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On the Radio: Public Performance Rights in Sound Recordings

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On the Radio: Public Performance Rights in Sound Recordings

A copyright grants the authors of a creative work certain exclusive rights in their creation. The scope of copyright in music depends on the type of work at issue and the particular use that is made of the work. U.S. law has explicitly recognized copyright in *musical works* (i.e., composition of the songwriters and lyricists who write a piece of music) since the early 19th century. Congress also has long recognized an exclusive right of public performance for musical works. This right means that persons wishing to perform a musical work publicly—for example, a symphony orchestra, music club, or a radio station—generally must pay royalties to the composers, songwriters, music publishers, or other owners of the musical-work copyright for that performance.

In 1971, after decades of legislative efforts, Congress extended copyright to *sound recordings* (i.e., recorded performance of a piece of music by musicians and singers). Although the issue was debated, Congress did not provide a public performance right for sound recordings in the 1970s. In 1995, Congress enacted the Digital Performance Right in Sound Recordings Act (DPRSRA), which created a new exclusive right to publicly perform sound recordings. DPRSRA limited that right to performances made “by means of a digital audio transmission.” Because over-the-air transmission by broadcast radio stations falls outside the definition of “digital audio transmission,” radio stations do not need to pay royalties to the performers, record labels, or other owners of the sound-recording copyright to publicly perform a sound recording.

Public performances of sound recordings fall into three broad categories—exempt transmissions, noninteractive digital transmissions, and interactive digital services—based on the means of transmission (broadcast versus internet, satellite, or cable) and the type of service (interactive versus noninteractive). Exempt transmissions do not require permission from or payment to the sound-recording copyright holder. Broadcast transmissions by Federal Communications Commission (FCC)-licensed radio stations, as well as certain transmissions to and within business establishments, are exempt. Noninteractive digital transmissions (such as the internet service Pandora, the satellite service Sirius XM, and the cable service Stingray Music) are subject to statutory licensing. These services do not need permission from the copyright holder to perform sound recordings, provided they pay a royalty rate set by the Copyright Royalty Board (CRB). Interactive digital services (such as Spotify and Apple Music) allow users to select particular sound recordings to be performed to them specifically. Interactive services must obtain permission from copyright holders, usually through a negotiated license and royalty rate.

Two pieces of legislation introduced in the 118th Congress focus on public performance rights for sound recordings transmitted by broadcast radio. The first, a nonbinding resolution known as Supporting the Local Radio Freedom Act (LRFA, H.Con.Res. 13 and S.Con.Res. 5), would effectively declare support for maintaining the status quo. LRFA would resolve that Congress should not impose any new performance royalty (or other fee, tax, or charge) for the public performance of sound recordings by a local radio station via over-the-air broadcast or on any business for such public performance of sound recordings via an over-the-air broadcast. The second, the American Music Fairness Act (AMFA, H.R. 791 and S. 253), would expand the public performance right for sound recordings to include any audio transmission, including broadcast radio transmissions. AMFA would subject performances by radio stations to the statutory license applicable to noninteractive digital services and place caps on royalties for broadcast stations with annual revenue under \$1.5 million in the preceding year (unless owned by an entity with annual revenue over \$10 million).

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Introduction

Copyright law grants the authors of original creative works a set of exclusive rights in their creations.¹ These rights can vary by the type of work at issue and its use. The public performance right for sound recordings—a type of copyrightable work that protects the creativity of the singers, musicians, and other performers that record a piece of music (collectively, performing artists)—is an example.² Congress did not recognize any right of public performance for sound recordings until 1995.³ This right is limited to performances “by means of a digital audio transmission.”⁴ As a practical matter, this limitation means that entities (such as radio stations) transmitting sound recordings via over-the-air broadcast do not need to pay royalties to performing artists.⁵ In contrast, entities making digital transmissions (e.g., streaming music services and online radio stations, including simulcasts) generally must pay such royalties.

Whether to maintain this distinction or change it has been a long-standing area of congressional debate. Supporting the Local Radio Freedom Act (LRFA)—H.Con.Res. 13 and S.Con.Res. 5 in the 118th Congress—is a concurrent resolution that would effectively support the status quo on public performance rights for sound recordings. LRFA would resolve that Congress is not to impose any new performance royalty (or other fee, tax, or charge) for the public performance of sound recordings by a radio station via over-the-air broadcast or by any business for such public performance of sound recordings.⁶ Resolutions similar to LRFA were introduced in past Congresses.⁷

In contrast, the American Music Fairness Act (AMFA)—H.R. 791 and S. 253 in the 118th Congress—would extend performance rights in sound recordings to broadcast radio transmissions. In other words, AMFA would require broadcast radio stations to pay copyright royalties to performing artists, record labels, and other sound-recording copyright owners for the right to transmit music over the air.⁸ While broadcast transmissions would generally be subject to statutory royalty rate, the amount that radio stations pay would be capped based on the amount of annual revenue the stations and their parent organizations generate.⁹ Bills similar to AMFA were also introduced in past Congresses.¹⁰

¹ See 17 U.S.C. § 106.

² Compare *id.* § 106(4) (public performance rights for musical and other works) with § 106(6) (limited public performance right for sound recordings).

³ See Digital Performance Right in Sound Recordings Act of 1995, P.L. 104-39, 109 Stat. 336 (codified as amended at 17 U.S.C. §§ 106(2), 114(d)–(j)).

⁴ See 17 U.S.C. § 106(6).

⁵ A “royalty” is a compensation to the owner of intellectual property for the right to use the work, often paid per copy made or sold. *Royalty*, BLACK’S LAW DICTIONARY (11th ed. 2009).

⁶ H.Con.Res. 13, 118th Cong. (2023); S.Con.Res. 5, 118th Cong. (2023).

⁷ Similar concurrent resolutions introduced in previous Congresses, all named the “Local Radio Freedom Act,” include the following: H.Con.Res. 33 and S.Con.Res. 9, 117th Cong. (2021); H.Con.Res. 20 and S.Con.Res. 5, 116th Cong. (2019); H.Con.Res. 13 and S.Con.Res. 6, 115th Cong. (2017); H.Con.Res. 17 and S.Con.Res. 4, 114th Cong. (2015); H.Con.Res. 16 and S.Con.Res. 6, 113th Cong. (2013); H.Con.Res. 21 and S.Con.Res. 7, 112th Cong. (2011); H.Con.Res. 49 and S.Con.Res. 82, 111th Cong. (2009); H.Con.Res. 244 and S.Con.Res. 82, 110th Cong. (2007).

⁸ See H.R. 791, § 2, 118th Cong. (2023); S. 253, § 2, 118th Cong. (2023).

⁹ H.R. 791, §§ 2(b), 4; S. 253, §§ 2(b), 4.

