishers, record labels negotiate with interactive streaming services for reproduction, distribution, and public performances based on marketplace rates, the record labels' contracts may pertain to this bundle of rights, rather than separate rights. For example, an agreement between Sony Music and Spotify defines "publishing rights" as "... (i) the reproduction, communication to the public, public performance, digital audio transmission and generally making available in connection with the applicable Service of musical compositions embodied in Authorized Materials ...," Exhibit A, "Term Sheet, Definitions, Digital Distribution Agreement between Sony Music and Spotify AB, April 1, 2017, Exhibit 10.25, at https://www.sec.gov/Archives/edgar/data/1639920/000119312518063434/d494294dex1025.htm.

[33] Passman, pp. 223-224.

[34] Passman, pp. 224-225.

[35] "UMG Increases Recorded-Music Market Share, Indies Enhance Publishing Dominance," *Music and Copyright's Blog*, May 20, 2020, at https://musicandcopyright.wordpress.com/2020/05/20/umg-increases-recorded-music-market-share-lead-indies-enhance-publishing-dominance/.

In a traditional publishing deal, a songwriter assigns the publisher's share to the publisher in return for the publisher's creative and promotional services. The songwriter and publisher split the royalties 50/50.[36] Well-known songwriters may have the bargaining power to negotiate a copublishing agreement and retain up to 75% of the total publishing royalties. During the contractual term, which typically lasts one to three years (usually with options for renewal), the songwriter must meet certain obligations, such as writing a minimum number of songs that are commercially satisfactory or writing songs that are recorded and released by an artist on a bona fide record label.

In a purely administration deal with a publisher, however, a songwriter keeps 100% of any royalties. Publishing administrators do not own or control any percentage of the songwriter's copyright during the term of the agreement. Instead, the publisher earns an administrative fee for collecting and distributing the royalties, In this case, the publisher is not involved in promoting the songwriter or matching songwriters with artists. Such an arrangement may be more beneficial to established songwriters who can promote their own music, or to songwriters who record their own songs.[37]

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 reproductions of sound recordings (e.g., compact discs and vinyl records) as well as electronic reproductions to music streaming services. The Copyright Act uses the term "phonorecords" to refer to reproductions of sound recordings in material objects.

Phonorecords

"Phonorecords" are audio-only recordings in tangible media. The Copyright Act defines phonorecords as "material objects in which sounds, other than those accompanying a motion picture or other audiovisual work, are fixed by any method now known or later developed, and from which the sounds can be perceived, reproduced, or otherwise communicated, either directly or with the aid of a machine or device." 17 U.S.C. §101. Phonorecords thus include vinyl records, compact discs, open-reel tapes, cartridges, cassettes, and player piano rolls.

Similar to songwriters, recording artists generally contract with a record label. The contracts usually require recording artists to transfer their copyrights to the record label for defined periods and defined geographic regions.[38] In return, recording artists receive advances from the labels to cover their costs of recording and marketing the songs. The artists also receive a share of royalties from sales and licenses of the sound recording, as well as whatever income they earn from touring, merchandising, sponsorships, movies, and songwriting. Thus, artists who are also

[36] Henry Schoonmaker, "Administration, Co-Publishing Deal, or Work for Hire: What is Right for You," *Music Publishing Resource (blog), Songtrust,* updated May 6, 2020, at https://blog.songtrust.com/music-publishing-deals.

[37] Passman, p. 223.

[38] The question of whether or not recording 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. Nimmer, "Ch. 5.3 Works Made for Hire (B)(2)(a)(ii)(I) Millennial Flip-Flop." See also Jon Pareles, "Musicians Take Copyright Issue to Congress," *New York Times,* May 25, 2000, at http://www.nytimes.com/2000/05/25/movies/musicians-take-copyright-issue-to-congress.html.

songwriters split royalties from musical works with both their publishing companies and their record labels.

The share of royalties that artists receive depends on their anticipated ability to generate revenue.[39] According to the publication *Rolling Stone*,

> As recently as 20 years ago—when physical goods still ruled the music industry and when breaking through on radio was your only real shot at success in the States—record labels typically offered a contract whereby the artist got an upfront check, but the label got lifetime ownership of rights and 80-plus percent of royalties. These days, that's all changed: A more typical major deal with an established star (or even a fast-rising new independent talent) will see rights ownership revert back to the artist much sooner, with a baseline 50/50 (profit share) royalty deal. Increasingly, for global megastars, major labels are actually agreeing to a minority of royalties.... This transformation [is] driven by the artist-empowering explosion of [streaming services] plus the natural erosion of traditional media's influence.[40]

Newer artists may earn a 15% share of U.S. royalties, while major stars who have proven their earning potential may be able to negotiate full ownership of copyrights to their masters (meaning that they would fully control the reproduction, distribution, and public performance of their sound recordings after the contracts with record labels expire).[41] The contractual term is generally based on a specific number of "albums" delivered by the artist, rather than a set time period.[42] This practice may be changing in light of the custom of artists in some genres to release multiple albums at once.[43] Collectively, the three major record labels had a share of about 68.1% of the global recording industry's 2019 wholesale revenue: (1) Sony Corporation (19.8%), (2) Universal Music Group (31.8%), and (3) Warner Music Group (16.4%).[44] According to IFPI, an organization that represents record labels worldwide, the recording industry generated $20.2 billion worldwide in 2019.[45] IFPI estimates that of the $20.2 billion in wholesale revenue, the United States and Canada accounted for 39.1%, or about $7.9 billion.[46] RIAA estimates that record labels earned $7.3 billion in wholesale revenues from U.S. sales in 2019.[47]

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[39] Passman, pp. 91-94.

[40] Tim Ingham, "Warner Music Group's A&R Costs Say a Lot About How Much Labels Need to Spend on Artists in Today's Music Industry," *Rolling Stone*, February 16, 2020, at https://www.rollingstone.com/pro/features/warner-music-group-ipo-ar-costs-952821/.

[41] Passman, pp. 92, 197-198. See, for example, Melinda Newman, "Inside Prince's Career-Long Battle to Master His Artistic Destiny," *Billboard*, April 28, 2016, at https://www.billboard.com/articles/news/cover-story/7348551/prince-battle-to-control-career-artist-rights.

[42] Eriq Gardner, "How a Rock Band's Lawsuit Could Upend Record Deals Everywhere," *Hollywood Reporter*, August 25, 2017, at https://www.hollywoodreporter.com/thr-esq/how-a-rock-bands-lawsuit-could-upend-record-deals-everywhere-1031489.

[43] Passman, pp. 112-116. See also, Zach "Goose" Gase, "From DMX to DaBaby: A Brief History of Rap Artists Releasing 2 Albums in 1 Year," *DJ Booth*, November 11, 2019, at https://djbooth.net/features/2019-11-11-rappers-releasing-two-albums-one-year-brief-history.

[44] UMG Increases Recorded-Music Market Share, Indies Enhance Publishing Dominance," *Music and Copyright's Blog*, May 20, 2020, at https://musicandcopyright.wordpress.com/2020/05/20/umg-increases-recorded-music-market-share-lead-indies-enhance-publishing-dominance/.

[45] IFPI, "Industry Data," at https://www.ifpi.org/our-industry/industry-data/.

[46] IFPI, *The Global Music Report*, The Industry in 2019, London, England, 2020, p. 17, at https://www.ifpi.org/resources/.

[47] Joshua Friedlander, *Year-End 2019 RIAA Music Revenues Report*, RIAA, Washington, DC, February 25, 2020, p. 1, at https://www.riaa.com/reports/riaa-releases-2019-year-end-music-industry-revenue-report/.

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).[48] The publishing and recording divisions of parent companies may not necessarily both publish and record the same song.

Independent labels have consistently sought out major labels for their distribution networks, enabling them to increase both revenue and global reach. Traditionally, these networks moved physical recordings from manufacturing plants into retail outlets. This distribution role, however, is changing. The decline in consumption of physical recordings has reduced the need to operate warehouses. The labels nevertheless perform many functions with respect to selling digital copies of songs, such as adding data to each recording to identify the parties entitled to royalties and keeping track of payments. In addition, record labels negotiate with streaming services for the rights to use sound recordings, track social media engagement, market songs to the public, and monitor the sales and streaming of songs.[49]

Producers, Mixers, and Sound Engineers

A record producer is responsible for fixing the sound recording.[50] 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.[51] In the past, record labels hired producers to oversee the recording of 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.[52] In such cases, the producer negotiates compensation with the artist.