¹⁰ Similar bills introduced in previous Congresses include the following: American Music Fairness Act (AMFA) of 2022, H.R. 4130 and S. 4932, 117th Cong. (2022); Ask Musicians For Music Act of 2019, H.R. 5219 and S. 2932, 116th Cong. (2019); Fair Play Fair Pay Act of 2017, H.R. 1836, 115th Cong. (2017); Fair Play Fair Pay Act of 2015, H.R. (continued...)

This report explains how U.S. copyright law currently protects sound recordings. It reviews the history of exclusive rights that apply to certain digital public performances of sound recordings and ephemeral copies of sound recordings. In addition, this report discusses past legislative efforts around extending those public performance rights to broadcasters, business establishments, and services transmitting to business establishments and the varying treatment of ephemeral recording rights. It also discusses how these complex copyrights work in practice; that is, how royalties are typically paid for various uses of sound recordings and to whom. This report also examines LRFA and contrasts it with AMFA. Finally, the report analyzes the policy implications of expanding copyright in sound recordings to include over-the-air broadcast radio transmissions, including how AMFA—if enacted—might affect radio stations.

Copyright in Musical Works and Sound Recordings

The Difference Between Musical Works and Sound Recordings

Copyright law recognizes two distinct types of copyrightable works relating to musical creativity. The first type, a *musical work*, covers the musical composition itself—for example, the melody of a song and any accompanying lyrics.¹¹ The author—the initial copyright owner of a musical work—is typically the composer(s), lyricist(s), or songwriter (collectively, songwriters.)¹² In many cases, songwriters assign their musical-work copyrights to a music publisher.¹³ Copies of a musical work—the physical objects in which the work is “fixed” (i.e., recorded in some medium for later perception)—may take the form of a digital or analog recording, a musical score, or a written lyric sheet.¹⁴

The second type of copyrightable work relating to music is a *sound recording*, which covers the recorded performance of a musical work.¹⁵ The author—the initial copyright owner of a sound recording—is typically the performing artists who made a recording of a piece of music (e.g., the singers, musicians, producers, or engineers). Copies of a sound recording—the physical objects in which a sound recording is fixed, which copyright law calls “phonorecords”—take the form of a digital or analog recording, such as a compact disc, digital file (e.g., MP3), or vinyl record.¹⁶ In

1733, 114th Cong. (2015); Free Market Royalty Act, H.R. 3219, 113th Cong. (2013); Performance Rights Act, H.R. 848 and S. 379, 111th Cong. (2009).

¹¹ 17 U.S.C. § 102(a)(2); *see generally* U.S. COPYRIGHT OFF., CIRC. NO. 50, COPYRIGHT REGISTRATION FOR MUSICAL COMPOSITIONS (revised Mar. 2021), <https://www.copyright.gov/circs/circ50.pdf>.

¹² U.S. COPYRIGHT OFF., CIRCULAR 56A, MUSICAL COMPOSITIONS AND SOUND RECORDINGS (revised Mar. 2021), <https://www.copyright.gov/circs/circ56a.pdf>; *see also* SONG PIONEER, *Songwriter vs. Composer*, <https://songpioneer.com/songwriter-vs-composer/> (last visited April 27, 2023).

¹³ *See* CRS Report R43984, *Money for Something: Music Licensing in the 21st Century*, by Dana A. Scherer, at 7–8. In exchange, publishers (1) promote the use of the musical works by artists and other users (e.g., producers of movies, television programs, and commercials); (2) administer copyrights and royalty payments; and (3) support the composers’, lyricists’, and/or songwriters’ creative process. DONALD S. PASSMAN, *ALL YOU NEED TO KNOW ABOUT THE MUSIC BUSINESS* 220–21 (10th ed. 2019).

¹⁴ *See* 17 U.S.C. § 101 (definitions of “fixed” and “copies”). In the case of a digital or analog recording, the material object is termed a “phonorecord.” *See id.* (definition of “phonorecord”).

¹⁵ *Id.* §§ 101 (definition of “sound recording”), 102(a)(7); *see generally* U.S. COPYRIGHT OFF., CIRC. NO. 56, COPYRIGHT REGISTRATION FOR SOUND RECORDINGS (revised Mar. 2021). Nonmusical sound recordings are also copyrightable—for example, an audiobook or a podcast. *See* COPYRIGHT OFF. CIRC. 56, *supra*, at 1. This report focuses on sound recordings of musical works.

¹⁶ 17 U.S.C. § 101 (definition of “phonorecord”); *see* COPYRIGHT OFF. CIRC. 56, *supra* note 15, at 2 (“The term ‘phonorecord’ includes any type of object that may be used to store a sound recording, including digital formats....”).

copyright terms, a sound recording is considered a derivative work of the musical work being recorded (although, in some cases, both works may be created and fixed at the same time).¹⁷

In many cases, performing artists will contract with a record label and assign their sound-recording copyrights to the label.¹⁸ These transfers generally last for defined periods—for example, for recording a set number of albums—and apply to defined geographic regions.¹⁹ In return, recording artists receive advanced payment (i.e., *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 recordings, as well as income they earn from touring, merchandising, and sponsorships.

Exclusive Rights of the Copyright Holder for Musical Works Versus Sound Recordings

Owners of copyrights in musical works generally have the exclusive right to reproduce the work; create derivative works from it; distribute (i.e., sell) copies or phonorecords of the work; and perform or display the copyrighted work publicly.²⁰

Owners of copyrights in sound recordings have more limited legal rights. Like the owners of musical-work copyrights, sound-recording copyright owners have the exclusive right to reproduce the recording, create derivative works from it, and distribute it.²¹ However, the reproduction and derivative-work rights for sound recordings are limited to duplication of the actual sounds of the recording.²² Additionally, sound-recording copyright owners do *not* have any general exclusive right to perform the sound recording publicly. Instead, the public performance right for sound recordings extends only to “digital audio transmissions.”²³

Generally, if a particular action is within the copyright owner’s exclusive rights, no other person can take that action without authorization from the copyright owner.²⁴ For example, another person generally may not make copies of or sell a sound recording without permission from the copyright owner (unless one of the exceptions to and limitations on the copyright owner’s

¹⁷ COPYRIGHT OFF. CIRCULAR 56A, *supra* note 12; 1 NIMMER ON COPYRIGHT § 2.10[b] (2022); *see also* Palladium Music, Inc. v. EatSleepMusic, Inc., 398 F.3d 1193, 1197 (10th Cir. 2005); TufAmerica, Inc. v.Codigo Music LLC, 162 F. Supp. 3d 295, 303 n.5 (S.D.N.Y. 2016).

¹⁸ Scherer, *supra* note 13, at 8–10.

¹⁹ Whether recording artists are “employees” of the labels under the “work made for hire” doctrine has been the topic of considerable congressional debate. *See* Jon Pareles, *Musicians Take Copyright Issue to Congress*, N.Y. TIMES (May 25, 2000), <http://www.nytimes.com/2000/05/25/movies/musicians-take-copyright-issue-to-congress.html>. When sound recordings are not works made for hire, recording artists may terminate the assignment of their copyrights to the record labels after 35 years. 17 U.S.C. § 203; 2 PATRY ON COPYRIGHT § 5:44, *Work Made for Hire* (2021).

²⁰ *Id.* § 106(1)–(5).

²¹ *Id.* § 106(1)–(3).

²² *Id.* § 114(b). The limitation of the reproduction right to duplication of the actual sounds of the recording means that others may *imitate* a musical performance (e.g., Jimi Hendrix’s take on “The Star Spangled Banner”) without violating the sound-recording copyright, so long as the sounds themselves are independently produced and fixed by the second performer (rather than duplicated or sampled from the first recording). In contrast, the musical-work copyright reaches beyond literal duplication—any “substantially similar” composition that copied from the original work will infringe. *See* Skidmore v. Led Zeppelin, 952 F.3d 1051, 1064 (9th Cir. 2020).

²³ 17 U.S.C. §§ 106(6), 114(a). 17 U.S.C. § 114(j)(5) defines a “digital audio transmission” as “a digital transmission as defined in Section 101, that embodies the transmission of a sound recording.” In turn, 17 U.S.C. § 101 defines a “digital transmission” as “a transmission in whole or in part in a digital or other non-analog format” and “to transmit” as “to communicate ... by any device or process whereby images or sounds are received beyond the place from which they are sent.” The digital transmission definition excludes over-the-air broadcast transmissions.

²⁴ *Id.* §§ 106, 501(a).

exclusive rights, such as the fair use doctrine, apply).²⁵ Persons who act without permission from the copyright owner are said to *infringe* the copyright and may be sued in court for damages and other legal remedies.²⁶

Permission from the copyright owner is generally called a *license*.²⁷ Licenses may take two general forms. The first is a voluntary (or ordinary) license, in which the copyright owner grants permission via a negotiated contract, typically in exchange for monetary compensation (e.g., royalties).²⁸ The second is a *statutory license*—also known as a “compulsory license”—where permission is granted by law.²⁹ When Congress provides for a statutory license for some use of a copyrighted work, a third party need not seek individual permission from the copyright owner but can instead engage in the use and pay a royalty set by law, including by an agency known as the Copyright Royalty Board (CRB).³⁰ (For examples of statutory licenses, *see infra* “Noninteractive Services: Statutory Licensing” and **Figure 1**.)

Historical Development of Copyrights for Music

For nearly 200 years, Congress has amended music-related copyright laws, often in reaction to and in anticipation of consumer trends, stakeholder interests, technological developments, court decisions, overseas competition, and international copyright treaties, among other reasons. While a full discussion of these factors is beyond the scope of this report, **Appendix B** provides a chronology of key events. This section summarizes some of those events, focusing on public performance rights in sound recordings.

Musical Works

Musical works have been protected explicitly by federal copyright law since 1831.³¹ An exclusive right of public performance was granted to musical works in 1897.³² Given the many places in which songs may be publicly performed and the fleeting nature of performances, individual copyright owners found it difficult to detect unauthorized uses and negotiate licenses with potential users.³³ Copyright owners of nondramatic musical works (e.g., songwriters, composers, and music publishers) therefore joined together to form performing rights organizations (PROs)

²⁵ *See id.* §§ 106 (exclusive rights), 107–122 (exceptions and limitations).

²⁶ *Id.* §§ 501–505.

²⁷ *License*, BLACK’S LAW DICTIONARY (11th ed. 2019) (“A permission ... to commit some act that would otherwise be unlawful.”).

²⁸ A written, signed contract is required for transfers of copyright ownership and exclusive licenses but not for nonexclusive licenses. 17 U.S.C. §§ 101, 204.

²⁹ *Compulsory License*, BLACK’S LAW DICTIONARY (11th ed. 2019) (“A statutorily created license that allows certain parties to use copyrighted material without the explicit permission of the copyright owner in exchange for a specified royalty.”).

³⁰ *See, e.g.*, 17 U.S.C. § 115 (compulsory license to make and distribute phonorecords of musical works); *id.* ch. 8 (establishing the Copyright Royalty Board [CRB] to determine reasonable royalty rates for statutory copyright licenses).

³¹ Act of Feb. 3, 1831, 21st Cong., 2d Sess., 4 Stat. 436 (extending copyright to “authors of ... musical composition[s]”). Prior to 1831, sheet music could be registered and protected as a “book” under the Copyright Act of 1790. *See generally* 1 PATRY ON COPYRIGHT § 1:19, *The First Copyright Act—Generally*, at n.21 (2021); Clayton v. Stone, 5 F. Cas. 999, 1000 (C.C.S.D.N.Y. 1829).

³² Act of Jan. 6, 1897, 54th Cong., 2d Sess., 29 Stat. 481.

³³ *See Broadcast Music, Inc. v. CBS*, 441 U.S. 1, 4–6 (1979) (recounting history of the formation of performing rights organizations).

to license their works on a collective (i.e., “blanket”) basis.³⁴ The first PRO was the American Society of Composers, Authors and Publishers (ASCAP), founded in 1914.³⁵ PROs generally offer users—such as radio stations, television stations, and businesses establishments—a blanket license that allows them to perform publicly any of the musical works in the PRO’s catalog for a flat fee or a percentage of total revenues.³⁶

Sound Recordings

Reproduction and Distribution

Between 1926 and 1971, Members of Congress introduced at least 19 bills that would have granted copyright protection for the reproduction, distribution, and/or public performance of sound recordings.³⁷ It was not until 1971 that Congress provided federal copyright protection for sound recordings, prohibiting the reproduction and distribution of sound recordings without the copyright holder’s permission.³⁸ The stated reason for the legislation was the increasing piracy of records and tapes, which a House report estimated as causing losses “in excess of \$100 million,” and for which state laws offered inconsistent and limited legal remedies.³⁹

The 1976 general revision of the Copyright Act (1976 Act), which created the Copyright Act’s Section 114 to address sound recordings, largely maintained the scope of the 1971 law.⁴⁰ The 1976 Act recognized sound recordings as a type of copyrightable work, and granted copyright

³⁴ *Broadcast Music*, 441 U.S. at 5–6. Performing rights organizations (PROs) do not license performance rights for dramatic musical works—music that serves to enhance the plot of dramatic work, as in musical theater or opera. Instead, rights holders of dramatic musical works control the licensing themselves. American Society of Composers, Authors and Publishers (ASCAP), *Common License Terms Defined*, <https://www.ascap.com/help/ascap-licensing/licensing-terms-defined> (last visited May 30, 2023). Copyright law does not define the terms *dramatic* or *nondramatic*. The delineation depends on the facts pertaining to a particular performance. *Id.*

³⁵ *Broadcast Music*, 441 U.S. at 4–5.