A mixing engineer ("mixer") is responsible for combining all of the different sonic elements of a recorded piece of music into a final version, and balancing the distinct parts to achieve a desired effect.[53] Mixers both create a mix for the original release of a record and create remixes for later versions. A sound engineer (also known as an "audio engineer") oversees many technical and aesthetic aspects of a recording session and is responsible for the overall sound of all recorded tracks, ensuring that the mixing engineer has good material to work with and that the final product satisfies the artists and producers.[54]

[48] The Chinese company Tencent Music Entertainment also owns 10% of the equity in Universal Music Group and 1.6% of the equity in Warner Music. In addition, Tencent and Spotify each own about 10% of each other. Patrick Frater, "Why is China's Media Giant Tencent Spending Billions Investing in Major Music Companies," *Variety*, June 29, 2020, at https://variety.com/2020/biz/asia/china-tencent-music-buying-stakes-in-universal-warner-1234644387/.

[49] Passman, pp. 71-72.

[50] As the U.S. Copyright Office states, "A work is copyrighted the moment it is created and fixed in a tangible form that is perceptible either directly or with the aid of machine or device." U.S. Copyright Office, "FAQs: Copyright in General," at https://www.copyright.gov/help/faq/faq-general.html.

[51] Passman, p. 125.

[52] Passman, p. 131.

[53] Berklee College of Music, "Careers: Roles: Mixing Engineer," at https://www.berklee.edu/careers/roles/mixing-engineer.

[54] Berklee College of Music, "Careers: Roles: Recording Engineer," at https://www.berklee.edu/careers/roles/recording-engineer.

Copyright for Songwriters and Music Publishers

Reproduction and Distribution Licenses (Mechanical Licenses)

Since at least 1831, musical works have been subject to copyright protection in the United States, including the exclusive right to reproduce the work.[55] When Congress considered the 1909 Copyright Act (a general revision to the copyright laws), 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.[56] 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.[57] A music publisher or songwriter may withhold the right to reproduce and distribute a musical work altogether by restricting the work to his or her personal use. However, pursuant the compulsory license, once the publisher/songwriter and licensee take a certain set of actions, described in "Physical Media" and "

New Licensing Process for DPDs," the publisher/songwriter must grant the reproduction and distribution rights for the musical works to certain users under a compulsory license. This "mechanical license" permits (1) the audio-only reproduction of music in physical media or digital downloads that listeners can hear with the aid of "mechanical" devices such as a player piano, a phonograph record, a CD player, or a smartphone, among other devices; and (2) the distribution of such copies to the public for private use.[58] **Figure 2** illustrates the process of compulsory licensing for the reproduction and distribution of musical works in retail sales.

[55] February 3, 1831, First Revisions, 21st Congress, Second Session, Chapter 16, An Act to Amend the Several Acts Respecting Copyrights, (4 Stat. 436-439.). See also, Thorvald Solberg, Register of Copyrights, *Copyright Enactments of the United States, 1793 - 1909*, Library of Congress, Copyright Office Bulletin No. 3, Second Edition, Revised, Washington DC, July 15, 1906, p. 37 and *White-Smith Music Publishing Co. v. Apollo Co.*, 209 U.S. 1, 15-16 (1908).

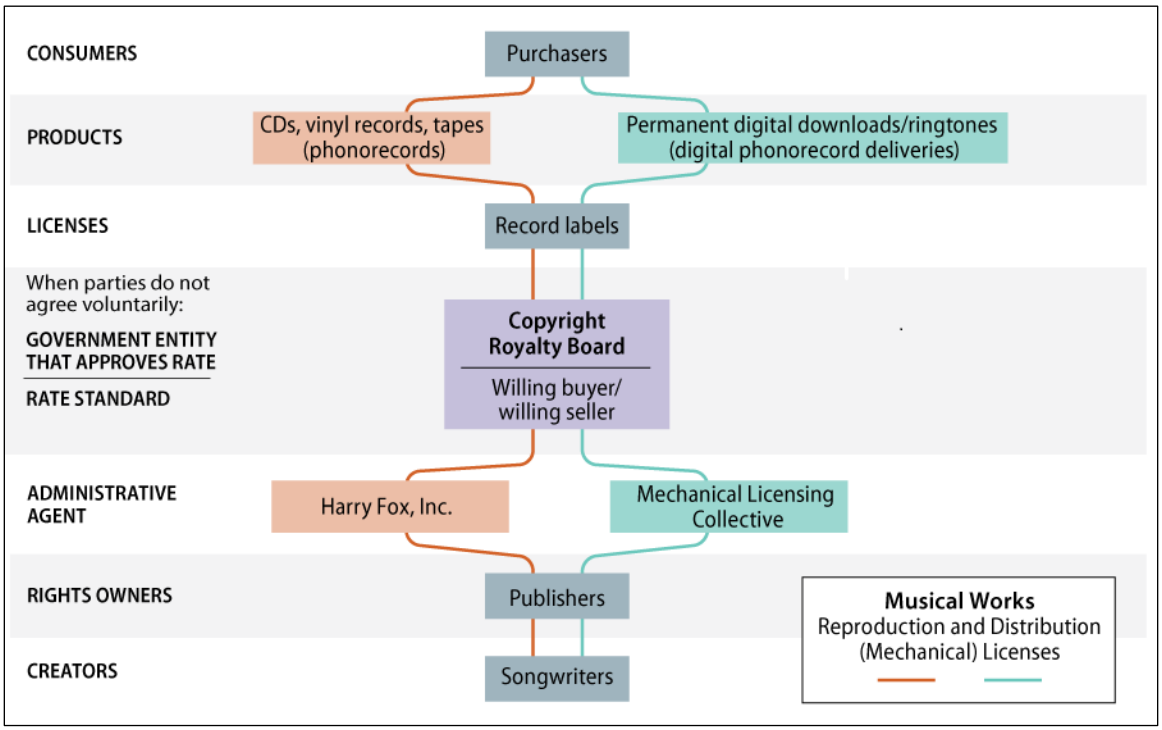
[56] U.S. Congress, House Committee on Patents, *To Amend and Consolidate the Acts Respecting Copyright*, committee print, 60th Cong., 2nd sess., February 22, 1909, Rep. 2222, pp. 7-8. See also Kohn, p. 733.

[57] 2015 U.S. Copyright Office Report, p. 26.

[58] Kohn, p. 719.

Figure 2. Retailers

Process of Licensing Musical Works (Compulsory)



Sources: CRS; Exploration, "What is the Harry Fox Agency," at https://exploration.io/what-is-the-harry-fox-agency/; Mechanical Licensing Collective, "How It Works," https://www.themlc.com/how-it-works.

Notes: For an explanation about the willing buyer/willing seller rate standard, see "Copyright Royalty Board and Rate Setting." Songwriters unaffiliated with publishers receive payments from Harry Fox Inc. and the Mechanical Licensing Collective directly.

Physical Media

For physical media such as vinyl records and compact discs, the compulsory license does not become effective until after a musical work is distributed to the public (generally by a record label under contract with the work's publisher or songwriter).

After the initial distribution of musical works, licensees, which are generally record labels seeking to rerelease the works, must obtain mechanical rights for each musical work individually. For example, in 1974, Dolly Parton's record label, RCA/Victor,[59] reached a negotiated agreement with the publishing company she had cofounded, Owe-Par Publishing Company,[60] to reproduce and distribute the notes and lyrics of "I Will Always Love You." After RCA/Victor distributed the song to the public, Whitney's Houston's label, Arista Records, reproduced and distributed Ms.

[59] Library of Congress, "Digital Collections: Dolly Parton and the Roots of Country Music, Dolly Parton Discography," at https://www.loc.gov/collections/dolly-parton-and-the-roots-of-country-music/articles-and-essays/dolly-parton-discography/ (listing Dolly Parton's sound recordings and record labels).

[60] Katie Kramer, "Dolly Parton is Back on the Charts, and She Means Business," CNBC, September 5, 2016, at https://www.cnbc.com/2016/09/05/dolly-parton-is-back-on-the-charts-and-she-means-business.html.

Houston's recording of the same song. Because of the compulsory mechanical license, Arista had no need to negotiate with Owe-Par Publishing for the right to do this.[61]

The licensee must serve a notice of intention to license the music on the copyright owner, or, if the copyright owner's address is unknown, the Copyright Office, within 30 days of making the new recording or before distributing it.[62]

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

1. It removed any limitation on liability and provided that a potential licensee who fails to provide the required notice of intention is ineligible for a compulsory license. If the potential licensee then fails to obtain a negotiated license, the making and distribution of recordings of musical works (phonorecords) constitutes infringement under 17 U.S.C. §501 and is subject to remedies set forth in 17 U.S.C. §§502-506.[63]
2. It removed the requirement that copyright owners file a "notice of use" with the Copyright Office in order to recover damages from parties responsible for an unauthorized reproduction and distribution.[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 notice of intention requirements.[66]

Digital Phonorecord Deliveries (DPDs)

In 1995, with the enactment of the Digital Performance Right in Sound Recordings Act (DPRA), P.L. 104-39, Congress defined a new category of phonorecords called "digital phonorecords," or "DPDs," to reflect the ability of consumers to listen to or purchase music via the internet. With enactment of the MMA, Congress amended the definition of a DPD.