³⁶ *Id.* at 5. For more detail on PROs, see generally Scherer, *supra* note 13, at 18–22. As a result of antitrust litigation, the licensing activities of ASCAP and another PRO—Broadcast Music, Inc. (BMI)—are subject to consent decrees with the U.S. Department of Justice. See CRS In Focus IF11463, *Music Licensing: The ASCAP and BMI Consent Decrees*, by Kevin J. Hickey and Dana A. Scherer. At a high level, these consent decrees require the PROs to obtain only the nonexclusive right to license musical performances, to offer licenses on equal terms to similarly situated applicants, and to accept any songwriter who meets minimum membership requirements. See *id.*

³⁷ Matthew S. DelNero, *Long Overdue? An Exploration of the Status and Merit of a General Public Performance Right in Sound Recording*, 6 VAND J. ENT. L. & PRAC. 181, 202–03 n. 11 (2003). See generally BARBARA A. RINGER, COPYRIGHT LAW REVISION NO. 26: THE UNAUTHORIZED DUPLICATION OF SOUND RECORDINGS 21–37 (1957), <https://www.copyright.gov/history/studies/study26.pdf> (reviewing dozens of legislative proposals dating from 1906 to grant federal copyright protection to sound recordings). Part of the controversy delaying legislative action was legal uncertainty about whether sound recordings (which are not legible to a human eye) could be considered “Writings” within the meaning of the Constitution’s Copyright Clause. See RINGER, *supra*, at 4–7; *White-Smith Music Pub. Co. v. Apollo Co.*, 209 U.S. 1, 17 (1908) (construing a “copy” of a musical composition under the Copyright Act of 1831 as “a written or printed record of it in intelligible notation”). The Supreme Court eventually put this issue to rest in *Goldstein v. California*, 412 U.S. 546, 561–62 (1973) (holding that recorded musical performances were included within the term “Writings” as used in the Copyright Clause).

³⁸ Sound Recording Act of Oct. 15, 1971, Pub. L. No. 92-140, 85 Stat. 391, 391. For sound recordings made before the effective date of the 1971 Act—February 15, 1972—copyright protection was, until recently, available only under state law. In 2018, however, Congress provided for federal copyright-like protections for pre-1972 sound recordings. See generally CRS Legal Sidebar LSB10181, *The Music Modernization Act: Extending Copyright Protection to Pre-1972 Sound Recordings*, by Kevin J. Hickey.

³⁹ See H.R. REP. NO. 92-487, at 2–3 (1971).

⁴⁰ Act of Oct. 19, 1976 (1976 Act), P.L. 93-553, 90 Stat. 2541, 2545–46, 2560–61.

owners the exclusive rights to reproduce, distribute, and create derivative works.⁴¹ The reproduction right continued to be limited to duplication of the actual sounds in the recording (as it still is).⁴²

Public Performances

Although the issue was debated in Congress, the 1976 Act did not provide an exclusive right of public performance for sound recordings.⁴³ The new Section 114 included a provision stating that the rights of the sound-recording copyright owner “do not include any right of performance.”⁴⁴ Instead, the 1976 Act directed the Copyright Office to study whether the law should be amended to provide an exclusive right of public performance.⁴⁵

In 1978, the Copyright Office submitted its report to Congress and generally supported a public performance right for sound recordings.⁴⁶ Although there were several congressional hearings and bills introduced in the late 1970s and 1980s,⁴⁷ as well as a second Copyright Office report favoring a performance right in 1991,⁴⁸ there was no change in the law until 1995. In describing events that prompted the 1995 change, the House Committee on the Judiciary stated as follows:

Trends within the music industry, as well as the telecommunications and information services industries, suggest that digital transmission of sound recordings is likely to become a very important outlet for the performance of recorded music in the near future.... However, in the absence of appropriate copyright protection in the digital environment, the creation of new sound recordings and musical works could be discouraged, ultimately denying the public some of the potential benefits of the new digital transmission technologies.⁴⁹

Through the Digital Performance Right in Sound Recordings Act of 1995 (DPRSRA),⁵⁰ Congress amended the copyright laws to create a new exclusive right to publicly perform sound recordings, but only when performed “by means of a digital audio transmission.”⁵¹ This new right was also

⁴¹ *Id.*

⁴² *Id.* at 2560; *see also* 17 U.S.C. § 114(a)–(b).

⁴³ *See generally* Sidney A. Diamond, *Sound Recordings and Phonorecords: History and Current Law*, 1979 U. ILL. L.F. 337, 358–59 (noting that earlier versions of the 1976 Act included a performance right for sound recordings, subject to a compulsory license, that was abandoned because “its controversial nature threatened further delay of the entire copyright revision”); H.R. REP. NO. 94-1476, at 106 (“The Committee considered at length the argument in favor of establishing a limited performance right [for sound recordings], but concluded that the problem requires further study.”).⁴⁴ Copyright Act of Oct. 19, 1976, § 101; 90 Stat. 2541, 2560 (codified at 17 U.S.C. § 114(a)).

⁴⁴ Copyright Act of Oct. 19, 1976, § 101; 90 Stat. 2541, 2560 (codified at 17 U.S.C. § 114(a)).

⁴⁵ *Id.* at 2560–61.

⁴⁶ Subcomm. on Courts, Civil Liberties, and the Admin. of Justice of the H.R. Comm. on the Judiciary, *Performance Rights in Sound Recordings*, 95th Cong., 2d Sess., at 177 (Comm. Print June 1978), <https://copyright.gov/reports/performance-rights-sound-recordings.pdf>.

⁴⁷ *See* 4 PATRY ON COPYRIGHT § 14:81, *The Right to Publicly Perform a Work—Sound Recordings—Generally* (2021) (citing to congressional hearings on the issue).

⁴⁸ U.S. COPYRIGHT OFF., *THE REPORT OF THE REGISTER OF COPYRIGHTS ON COPYRIGHT IMPLICATIONS OF DIGITAL AUDIO TRANSMISSION SERVICES* 160 (Oct. 1991), <https://www.copyright.gov/history/Copyright%20Implications%20of%20Digital%20Audio%20Transmission%20Services.pdf>.

⁴⁹ H.R. REP. NO. 104-274, at 12–13 (1995).

⁵⁰ P.L. 104-39, 109 Stat. 336 (1995) (codified as amended at 17 U.S.C. §§ 106(2), 114(d)–(j)).

⁵¹ *Id.* at 336; 17 U.S.C. § 106(6).

made subject to various limitations, exceptions, and statutory licenses, described in amendments to Section 114.⁵²

For example, Congress exempted over-the-air transmissions by broadcast radio stations.⁵³ The Senate Committee on the Judiciary reasoned that performers have “benefitted considerably from airplay and other promotional activities provided by advertiser-supported, free over-the-air broadcasting” and that Congress did not wish to alter “the mutually beneficial economic relationship between the recording and traditional broadcasting industries.”⁵⁴ The committee also distinguished traditional radio from then-emerging “on-demand” digital music services:

The Committee believes that copyright owners of sound recordings should enjoy protection with respect to digital subscription, interactive and certain other such performances. By contrast, free over-the-air broadcasts are available without subscription, do not rely on interactive delivery, and provide a mix of entertainment and non-entertainment programming and other public interest activities to local communities to fulfill a condition of the broadcasters’ license. The Committee has considered these factors in concluding not to include free over-the-air broadcast services in this legislation.... It is the Committee’s intent to provide copyright holders of sound recordings with the ability to control the distribution of their product by digital transmissions, without hampering the arrival of new technologies, and without imposing new and unreasonable burdens on radio and television broadcasters, which often promote, and appear to pose no threat to, the distribution of sound recordings.⁵⁵

Congress also exempted certain transmissions to and within business establishments.⁵⁶ The Senate committee’s report explained its intent to exempt from liability both “noninteractive transmissions and retransmissions made to business establishments for use in the ordinary course of their business, such as for background music played in offices, retail stores or restaurants,”⁵⁷ as well as “storecasting” (i.e., transmission or retransmissions by businesses “on or around their premises”).⁵⁸

DPRSRA also created a new statutory license for certain noninteractive public performances of sound recordings by digital means.⁵⁹ This license, later amended and expanded in 1998 in the Digital Millennium Copyright Act (DMCA),⁶⁰ is explained below.⁶¹

Ephemeral Recordings

As early as the 1940s, broadcast radio stations have made temporary copies of sound recordings to facilitate the transmission of music over the air. For example, stations may have recorded live

⁵² 109 Stat. at 336–44; 17 U.S.C. § 114(d)–(j).

⁵³ 17 U.S.C. § 114(d)(1)(A).

⁵⁴ S. REP. NO 104-128, at 15 (1995).

⁵⁵ *Id.*

⁵⁶ 17 U.S.C. § 114(d)(1)(C)(ii), (iv).

⁵⁷ S. REP. NO 104-128, at 23.

⁵⁸ *Id.* at 22.

⁵⁹ 109 Stat. at 338; 17 U.S.C. § 114(d)(2).

⁶⁰ P.L. 105-304, § 405; 112 Stat. 2860, 2890–2902 (1998) (codified at 17 U.S.C. §§ 112(f), 114(d)).

⁶¹ *See infra* “Noninteractive Services: Statutory Licensing.”

performances of orchestras but broadcast those performances at a later date.⁶² In addition, broadcast stations may retain copies of music broadcasts for archival purposes.⁶³

Thus, in contrast to a “permanent” reproduction of a sound recording available to the public for sale, an “ephemeral” copy of a sound recording is a temporary copy used internally by broadcasters and/or other entities that transmit music to the public. In 1976, Congress created a separate statutory license to allow broadcast radio stations to make ephemeral recordings if the stations were otherwise to transmit the work.⁶⁴

The Federal Communications Commission (FCC), the agency that licenses broadcast radio stations, began to consider authorizing digital broadcast radio services in 1990.⁶⁵ In the DMCA, Congress amended Section 112(a) to extend to broadcast radio stations the same ability to make royalty-free ephemeral recordings for over-the-air digital transmissions as they had for over-the-air analog transmissions.⁶⁶

Similarly to broadcast radio stations, the digital music services emerging in the 1990s also needed to reproduce sound recordings for internal business and technical purposes (e.g., multiple copies of sound recordings on different servers to transmit music to listeners at different bitrates and qualities).⁶⁷ To allow this, the DMCA created a new, separate ephemeral recording statutory license under Section 112(e).⁶⁸ Section 112(e) permits entities transmitting to business establishments and entities relying on the Section 114 statutory license for noninteractive digital audio transmissions to make multiple ephemeral copies of sound recordings, subject to certain limitations.⁶⁹

Current Law Governing Public Performance of Sound Recordings

Following DPRSA, organizations that publicly transmit performances of sound recordings via digital audio transmissions generally must pay to license those performances.⁷⁰ Examples of

⁶² General Report on the Work of the Brussels Diplomatic Conference of the Revision of the Berne Convention Presented by Marcel Plaisant, Rapporteur-General to the General Committee on June 25, 1948, and Approved in Plenary on June 26, 1948, at 264, <https://global.oup.com/booksites/content/9780198259466/15550028>. The signatories to this treaty agreed to make it a matter of individual nations’ laws “to determine the regulations for epithermal recordings made by a broadcasting organization of means of its own facilities and used for its own broadcasts.” Article 11-bis (2), Brussels Act (1948), at WIPO Lex.

⁶³ H.R. REP. NO. 94-1476, at 103 (1976).

⁶⁴ 17 U.S.C. § 112(a); H.R. REP. NO. 94-1476, at 47, 101 (1976). Under § 112(a) of the 1976 Act (P.L. 94-553), a broadcast station may make a single ephemeral copy for its own transmission, within its “local service area.” The term “local service area” is defined in § 111(f) of the 1976 Act (17 U.S.C. § 111(f)). However, this definition applies to television stations rather than radio stations. For more information about this definition, see CRS Report R44473, *What’s on Television? The Intersection of Communications and Copyright Policies*, by Dana A. Scherer. § 112(b), also enacted in 1976, provides instructional broadcasters and educational groups with more extensive ephemeral recording rights than those for commercial broadcaster stations. See 17 U.S.C. § 112(b).

⁶⁵ *Digital Audio Broadcasting Systems and Their Impact on Terrestrial Radio Broadcast Service, Notice of Proposed Rule Making*, MM Docket No. 99-325, 15 F.C.C.R. 1722, 1724 (1999), <https://docs.fcc.gov/public/attachments/FCC-99-327A1.pdf>.

⁶⁶ Digital Millennium Copyright Act (DMCA), P.L. 105-304, § 402 (codified at 17 U.S.C. § 112(a)).

⁶⁷ H.R. REP. NO. 105-796, at 79, 89-90 (1998).

⁶⁸ DMCA § 405(b) (codified at 17 U.S.C. § 112(e)).