[61] CMT.com Staff, "Whitney Houston: How Dolly Parton Song Landed on the *Bodyguard* Soundtrack," *CMT News*, February 12, 2012, at http://www.cmt.com/news/1679096/whitney-houston-how-dolly-parton-song-landed-on-the-bodyguard-soundtrack/.

[62] 17 U.S.C. §115(b)(1).

[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.

Digital Phonorecord Delivery (DPD)

"The term 'digital phonorecord delivery' means each individual delivery of a phonorecord by digital transmission of a sound recording that results in a specifically identifiable reproduction by or for any transmission recipient of a phonorecord of that sound recording, regardless of whether the digital transmission is also a public performance of the sound recording or any musical work embodied therein, and includes a permanent download, a limited download, or an interactive stream. A digital phonorecord delivery does not result from a real-time, noninteractive subscription transmission of a sound recording where no reproduction of the sound recording or the musical work embodied therein is made from the inception of the transmission through to its receipt by the transmission recipient in order to make the sound recording audible. A digital phonorecord delivery does not include the digital transmission of sounds accompanying a motion picture or other audiovisual work as defined in section 101." 17 U.S.C. §115(e)(10).

In November 2008, the Copyright Office, which Congress has charged with interpreting and enforcing Copyright Act (subject to approval by the Librarian of Congress),[67] issued an interim rule that refined both the definition of DPDs and the application of 17 U.S.C. §115 to DPDs.[68]

Nevertheless, the Copyright Office has not resolved the controversial issue of whether or not a temporary reproduction of a phonorecord by a noninteractive streaming service constitutes a DPD. In the interim rule, it took "no position on whether or when a buffer copy independently qualifies as a DPD, or whether and when it is necessary to obtain a license to cover the reproduction or distribution of a musical work in order to engage in activities such as streaming."[69]

On the questions of interactivity, however, the Copyright Office stated that

> [I]f phonorecords are delivered by a transmission service, then under the last sentence of 115(d) it is irrelevant whether the transmission that created the phonorecords is interactive or non-interactive.... The Office would not dispute a finding that non-interactive and interactive streams have different economic value, or even that a rate of zero might be appropriate for DPDs made in the course of non-interactive streams.... However, the Office maintains that any such distinctions can and should be addressed by different rates rather than being based on an unfounded assertion that non-interactive streaming cannot involve the making and distribution of phonorecords, which are licensable under Section 115.[70]

In September 2008, three months prior to the Copyright Office's issuance of its interim rule, organizations representing record labels, music publishers, songwriters, and digital music services announced that they had reached an agreement on mechanical royalty rates for online distribution of musical works.[71] The agreement, in the form of draft regulations submitted to the CRB for

[67] 17 U.S.C. §702.

[68] U.S. Copyright Office, Library of Congress, "Compulsory License for Making and Distributing Phonorecords, Including Digital Phonorecord Deliveries, Interim Rule and Request for Comments," 73 *Federal Register* 66173, November 7, 2008. The rule, which the Copyright Office amended after Congress enacted the MMA, is 37 C.F.R. §201.18. The rule contains the Copyright Office's definition of a DPD, which includes sentences that are not in the Copyright Act's definition.

[69] Ibid., p. 66174.

[70] Ibid., pp. 66180-66181.

[71] RIAA, "Major Music Industry Groups Announce Breakthrough Agreement," press release, September 23, 2008, at https://www.bloomberg.com/press-releases/2008-09-23/music-industry-groups-draft-online-compensation-plan. (September 2008 RIAA press release.) In addition to RIAA, the trade groups include the Digital Media Association (DiMA), the National Publishers' Association (NMPA), the Nashville Songwriters Association International (NSAI), and the Songwriters Guild of America (SGA).

approval, proposed a general 10.5% mechanical royalty rate for interactive online services, based on percentage of the services' revenues.[72] The agreement also covered rates for "limited downloads."[73] Outside of the scope of the draft regulations, "the parties confirmed that noninteractive, audio-only streaming services do not require reproduction or distribution licenses from copyright owners."[74]

New Licensing Process for DPDs

With the agreement in place, music publishers wanted to establish direct relationships with digital music services, rather than rely on record labels to act as intermediaries. As Serona Elton explains in the *Music and Entertainment Industry Educators Association Journal*,

> Digital music services offering interactive streaming and limited downloads had to obtain their own mechanical licenses, and pay mechanical royalties, no longer relying on the record companies to do it for them.... The impact of this cannot be overstated. Record companies had long ago put in place staff, procedures, and technology systems to support the mechanical licensing and related royalty calculation, allocation, and payment process. However, interactive streaming/limited download services, operated by relatively new companies, had no such infrastructure.[75]

To make it easier for interactive streaming services to license mechanical rights from music publishers and songwriters, Title I of the MMA established several new procedures. Beginning on January 1, 2021, the "license availability date," interactive streaming services and publishers/songwriters may receive a blanket mechanical license for millions of musical works simultaneously, rather than attempt to acquire the musical works one-by-one.[76] Second, in contrast to licensees of phonorecords in the form of physical media and digital downloads, interactive streaming services can get a compulsory license for the first use of a song provided they already have obtained the rights from record labels or artists to stream the sound recording.[77]

The MMA provides that blanket mechanical licenses are available only for "included activities," defined as "the making and distribution of server, intermediate, archival, and incidental reproductions of musical works that are reasonable and necessary for the digital music provider to engage in covered activities licensed under this subsection."[78]

It defines "covered" activity as "making a digital phonorecord delivery of a musical work, including in the form of a permanent download, limited download, or interactive stream, where such activity qualifies for a compulsory license under this section."[79]

It defines a "digital music provider" as

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[72] Current rates, which were subject to approval by the CRB, are codified at 37 C.F.R. §385.

[73] Today, as codified by the MMA, the term "limited download" means a digital transmission of a sound recording of a musical work in the form of a download, where such sound recording is accessible for listening only for a limited amount of time or specified number of times. 17 U.S.C. §115(e)(16).

[74] September 2008 RIAA press release.

[75] Serona Elton, "Mechanical Licensing Before and After the Music Modernization Act," *Journal of the Music & Entertainment Industry Educators Association*, vol. 19, no. 1 (2019), p. 20.

[76] 17 U.S.C. §115(d).

[77] 17 U.S.C. §115(a)(1)(A)(ii)(Ii). For more on rights required to stream sound recordings on interactive services, see "Interactive Services."

[78] 17 U.S.C. §115(d)(1)(B).

[79] 17 U.S.C. §115(e)(7).

> [a] person (or persons operating under the authority of that person) that, with respect to a service engaged in covered activities-
>
> (A) has a direct contractual, subscription, or other economic relationship with end users of the service, or, if no such relationship with end users exists, exercises direct control over the provision of the service to end users;
>
> (B) is able to fully report on any revenues and consideration generated by the service; and
>
> (C) is able to fully report on usage of sound recordings of musical works by the service (or procure such reporting).[80]

Because the definition of "digital music provider" excludes record labels, the labels are ineligible for blanket mechanical licenses. **Figure 5** illustrates the licensing processes, including the process of licensing DPDs, for interactive music services.

Mechanical Licensing Collective

The MMA sets forth a structure for a new organization, called the Musical Licensing Collective (MLC), to offer and administer the mechanical licenses for DPDs, including blanket licenses for digital services and retailers and nonblanket licenses for record labels.[81] The MLC is a nonprofit entity with several responsibilities:

- Establish and maintain a publicly accessible database containing information relating to musical works (and shares of such works) and, to the extent known, the identity and location of the copyright owners of such works and the sound recordings in which the musical works are embodied;[82]
- Receive notices and reports of musical work usage from digital services/retailers;[83] and
- Collect royalties from interactive digital music services and distribute them to publishers/songwriters.[84]

When the MLC is unable to match musical works to copyright owners, it may distribute the unclaimed royalties to copyright owners identified in its records, based on the relative market shares of such copyright owners as reflected in usage reports provided by digital music providers for the periods in question.[85] The MLC has 14 voting board members: 10 representing music publishers and four representing songwriters.[86]

Separately, the MMA sets forth a structure for another nonprofit entity, called a digital licensee coordinator, to coordinate the activities of the licensees and designate a representative to serve as a nonvoting member on the MLC's board. The digital license coordinator's responsibilities include

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[80] 17 U.S.C. §115(e)(8).

[81] 17 U.S.C. §§115(d)(3)-(d)(4), §115(d)(6). See also U.S. Copyright Office, "Music Modernization, Frequently Asked Questions," at https://www.copyright.gov/music-modernization/faq.html. On July 8, 2019, the Copyright Office named Mechanical Licensing Collective Inc. as the designated MLC. U.S. Copyright Office, "The Music Modernization Act," at https://www.copyright.gov/music-modernization/.

[82] 17 U.S.C. §115(d)(3)(C)(i)(IV).

[83] 17 U.S.C. §115(d)(3)(C)(i)(I).

[84] 17 U.S.C. §115(d)(3)(C)(i)(II).

[85] 17 U.S.C. §115(d)(3)(J)(i)(II).

[86] 17 U.S.C. §115(d)(3)(D).

> mak[ing] reasonable, good-faith efforts to assist the collective in locating and identifying copyright owners of unmatched musical works (and shares of such works) by encouraging digital music providers to publicize the existence of the collective and the ability of copyright owners to claim unclaimed accrued royalties, including by (1) posting contact information for the collective at reasonably prominent locations on digital music provider websites and applications, and (2) conducting in-person outreach with songwriters.[87]

The music services fund the costs of setting up and maintaining the MLC through a combination of voluntary contributions and an administrative assessment set by the Copyright Royalty Judges.[88] The MMA authorizes the digital license coordinator to participate in these proceedings.

Limited Liability of Music Streaming Services

Prior to enactment of the MMA, several songwriters and publishers filed lawsuits charging Spotify and other online music services with illegally streaming their copyrighted musical works.[89] Title I of the MMA limits liability of digital music services after January 1, 2018, and prior to the "license availability date" of January 1, 2021, if the services meet certain obligations.[90] The services must engage in good-faith efforts to locate copyright owners and pay royalties accrued prior to the license availability date on a monthly basis. According to the background and section analysis of the legislation posted by the chairman of the House Committee on the Judiciary on behalf of the chairpersons and ranking members of the House and Senate Judiciary Committees, this provision was key to enabling the various sectors of the music industry to reach common ground.[91]

In August 2019, Eight Mile Style, the music publisher of the rapper and songwriter Marshall Mathers, also known as "Eminem," filed a lawsuit against Spotify in federal court in Nashville, TN. Eight Mile Style accuses Spotify of willful copyright infringement by unlawfully reproducing about 250 of Eminem's songs on its service, and of failure to comply with the MMA's conditions for lawsuit immunity. The lawsuit also contends that this provision of the MMA is an unconstitutional "taking" of the publisher's property rights.[92] The case remains pending.

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[87] 17 U.S.C. §115(d)(3)(C)(iii).

[88] 17 U.S.C. § 801(8) (2018) [provision authorizing the CRB to perform that function].

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

[90] 17 U.S.C. §115(d)(10).

[91] The Judiciary Committees did not publish a Conference Committee Report. Mary LaFrance, "Music Modernization and the Labyrinth of Streaming," *The Business, Entrepreneurship & Tax Law Review*, vol. 2, no. 2 (2018), pp. 310, 321, n.87. (LaFrance.) One week after the law's enactment, however, then-Chairman of the House Committee on the Judiciary, Representative Bob Goodlatte, released a background and section analysis of the legislation. U.S. Congress, House Committee on the Judiciary, *H.R. 1551, the Music Modernization Act*, committee print, 115th Cong., 2nd sess., October 19, 2018, p. 12, at https://www.copyright.gov/legislation/mma_conference_report.pdf (October 2018 MMA Background and Section Analysis).

[92] *Eight Mile Style, LLC and Martin Affiliated, LLC v. Spotify USA Inc*., Civil Case No.3:19-cv-00736, U.S.D.C. Mid. Dist. Tenn., Nashville Div., Aug. 21, 2019, at https://musictechpolicy.files.wordpress.com/2019/08/eight-mile-style-complaint.pdf.

Musical Work Public Performance Royalties

Congress granted songwriters the exclusive right to perform their works publicly in 1897.[93] Thereafter, in order to perform songwriters' works publicly and legally, establishments that featured orchestras and bands, operas, concerts, and musical comedies needed to obtain permission from songwriters and/or publishers.[94] While this right represented a way for copyright owners to profit from their musical works, the sheer number and fleeting nature of public performances, given the limitations of technology in the early 20th century, made it impossible for copyright owners to negotiate individually with each user for every use or to detect every case of infringement.[95]

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 and Publishers (ASCAP) in 1914.[96] ASCAP is 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.[97] The PROs also monitor the use of musical works and take legal actions against venues and service that publicly perform musical works without obtaining permission.[98]

Most commonly, a licensee obtains 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 revenue. After charging an administrative fee, PROs distribute the public performance royalties they collect to the publishers and songwriters who are their members.

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.[99] 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 of sheet music and other traditional revenue sources for publishers, also prompted action from ASCAP.[100] In 1932, ASCAP negotiated a public performance license with radio broadcasters that, for the first time, established rates based on a

[93] Act of March 3, 1897, Ch. 392, 29 Stat. 694. Congress declined to grant exclusive performance rights when it first amended copyright law expressly to 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.

[94] Marcus Cohn, "Music, Radio Broadcasters and the Sherman Act," *Georgetown Law Journal*, vol. 29, no. 4 (January 1941), pp. 407, 410. (Cohn).

[95] *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).

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

[97] 2015 U.S. Copyright Office Report, p. 33.

[98] R.J. Marx, "Why They're Not Playing Our Song," *Seaside Signal*, June 13, 2019, at https://www.seasidesignal.com/opinion/seen-from-seaside/seen-from-seaside-why-they-re-not-playing-our-song/article_915b31c8-8585-11e9-ba19-832895f0ac3f.html. In 2018, Oregon enacted legislation that, among other provisions, prohibits ASCAP, BMI, and SESAC from "Engag[ing] in any coercive conduct, act or practice that is substantially disruptive to a proprietor's business [and] Us[ing] or attempt[ing] to use any unfair or deceptive act or practice in negotiating with a proprietor." ORS §647.715.

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

[100] Cohn, p. 414.

percentage of each station's advertising revenues.[101] 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.[102] A fourth PRO, Global Music Rights, 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.[103] 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.[104]

ASCAP and BMI Consent Decrees with the Department of Justice

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.[105] To avert an antitrust lawsuit threatened by DOJ, BMI agreed to enter a consent decree in 1941.[106] After DOJ filed an antitrust lawsuit against ASCAP, ASCAP also agreed to enter a consent decree in 1941.[107]

Although the ASCAP and BMI consent decrees are not identical, they share many of the same features. The features include the following four requirements:

1. acquiring only nonexclusive rights to license members' public performance rights;
2. granting a license to any user that applies on terms that do not discriminate against similarly situated licensees;
3. accepting any songwriter or music publisher that applies to be a member, as long as the writer or publisher meets certain minimum standards; and
4. offering 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 district court judges in the Southern District of New York. The MMA divested responsibility of overseeing the rate from the two judges who had

[101] Kohn, pp. 14-15.

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

[103] The following is a summary of the 2015 U.S.

Copyright Office Report, pp. 35-42.

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

[105] "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.

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

[107] For additional information about the ASCAP and BMI consent decrees, see CRS In Focus IF11463, *Music Licensing: The ASCAP and BMI Consent Decrees*, by Kevin J. Hickey and Dana A. Scherer.

been assigned that task, and instead provides that the Southern District of New York randomly assign judges to handle cases involving rates paid to ASCAP or BMI.[108]

In contrast to the mechanical right, the Copyright Act generally does not provide for compulsory licensing of public performance rights in musical works. (An exception is the rate determination for public performance license by noncommercial broadcasting stations, of which the CRB has oversight.[109]) 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 or BMI, the federal district court must find that the PRO has demonstrated that the rates are "reasonable."[110] According to the U.S. Court of Appeals for the Second Circuit, the district court must also consider that ASCAP and BMI exercise "disproportionate power over the market for music rights."[111] The MMA permits the district court to consider sound recording performance royalties by means of "'digital audio transmission' other than a transmission of a broadcaster" when setting rates that streaming services pay for the right to publicly perform musical works, but prohibits such consideration for any another licensees.[112] U.S. broadcast radio services are not legally obligated to pay for public performance rights for sound recordings. Thus, excluding broadcast service rates for sound recording public performances from the judges' consideration of rates for musical work public performances ensures that the ASCAP and BMI rates are higher than they might be otherwise.

Figure 3 illustrates the processes of licensing musical works for public performances.

[108] 28 U.S.C. §137(b). The House and Senate Judiciary Committees stated, "This change is not a reflection upon any past actions by the Southern District of New York—rather, it is believed that rate decisions should be assigned on a random basis to judges not involved in the underlying consent decree cases." October 2018 MMA Background and Section Analysis, p. 13.

[109] 17 U.S.C. §118(c)(1).