⁶⁹ See 17 U.S.C. § 112(e)(1). See also H.R. REP. NO. 105-796, at 89–90 (1998).

⁷⁰ 17 U.S.C. § 106(6).

digital audio transmission services include “webcasters” (e.g., broadcast radio stations transmitting programming over the internet); digital subscription services (e.g., SiriusXM satellite digital radio service and Music Choice cable network); and music streaming services (e.g., Pandora and Spotify).

In granting performance rights for the digital audio transmission of sound recordings in the 1990s, however, Congress exempted certain transmissions entirely and subjected others to statutory licensing. This section reviews the law on which digital audio transmissions are exempt, subject to statutory licensing, or subject to negotiated licensing, including provisions that permit the creation of ephemeral recordings.

Exempt Transmissions

Generally, a radio broadcaster transmitting over the air need not pay to license public performances of sound recordings for those broadcasts.⁷¹ A radio broadcaster, however, must limit retransmissions to a radius of 150 miles of its station’s transmitter, unless it is transmitting its signal to another radio station to extend its over-the-air signal.⁷²

In addition, a digital music service that transmits to a business establishment for the use of music in its ordinary course of business as background music need not pay a licensing fee for performance of the sound recording (provided the business does not retransmit the music outside its premises or immediate vicinity).⁷³

Nonexempt Transmissions

For nonexempt digital audio transmissions of sound recordings, the public performance royalty rate depends largely on whether the service is *interactive* or *noninteractive*.

Interactive Services: Marketplace Negotiations

An interactive service, such as Spotify, enables members of the public to select particular sound recordings to be performed to them.⁷⁴ These types of transmissions require a negotiated license from the copyright owner to perform (i.e., stream) the sound recording to the public.⁷⁵ Thus, public performance royalty rates for interactive services are set by contractual agreements between rights holders (e.g., record companies) and the service.⁷⁶ (Under the Musical Works Modernization Act, services like Spotify may obtain blanket licenses for “digital phonorecord deliveries,” but these licenses are for the reproduction and distribution of the *musical works*, not for the reproduction, distribution, or performance of the sound recording.⁷⁷)

⁷¹ *Id.* § 114(d)(1)(A).

⁷² *Id.* § 114(d)(1)(B).

⁷³ *Id.* § 114(d)(1)(C)(iv); *see also* S. REP. NO. 104-128, at 23–24. The Senate report noted that the bill was “[not] intended to change current law as it applies to such public performances of copyrighted musical works under section 106(4).” *Id.* at 24.

⁷⁴ 17 U.S.C. § 114(j)(7).

⁷⁵ *Id.* § 114(d)(3).

⁷⁶ *See* Scherer, *supra* note 13, at 28.

⁷⁷ P.L. 115-264, § 102, 132 Stat. 3676, 3677–3723 (codified at 17 U.S.C. § 115).

Noninteractive Services: Statutory Licensing

Digital audio transmissions by noninteractive services, where the user cannot select particular sound recordings to be played to them on demand (e.g., Pandora), are generally subject to statutory licensing.⁷⁸ These services do not require advance permission from the copyright owner to perform a sound recording. Instead, the organizations receive a compulsory license to make the performances in exchange for paying royalty rates set by the CRB. This category includes subscription services, such as Sirius XM, and nonsubscription services, such as simulcasts of broadcast radio transmissions online.⁷⁹

In a 2002 order setting royalty rates for noninteractive services, the Librarian of Congress, who had ultimate authority over the forerunner to the CRB, the Copyright Arbitration Royalty Panel,⁸⁰ upon recommendation of the Register of Copyrights, determined that “the better interpretation of the law is that the exemption [for public performances of sound recordings made within a 150 mile radius of the station’s transmitter] does not apply to radio retransmissions made over the Internet.”⁸¹ Therefore, radio stations that simulcast their over-the-air broadcasts over the internet are subject to the statutory licensing scheme for the online simulcast.

Ephemeral Recordings

Two separate provisions allow radio stations and other transmitting entities to make ephemeral copies of a sound recording to make an otherwise authorized transmission.

Under Section 112(a) of the DCMA, a radio broadcaster need not pay to make a single ephemeral recording of a phonorecord necessary to transmit sound recordings over the air, provided it (1) is the only organization that uses those recordings, (2) limits transmission to its local service area, and (3) destroys the copy of the sound recording within six months from the first date of transmission to the public, unless it is preserving the recording for archival purposes.⁸² Section 112(a) is an exemption for copyright, so the broadcasters need not pay royalties to make these ephemeral recordings.

Under Section 112(e), broadcasters—as well as webcasters, services transmitting music to business establishments, and others relying on the statutory license for noninteractive services—may make multiple ephemeral recordings in order to make licensed transmissions.⁸³ These ephemeral copies must be used solely by the transmitting organization for their own transmissions, and they generally must be destroyed within six months.⁸⁴ Unlike Section 112(a),

⁷⁸ *Id.* § 114(d)(2).

⁷⁹ *Id.* § 114(d)(2), (j)(6).

⁸⁰ The Copyright Royalty Tribunal Act of 1993, P.L. 103-198, created two layers of review that result in a final order: one by the Librarian of Congress (Librarian) and a second by the U.S. Court of Appeals for the District of Columbia Circuit. The act directed the Librarian, on the recommendation of the Register of Copyrights, either to accept the decision of the tribunal or to reject it. If the Librarian rejected it, the Librarian was required to substitute the Librarian’s own determination. If the Librarian accepted it, then the determination of the tribunal became the determination of the Librarian. The Copyright Royalty and Distribution Reform Act of 2004, P.L. 108-419, amended the rate-setting procedures, which are now described in 17 U.S.C. § 803.

⁸¹ Determination of Reasonable Rates and Terms for the Digital Performance of Sound Recordings and Ephemeral Recordings, 67 Fed. Reg. 45,240, 45,256 (July 8, 2002). *See also* Bonneville Int’l Corp. v. Peters, 347 F.3d 485 (3d Cir. 2003), *aff’g* 153 F. Supp. 2d 763 (E.D. Pa. 2001); Public Performance of Sound Recordings: Definition of a Service, 65 Fed. Reg. 77,292, 77,295–300 (Dec. 11, 2000).