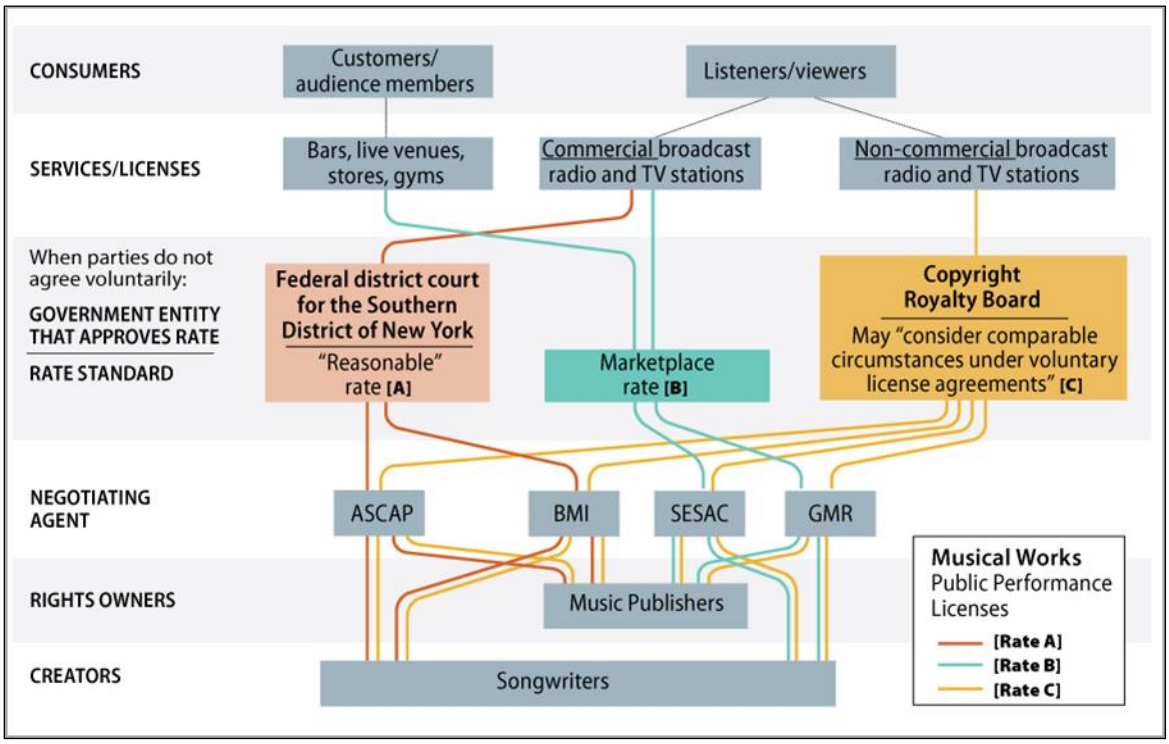
[110] ASCAP Consent Decree §IX; BMI Consent Decree §XIV.

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

[112] MMA, §103(c). [Note to 17 U.S.C §114.] The MMA repealed the provision in the Copyright Act that prohibited the rate court from considering rates paid by streaming services for rights to publicly perform sound recordings. MMA, §103(b). [The now-deleted 17 U.S.C §114(i) specified this prohibition.]

Figure 3. Venues and Broadcasters

Process of Licensing Musical Works (Public Performance Licenses)



Source: CRS

DOJ Consent Decree Review

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. DOJ completed a review of the consent decrees in 2016. In December 2017, the Second Circuit Court of Appeals upheld BMI's challenge to DOJ's interpretation of the consent decrees.[113] In 2019, DOJ began another review of the consent decrees and sought comment from the public on whether to terminate or modify the decrees.[114] On January 15, 2021, DOJ announced that it would leave the consent decrees in place.[115] However, Makan Delrahim, then the assistant attorney general heading the DOJ Antitrust Division, recommended that the agency review the decrees every five years "to assess whether the decrees continue to achieve their objective to protect competition and whether modifications to the decrees are appropriate in light of changes in technology and the music industry."[116]

[113] United States v. Broad. Music, Inc., 720 F. App'x 14, 15 (2d Cir. 2017), *aff'g* United States v. Broad. Music, Inc., 207 F. Supp. 3d 374 (S.D.N.Y. 2016).

[114] U.S. Department of Justice, "Antitrust Consent Decree Review: ASCAP and BMI 2019," at https://www.justice.gov/atr/antitrust-consent-decree-review-ascap-and-bmi-2019.

[115] 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, Remarks of Assistant Attorney General Makan Delrahim," January 15, 2021, at https://www.justice.gov/atr/antitrust-consent-decree-review-ascap-and-bmi-2019.

[116] Ibid.

Provisions of the MMA allow for additional Congress's oversight of DOJ's consent decree review via access to information from the agency.[117] First, the MMA requires DOJ, upon request, to brief any Member of the House or Senate Judiciary Committees regarding the status of any PRO consent decree review. Second, the MMA requires that DOJ, before seeking to terminate a consent decree, notify the Judiciary Committee chairpersons and ranking members. The notification must include a written report on DOJ's process, the public comments it received, and information regarding the impact of the proposed termination on the market for licensing public performances. According to the October 2018 MMA Background and Section Analysis, "There is serious concern that terminating the ASCAP and BMI decrees without a clear alternative framework in place would result in serious disruption in the marketplace, harming creators, copyright owners, licensees, and consumers."[118]

Copyright for Recording Artists and Record Labels

Sound Recording 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), in part to implement an international treaty called the Geneva Convention for the Protection of Producers of Phonograms Against Unauthorized Duplication of their Phonograms (1971).[119] 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.[120] According to the House Judiciary Committee report, the best solution for combating the trend was to amend federal copyright laws.[121] The 1971 Sound Recording Act applied to sound recordings fixed on or after February 15, 1972. [For information about how Congress addressed pre-1972 sound recordings in the MMA, see "Pre-1972 Sound Recordings (Classics Protection and Access Act)."]

Record labels have used these rights as the basis for suing for copyright infringement.[122] Until the advent of interactive streaming services, record labels did not license reproduction and distribution rights to third parties. Instead, the record labels retained those rights and distributed physical media (CDs, vinyl records, and cassette tapes) or digital files to retail stores such as Target or iTunes.[123] In the case of physical media, under the first sale doctrine of copyright law,

[117] MMA, §105. [Note to 17 U.S.C §106.]

[118] October 2018 MMA Background and Section Analysis, pp. 13-14.

[119] Nimmer, "Ch. 8.11 The Distribution Right (B)(2) Component Parts." See also World Intellectual Property Organization, "Home, Resources, WIPO-Administered Treaties, Phonograms Convention," at https://www.wipo.int/treaties/en/ip/phonograms/.

[120] 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, at https://www.copyright.gov/docs/sound/ (2011 U.S. Copyright Office Report), pp. 10-11.

[121] 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.

[122] See, for example, A&M Records v. Napster, Inc., 239 F.3d 1004, 1014 (9th Cir. 2001) ("We agree that plaintiffs have shown that Napster users infringe at least two of the copyright holders' exclusive rights: the rights of reproduction, §106(1); and distribution, §106(3). Napster users who upload file names to the search index for others to copy violate plaintiffs' distribution rights. Napster users who download files containing copyrighted music violate plaintiffs' reproduction rights.").

[123] Kristin Thomas and Brian Zisk, *iTunes and Digital Downloads: An Analysis*, Future of Music Coalition, June 15, 2003, at http://futureofmusic.org/article/article/itunes-and-digital-downloads-analysis. ("The arrangement between

the owner of a lawfully obtained reproduction of a copyrighted work can "sell or otherwise dispose of the possession of that copy" without the permission of the copyright owner.[124] This allowed record labels to sell physical media to retailers, without actually licensing distribution rights. In the case of electronic reproductions of songs, record labels initially conditioned their sale of songs to iTunes on Apple's incorporation of digital rights management software.[125] The software allowed consumers some flexibility to reproduce their electronic files of songs, but with limitations. Rather than purchasing an actual copy of the song, consumers often purchased only a license to access those songs; software embedded in the electronic files of the songs restricted the ability of consumers to resell them.[126] Record labels had the legal ability to insist on these limitations due in part to their rights pursuant to Title I of Digital Millennium Copyright Act (DMCA; P.L. 105-304), which Congress enacted in 1998.[127] The title, called the "WIPO Copyright and Performances and Phonograms Treaties Implementation Act of 1998," requires contracting parties to provide "adequate legal protection and effective legal remedies against the circumvention of effective technological measures that are used by [creators] in connection with the exercise of their [copyrights]."[128]

The anti-circumvention prohibitions are separate and distinct from copyright infringement.[129]

Ephemeral Reproductions

In 1976, as part its comprehensive copyright legislation, Congress enacted a provision related to the treatment of "ephemeral recordings" of phonorecords by commercial broadcast stations, government organizations, and nonprofit organizations.[130]

As the House Judiciary Committee explained,

> Section 112 [deals] with a special problem that is not dealt with in the present statutes but is the subject of provisions in a number of foreign statutes and in the revisions of the Berne Convention since 1948. This is the problem of what are commonly called "ephemeral recordings": copies or phonorecords of a work made for purposes of later transmission by a broadcasting organization legally entitled to transmit the work. In other words, where a

Apple and labels is considered a 'reseller agreement.' That means they're not licensing content from any labels but instead buying songs 'wholesale' and reselling them to consumers—a lot like a terrestrial retail store that purchases CDs wholesale and sells them retail.")

[124] 17 U.S.C. §109.

[125] Alex Veiga, "Apple Urging Recording Companies to End Music Copy Restrictions," *Dow Jones International News*, May 6, 2007. The record subsequently agreed to licenses electronic reproductions of songs to online retailers without the digital rights management software, thereby giving consumers greater flexibility listen to the songs on a variety of devices. Ed Christman, "A Tipping Point for MP3s, Pepsi/Amazon Promotion, Wal-Mart Ultimatum Pushing Labels Toward DRM-Free Format," *Billboard*, December 8, 2007, at https://www.reuters.com/article/us-mp3/digital-developments-could-be-tipping-point-for-mp3-idUSN0132743320071201.

[126] Eric Hinkes, "Access Controls in the Digital Era and the Fair Use/First Sale Doctrines," *Santa Clara High Technology Law Journal*, vol. 23, no. 4 (2007), pp. 685, 690.

[127] 17 U.S.C. §1201. The United States signed the treaties in Geneva, Switzerland in December 1996. 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, p. 63. (1998 DMCA Conference Report.)

[128] 1998 DMCA Conference Report, pp. 63-64.

[129] Hinks, p. 710 ("Though as noted, circumvention is not a new form of infringement but rather a new violation prohibiting actions or products that facilitate infringement, it is significant that virtually every clause of § 1201 that mentions 'access' links 'access' to 'protection.'") (citing Chamberlain Grp., Inc. v. Sklink Techs., Inc., 381 F.3d 1178, 1197 (Fed. Cir. 2004)).

[130] 17 U.S.C. §112.

> broadcaster has the privilege of performing or displaying a work ... the question is whether he should be given the additional privilege of recording the performance or display to facilitate its transmission. The need for a limited exemption in these cases because of the practical exigencies of broadcasting has been generally recognized, but the scope of the exemption has been a controversial issue.[131]

Thus, 17 U.S.C. §112(a)-(d) set forth exemptions to reproduction rights for owners of sound recordings. That is, broadcast stations, government organizations, and nonprofit organizations need not negotiate with nor pay record labels or recording artists for the right to make ephemeral recordings of phonorecords, and are exempt from liability, subject to the conditions described in Section 112.

In 1998, with the enactment of the DMCA, Congress modified Section 112 of the Copyright Act in order to address "the application of the ephemeral recording exemption in the digital age."[132] In this instance, rather than create an exception to copyright owners' exclusive reproduction rights for sound recordings, Congress created a compulsory license, for which licensees must pay. Recognizing that noninteractive digital services may need to make ephemeral server reproductions of sound recordings, Congress established a related license under Section 112 of the Copyright Act specifically to authorize the creation of these copies.[133] Through SoundExchange, described in the "Sound Exchange and AMP Act," copyright owners of sound recordings (usually the record labels) receive Section 112 fees. Recording artists who do not own the copyrights, however, do not.[134]

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.[135] Record labels and artists primarily earned income from retail sales of physical products such as CDs. With the increased public use of the internet in the early 1990s, the recording industry was concerned that people would substitute music purchases with online listening.[136] Congress sought to address this concern with the DPRA and DMCA.[137]

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[131] U.S. Congress, House Committee on the Judiciary, *Copyright Law Revision*, committee print, 94th Cong., 2nd sess., the U.S. Government Printing Office, September 3, 1976, 94-1476 (Washington: GPO, 1976), p. 101. (1976 House Judiciary Copyright Report.)

[132] 1998 DMCA Conference Report, p. 78.

[133] 17 U.S.C. §112(e).

[134] U.S. 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.

[135] Since 1926, Members have introduced dozens of bills to grant a full public performance right in sound recordings. Matthew DelNero, "Long Overdue - An Exploration of the Status and Merit of a General Public Performance Right in Sound Recordings," *Vanderbilt Journal of Entertainment Law & Practice*, vol. 6, no. 2 (Spring 2004), p. 118, n. 111.

[136] Arista Records, LLC v. Launch Media, Inc., 578 F.3d 148, 153 (2d Cir. 2009), *cert. denied*, 559 U.S. 929 (2010). ("Launch Media.") In 1994, Jason Berman, then the president of RIAA, stated that without a public performance via internet technology, the industry would be "unable to compete in this emerging digital era." Jube Shiver Jr., "Digital Double Trouble," *Los Angeles Times*, April 11, 1994.

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

In the DPRA, Congress granted record labels and recording artists a limited exclusive public performance right for digital audio transmissions of their sound recordings, subject to a compulsory license for certain noninteractive services. The compulsory license applied only to certain subscription digital audio services (e.g., SiriusXM satellite radio and Music Choice's music channels available to cable television subscribers).[138] 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.[139] The provision thus represented a compromise between trade groups representing music publishers and record labels.[140]

Within two years after the DPRA's enactment, RIAA and nonsubscription, advertising-supported, noninteractive streaming service providers debated whether the compulsory license applied to those services, and whether the services were obligated to pay public performance royalties for sound recordings.[141] 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 other noninteractive online music services.[142]

Sound Exchange and AMP Act

In 2000, RIAA established SoundExchange as a designated common agent for the record labels to receive and distribute royalties for noninteractive public performances and ephemeral reproductions. In 2003, RIAA spun off SoundExchange as an independent entity. Prior to distributing royalty payments, SoundExchange deducts costs incurred in carrying out its responsibilities. 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."[143]

In 2006, the CRB, on an interim basis, designated SoundExchange as the sole "collective,"[144] 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)."[145]

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[138] P.L. 104-39, §3(2).

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

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

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

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

[143] 117 U.S.C. §§803(c)(E)(iii); 803(d)(2)(C)(ii).

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

[145] 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.

The CRB subsequently designed SoundExchange as the collective during for the period 2011-2015[146] and January 1, 2016-December 31, 2020.[147] 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.

Allocation of Royalty Distributions

Section 114 of the Copyright Act specifies how royalties collected pursuant to the compulsory license 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.[148]

In order to pay certain creators, such as producers, mixers, and sound engineers, who were not by statute receiving royalties under Section 114, SoundExchange has had a policy since 2004 of honoring ''letters of direction'' to pay these creators a portion of the featured performer's royalties.[149] Title III of the MMA, called the "Allocations for Music Producers Act" (AMP Act), added new provisions to Section 114,[150] effective January 1, 2020, codifies this practice.

For sound recordings fixed on or after January 1, 1995, the DPRA's date of enactment,

> Nothing in section 114(g)(5) requires that SoundExchange modify any of its current policies in place for letters of direction for recordings ... Section 114(g)(5) simply makes the provision of the letter of direction system a statutory requirement while giving SoundExchange, and any future designated distribution collective, the discretion necessary to operate such a system.[151]

For sound recordings fixed before November 1, 1995, the AMP Act sets forth "a more detailed statutory framework for a letter of direction system.... Prior to this date, producers, mixers, and sound engineers would not have contemplated or predicted the payment of digital royalties in their contracts with an artist."[152]

Figure 4 illustrates the process of licensing ephemeral recordings and public performances for noninteractive services, broadcast stations, and venues.

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[146] 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).

[147] 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).

[148] 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.

[149] October 2018 MMA Background and Section Analysis, p. 16.

[150] 17 U.S.C. §§114(g)(6)-(7).