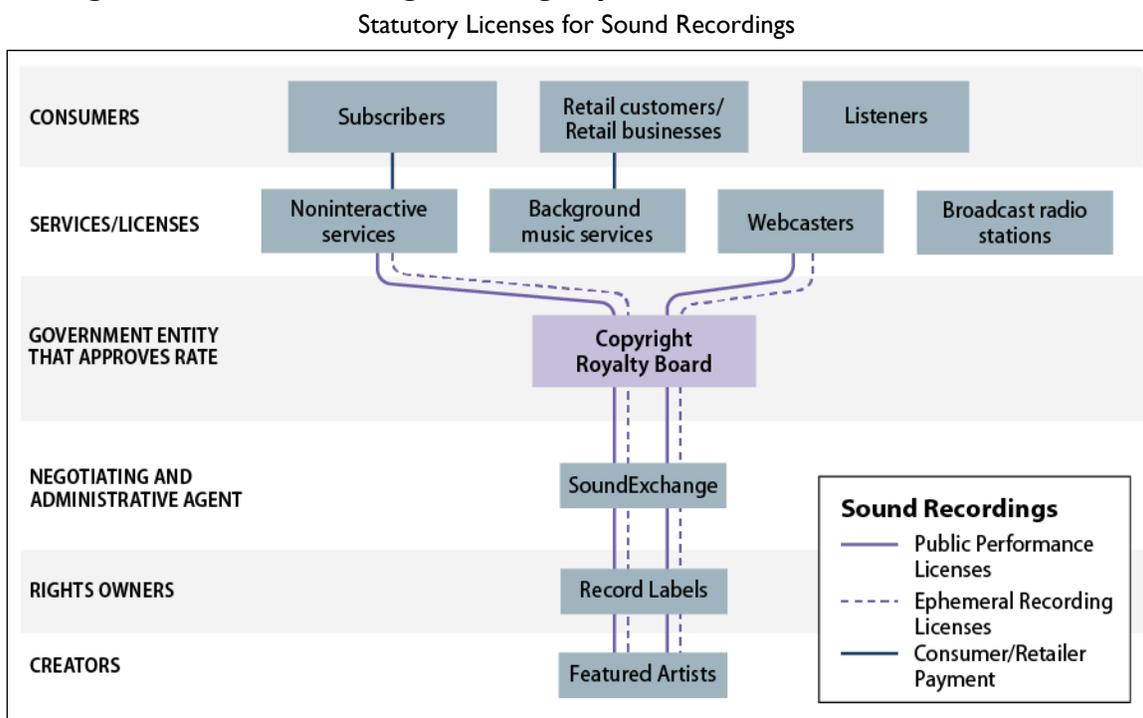
⁸² 17 U.S.C. § 112(a).

⁸³ *Id.* § 112(e)(1).

⁸⁴ *Id.*

transmitters relying on Section 112(e) *do* need to pay copyright holders for this right under a statutory license with rates set by the CRB.⁸⁵

Figure 1. Sound Recording Licensing Royalties from Noninteractive Services



Source: Congressional Research Service (CRS).

Note: As described in “Royalties for Statutory Licenses,” SoundExchange is an agent representing record labels and recording artists that collects and distributes royalties.

Technological, Legislative, and Industry Developments: Effects on Recording Industry Revenues

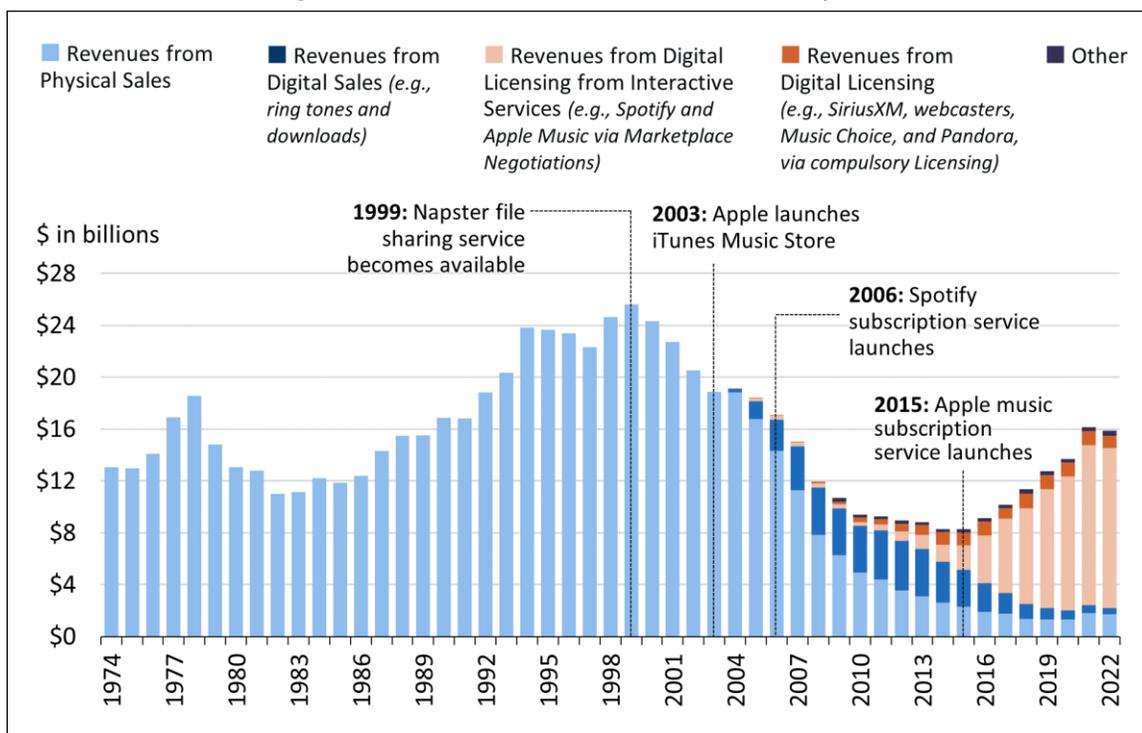
Figure 2 illustrates the relationship between technological, legislative, and industry developments within the recording industry and the revenues generated by the industry. In particular, the mix of revenues has shifted from predominately retail sales of physical products, such as vinyl records and cassette tapes in the 1970s, to predominately wholesale licensing of sound recordings to on-demand streaming services.

⁸⁵ *Id.* § 112(e)(3)–(5).

Figure 2. Recording Industry Revenue Trends

Adjusted for Inflation in 2022 Dollars

Figure is interactive in the HTML version of this report.



Source: CRS analysis of data provided by the Recording Industry Association of America, April 2023.

Notes: In 1999, the same year recording industry revenues reached an apex of \$25.6 billion (in 2022 dollars), two teenagers introduced a free, peer-to-peer file-sharing service called Napster, enabling computer users to share each other's record collections throughout the world. 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). Despite Napster's loss, total industry revenues, when adjusted for inflation, have declined overall since 1999. For additional information, see Scherer, *supra* note 13.