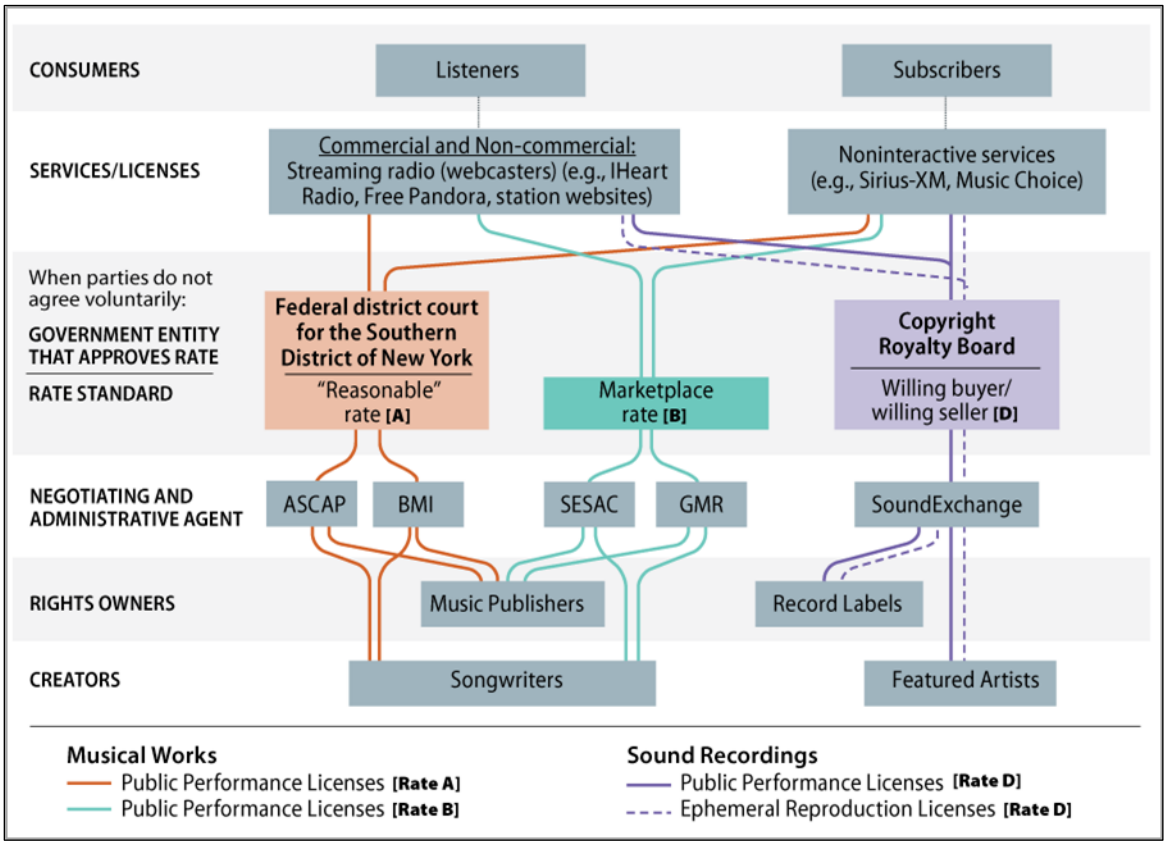
[151] October 2018 MMA Background and Section Analysis, p. 16.

[152] Ibid.

Some companies offer both noninteractive and interactive services. For example, in September 2016, Pandora rebranded one of its subscription streaming services and allowed subscribers to have greater control over the songs they can hear, making it ineligible for the statutory license rate.[153] Consequently, Pandora began to negotiate directly with record labels for public performance rights for its subscription services, while relying on SoundExchange to collect and distribute royalties for its noninteractive advertising-supported service. Press reports indicate SoundExchange's revenues dropped 26% between 2016 and 2017 (from $884 million to $652 million) due to Pandora's decision.[154] The amount that artists receive from Pandora is more dependent on their relationship with labels, rather than the 45% directed by Section 114 of the Copyright Act.

Figure 4. Noninteractive Services

Process of Licensing Musical Works and Sound Recordings



Source: CRS.

[153] SoundExchange, "Pandora Direct Licensing Agreement FAQs," at https://www.soundexchange.com/about/general-faqs/pandora-direct-licensing-agreements-faqs/.

[154] Ed Christman, "U.S. Industry Hits Highest Revenue Mark in a Decade, Fueled by Paid Subscriptions," *Billboard*, March 22, 2018, at https://www.billboard.com/articles/business/8257558/us-music-industry-2017-highest-revenue-in-decade-fueled-paid-subscriptions.

Interactive Services

The DPRA permitted record labels (and other rights holders) 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 sound recording. Examples of such services include Spotify, Apple Music, and Amazon Music.[155]

The Senate Judiciary Committee in 1995 stated,

> [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.[156]

Pre-1972 Sound Recordings (Classics Protection and Access Act)

The MMA also added a new Section 1401 to the Copyright Act, giving pre-1972 sound recordings generally the same exclusive rights and infringement remedies as those for sound recordings fixed on or after February 15, 1972.[157] Section 1401 treats pre-1972 sound recordings much like copyrighted sound recordings but technically withholds copyright protection. Thus, the section consistently refers to owners of exclusive rights to pre-1972 sound recordings as "rights holders" rather than copyright owners.

This difference in treatment leads to several differences in rights granted to the holders as well.[158] First, if the copyright owner of a pre-1972 sound recording is not making commercial use of it, another party can make noncommercial use of that recording under certain circumstances.[159] Second, pre-1972 recordings will enter the public domain on a rolling basis 95 years after their publication, following a further transitional period of protection.[160] Third, Section 1401 defers largely to state law in defining the rights owners of pre-1972 works, and addressing the validity of assignment of the rights to pre-1972 sound recordings prior to enactment of the MMA in October 2018.[161] Fourth, Section 1401 is silent on the topic of termination of copyright assignments. In contrast, for works protected by federal copyright, authors or their heirs can ordinarily terminate a license or assignment after a specified number of years.[162]

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[155] John Fletcher, Rob Parungo and Theodore Vincent Calaor, "Economics of Mobile Music," *S&P Market Intelligence*, July 2, 2020.

[156] 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.

[157] 17 U.S.C. §1401. These rights include the exclusive rights under Sections 106 and 602 and the right to pursue actions for violations of Sections 1201 and 1202. This portion of the MMA, Title II, is called the "Classics Protection and Access Act."

[158] For a detailed discussion of these differences, see LaFrance, pp. 325-338.

[159] 17 U.S.C. §1401(c).

[160] 17 U.S.C. §1401(a)(2).

[161] 17 U.S.C. §1401(*l*)(2).

[162] 17 U.S.C. §§203, 304(c)-(d).

Copyright Royalty Board and Rate Setting

The 1909 Copyright Act set the royalty rate for mechanical licenses at $0.02 per "part manufactured."[163] The rate remained in place for nearly 70 years.[164]

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. He stated that such adjustments should reflect the "accepted standards of statutory ratemaking."[165]

In testimony in 1975, then-Register of Copyrights Barbara Ringer suggested that Congress could simplify the process of administering the proposed compulsory licenses and the mechanical license by establishing a separate royalty tribunal. The tribunal would base royalty rates on standards set by Congress.[166] Congress created such a tribunal, consisting of five commissioners appointed by the President, in the 1976 Copyright Act.[167]

After replacing the tribunal with an arbitration panel (known as the Copyright Arbitration Royalty Panel) in 1993,[168] Congress established the Copyright Royalty Board in 2004.[169] The CRB, composed of three administrative judges appointed by the Librarian of Congress, sets rates for compulsory licenses every five years.[170] While copyright owners and users are free to negotiate voluntary licenses that depart from the statutory rates and terms, a CRB-set rate effectively limits what an owner may charge.[171]

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[163] 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.

[164] The rate 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).

[165] 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.

[166] 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.

[167] P.L. 94-553, §§801-810.

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

[169] 17 U.S.C. §§801-805; Copyright Royalty and Distribution Reform Act of 2004, P.L. 108-419.

[170] 17 U.S.C. §§801(b)(1) and 804(b)(4).

[171] For example, 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 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.

In 2018, with the enactment of the MMA, Congress directed the CRB to use a uniform "willing buyer, willing seller" standard to set rates for compulsory licenses of musical works and sound recordings.[172] The 2018 MMA Background and Section Analysis stated that the standard "equalize[s] the rate setting process for all licensees."[173] CRB will use this standard to set rates for Sirius-XM, Music Choice, and other digital music services operating in the United States prior to July 31, 1998, for ephemeral recording and sound recording public performance licenses they use as of January 1, 2028.[174]

Issues for Consideration

While the MMA addressed several issues related to music licensing and copyright, additional issues remain. Some of them have persisted for more than 70 years, while others have emerged in the 21st century. These include (1) the convergence of reproduction, distribution, and public performance rights in the transmission of musical works and sound recordings; (2) the types of licenses and negotiations required for interactive music services compared with those for other types of services and retailers; and (3) different treatment of musical works and sound recordings in statutes and antitrust oversight.

Convergence of Rights

The 1948 Records of the Brussels Diplomatic Conference for the Revision of the Berne Convention stated, "[W]ith respect to [programs] received and recorded in one stage but delayed or deferred for broadcasting within an unspecified period ... the rights of reproduction and performance overlap and merge ... "[175]

This convergence of reproductions and public performances is even truer today, particularly with respect to the use of sound recordings by interactive services. Because, in contrast to music publishers, record labels negotiate with interactive streaming services for reproduction, distribution, and public performances based on marketplace rates, the record labels' contracts may pertain to this bundle of rights, rather than separate rights. For example, an agreement between Sony Music and Spotify defines "publishing rights" as "(i) the reproduction, communication to

Copyright Royalty Board, Library of Congress, "Mechanical and Digital Phonorecord Delivery Rate Determination Proceeding," 74 *Federal Register* 4510, 4513, January 26, 2009. For information about additional compulsory licenses, see CRS Report R44473, *What's on Television? The Intersection of Communications and Copyright Policies*, by Dana A. Scherer.

[172] Pursuant to the now-repealed Section 801(b)(1) of the 1976 Copyright Act, as amended, the previous rate standard was based on policy objectives, including the objective of "minimizing any disruptive impact on the structure of the industries involved and on generally prevailing industry practices." The rate standard applied to (1) mechanical licenses for musical works and (2) public performance licenses for sound recordings licensed by noninteractive digital services in existence prior to July 31, 1998.

[173] October 2018 MMA Background and Section Analysis, p. 22.

[174] According to the DMCA conference report, the purpose of applying the previous rate-setting standard to services in existence prior to July 31, 1998, was to prevent disruption of the services' operations. 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.

[175] Marcel Plaisant, Rapporteur-General to the General Committee, *Records of the Conference Convened in Brussels June 5 to 26, General Report on the Work of the Brussels Diplomatic Conference for the Revision of the Berne Convention*, World Intellectual Property Organization, Geneva, June 26, 1948, p. 264. The report added, "It shall, however, be a matter for legislation [of each country] to determine the regulations for [and definition of] ephemeral recordings made by a broadcasting organization by means of its own facilities and used for its own broadcasts."

the public, public performance, digital audio transmission and generally making available in connection with the applicable Service of musical compositions embodied in Authorized Materials"[176]

Federal copyright laws permit record labels to negotiate with interactive services for a bundle of rights in marketplace negotiations. In contrast, the ASCAP and BMI consent decrees require music publishers to negotiate with interactive services for reproduction and public performance separately, subject to government oversight.

Different Treatment of Services, Retailers, and Copyright Owners

Rights Needed for Interactive Services

Figure 5 illustrates the numerous licenses that interactive music services must obtain from both music publishers and record labels in order to operate legally. Interactive services require reproduction and public performance licenses for both musical works and sound recordings.

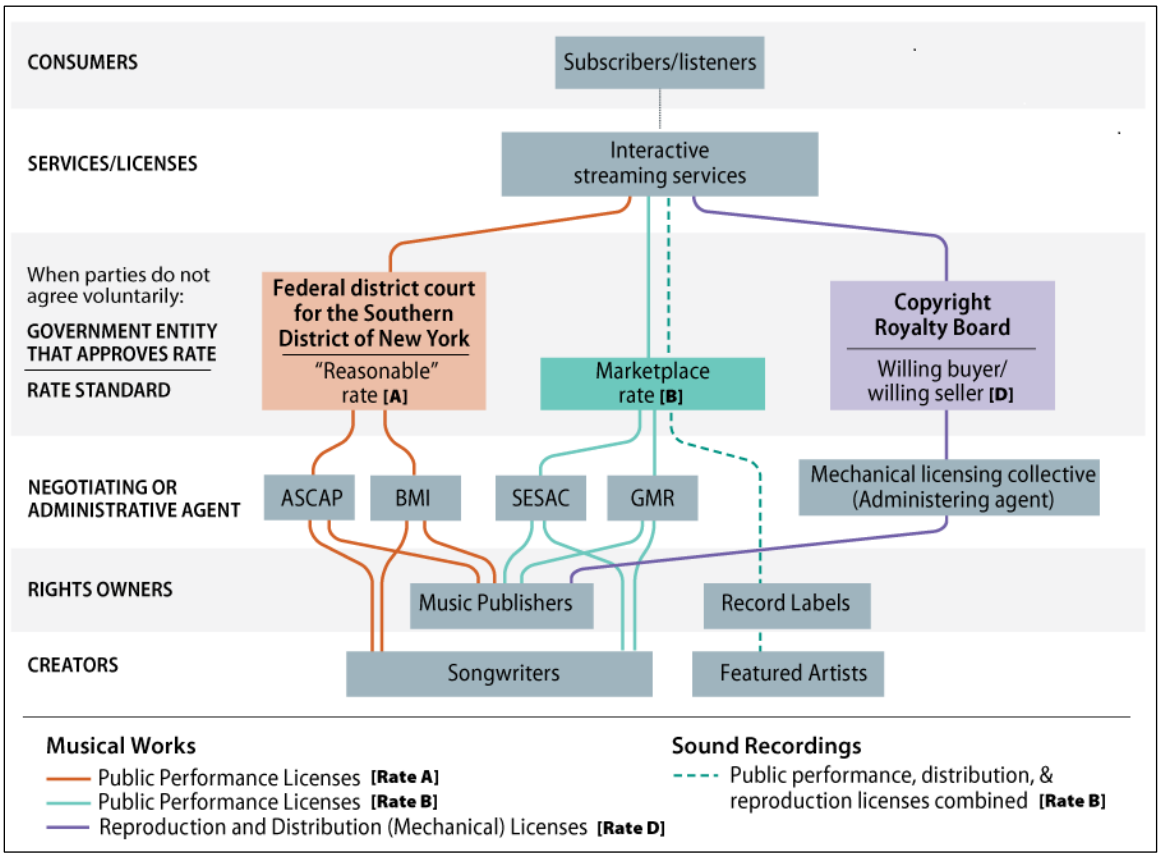
As illustrated by **Figure 2**, **Figure 3**, and **Figure 4**, other types of services and record labels, which distribute musical works to retailers on a wholesale basis, generally need only obtain reproduction or public performance rights, but not both. Some services need only obtain rights for musical works, while others must obtain rights for musical works and sound recordings. Some rights negotiations are subject to oversight by the Copyright Office and federal Southern District Court of New York, while other rights negotiations are not. An interactive service pays each record label in proportion to the label's share of the service's total streams.[177]

[176] Exhibit A, "Term Sheet, Definitions, Digital Distribution Agreement between Sony Music and Spotify AB, April 1, 2017, Exhibit 10.25," at https://www.sec.gov/Archives/edgar/data/1639920/000119312518063434/d494294dex1025.htm.

[177] Passman, p. 144. For subscription services, in addition to the formula, most record company contracts include a per-subscriber minimum to discourage the services from dropping their prices too low.

Figure 5. Interactive Services

Process of Licensing Musical Works and Sound Recordings



Sources: CRS; BMI, "FAQs: Royalties," at https://www.bmi.com/faq/category/royalties; ASCAP, "ASCAP Distribution Schedule," https://www.ascap.com/help/royalties-and-payment/payment/distribution.

Notes: Songwriters receive public performance royalties from PROs directly; they receive mechanical royalties from their publishers, unless they self-administer their rights.

Sound Recording versus Musical Reproduction Rights

Section 112 of the Copyright Act addresses the issue of ephemeral reproductions of sound recordings made by broadcasters and noninteractive services. Nevertheless, as discussed in "Digital Phonorecord Deliveries (DPDs)," the issue of temporary reproductions made by these services to transmit musical works remains unresolved. While in 2008, various industry participants "confirmed that noninteractive, audio-only streaming services do not require reproduction or distribution licenses from copyright owners,"[178] newer companies not privy to that agreement may disagree with that affirmation. Given that the MMA directs all licensees of DPDs to work with the Mechanical Licensing Collective, the lack of legal clarity about whether or not noninteractive services need to license DPDs may lead to future conflict.

[178] September 2008 RIAA press release.

Digital Services Versus Broadcast Stations

In 1995, the year Congress first required subscription digital services to obtain public performance licenses for sound recordings, it exempted radio stations from such a requirement.

The Senate Judiciary Committee explained in 1995 that it was attempting to strike a balance among many interested parties, stating,

> 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 of prerecorded music. This legislation should do nothing to change or jeopardize [these industries'] mutually beneficial relationship.[179]

However, the 2019 study *Gender Representation on Country Format Radio: A Study of Published Reports from 2000-2018* states that the promotional value of broadcast radio varies by genre, and that even within a genre, specifically country music, the value varies by the gender of the performing artists.[180] Specifically, the study found that

> These results show that women are not receiving anywhere near the same amount of [radio airplay] as their male colleagues, suggesting systemic issues of gender discrimination in radio programming far beyond what was originally presumed. The last five years (and in some cases 2018, in particular) emerge as particularly problematic for country culture, which lacks diversity and perpetuates gender biases.[181]

This finding may challenge one of the principal justifications for exempting broadcast radio stations from sound recording public performance licensing requirements.

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[179] 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. 14-15. The Senate Judiciary Committee further distinguished broadcast radio from other services by stating, "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." Ibid., p. 15.

[180] Jada Watson, Principle Investigator, SongData, *Gender Representation on Country Format Radio: A Study of Published Reports from 2000-2018*, WOMAN Nashville, Nashville, TN, April 26, 2019, p. 2, at https://songdata.ca/wp-content/uploads/2019/04/SongData-Watson-Country-Airplay-Study-FullReport-April2019.pdf. "Although streaming has become a major player in the marketing and promotion of popular music, country radio still functions as the gatekeeper of the genre and is integral to the concomitant viability and indeed success of artists."

[181] Ibid., p. 1.

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