Royalties for Statutory Licenses

For the services subject to statutory licensing, a nonprofit collective called SoundExchange acts as a common agent for record labels to receive and distribute royalties. The CRB, in line with previous decisions, formally designated SoundExchange as the collective for the period beginning January 1, 2021, and ending December 31, 2025.⁸⁶

The CRB sets rates for public performances and ephemeral reproductions of sound recordings—sometimes known as “Section 114” and “Section 112” licenses, respectively—which are paid to SoundExchange.⁸⁷ In some cases, the CRB codifies (in rulemakings approved by the Librarian of Congress) rates agreed to by interested parties.⁸⁸ The distribution of Section 114 royalties for

⁸⁶ Determination of Rates and Terms for Digital Performance of Sound Recordings and Ephemeral Recordings to Facilitate Those Performances (Web V), 86 Fed. Reg. 59,452, 59,589 (Oct. 27, 2021) [hereinafter Web V Proceeding].

⁸⁷ See Scherer, *supra* note 13, at 25–27.

⁸⁸ For example, in 2021, the CRB adopted rates based on negotiated settlements reached between SoundExchange and public broadcasters and between SoundExchange and educational institutions. Web V Proceeding, *supra* note 86, at 59,453.

noninteractive digital services is set by statute: 50% to the copyright owner; 45% to the featured performing artists; 2.5% to non-featured musicians; and 2.5% to non-featured vocalists.⁸⁹ (Section 112 royalties go the copyright owner, usually a record company.)

Rates for Noninteractive Services/Webcasters

The CRB set royalty rates for 2021 through 2025 at \$0.0026 per performance for subscription services and \$0.0021 per performance for nonsubscription (advertising-supported) services,⁹⁰ with adjustments made to reflect inflation as measured by the Consumer Price Index.⁹¹

The annual minimum fee for commercial webcasters is \$1,000 per channel or station, capped at \$100,000 for each licensee. The annual minimum fee for noncommercial webcasters is \$1,000 per channel or station, which covers 159,140 aggregate tuning hours each month and \$0.0021 per performance for all transmissions in excess of 159,140 listening aggregate tuning hours.⁹² This benchmark of aggregate tuning hours stems from a 2004 survey conducted by National Public Radio (NPR) in which it found that each of its stations averaged 218 simultaneous listeners.⁹³ Multiplying 218 listeners times 24 hours per day times the quotient of 365 days per year divided by 12 months per year results in 159,140 aggregate tuning hours per month.⁹⁴

Five percent of royalties collected are to be applied to the ephemeral license, and the performance rates are subject to yearly adjustments based on cost-of-living changes in the Consumer Price Index.⁹⁵

⁸⁹ 17 U.S.C. § 114(g)(2).

⁹⁰ In the context of these rate proceedings, a “performance” generally refers to the “public performance” (i.e., playing) of a single song (e.g., the delivery of any portion of a single track from an album to a listener). 37 C.F.R. § 380.7 (2022).

⁹¹ Web V Proceeding, *supra* note 86, at 58,452; 37 C.F.R. § 380.10.

⁹² The term “aggregate tuning hours” means

the total hours of programming that the Licensee has transmitted during the relevant period to all listeners within the United States from all channels and stations that provide audio programming consisting, in whole or in part, of eligible nonsubscription transmissions or noninteractive digital audio transmissions as part of a new subscription service, less the actual running time of any sound recordings for which the Licensee has obtained direct licenses apart from 17 U.S.C. § 114(d)(2) or which do not require a copyright license. By way of example, if a service transmitted one hour of programming containing Performances to 10 listeners, the service’s ATH would equal 10 hours. If three minutes of that hour consisted of transmission of a directly-licensed recording, the service’s ATH would equal nine hours and 30 minutes (three minutes times 10 listeners creates a deduction of 30 minutes). As an additional example, if one listener listened to a service for 10 hours (and none of the recordings transmitted during that time was directly licensed), the service’s ATH would equal 10 hours.

37 C.F.R. § 380.7.

⁹³ Digital Performance Right in Sound Recordings and Ephemeral Recordings, 72 Fed. Reg. 24084, 24099 (May 1, 2007) (amending 37 C.F.R. § 380).

⁹⁴ *Id.* n. 47.

⁹⁵ The CRB, and by extension the *Code of Federal Regulations*, defines several terms, which in turn are the basis of the amount of royalties they pay to license public performances. 17 C.F.R. §§ 380.7, 380.20, 380.30.

Rates for Services Transmitting to Business Establishments

In 2018, the CRB set rates for ephemeral recordings for services transmitting to business establishments as a percentage of the services' revenues, growing from 12.5% of revenues in 2019 to 13.5% of revenues in 2023.⁹⁶ The minimum fee for each calendar year is \$20,000.

Legislation Introduced in the 118th Congress

LRFA, H.Con.Res. 13 and S.Con.Res. 5 in the 118th Congress,⁹⁷ a nonbinding resolution, would effectively declare support for maintaining the status quo. Currently, broadcast radio stations and businesses pay copyright owners of musical works (e.g., music publishers and songwriters) for the right to publicly perform musical works,⁹⁸ and they are not required to pay copyright owners of sound recordings (e.g., record labels and performers) to publicly perform their works.

By contrast, AMFA, H.R. 791 and S. 253 in the 118th Congress, would extend performance rights in sound recordings to terrestrial broadcast radio.⁹⁹

As a bill, AMFA would become law if passed by Congress. As a concurrent resolution, LRFA would express the collective sentiment of Congress but would not be presented to the President or become law.

Supporting the Local Radio Freedom Act

LRFA contains a preamble explaining the resolution's rationale, which declares the following:

“[T]he United States enjoys broadcasting and sound recording industries that are the envy of the world, due to the symbiotic relationship that has existed among these industries for many decades[.]”

“[F]or nearly a century, Congress has rejected repeated calls by the recording industry to impose a performance fee on local radio stations for simply playing music on the radio and upsetting the mutually beneficial relationship between local radio and the recording industry[.]”

“[L]ocal radio stations provide free publicity and promotion to the recording industry and performers of music in the form of radio air play, interviews with performers, introduction of new performers, concert promotions, and publicity that promotes the sale of music, concert tickets, ring tones, music videos and associated merchandise[.]”

“Congress found that ‘the sale of many sound recordings and the careers of many performers benefited considerably from airplay and other promotional activities provided by both noncommercial and advertiser-supported, free over-the-air broadcasting’[.]”

“[L]ocal radio broadcasters provide tens of thousands of hours of essential local news and weather information during times of national emergencies and natural disasters, as well as public affairs programming, sports, and hundreds of millions of dollars of time for public

⁹⁶ Determination of Royalty Rates and Terms for Making Ephemeral Copies of Sound Recordings for Transmission to Business Establishments (Business Establishments III), 83 Fed. Reg. 60362 (Nov. 26, 2018) (amending 37 C.F.R. § 384). *See also* 37 C.F.R. § 384.3.

⁹⁷ As of July 28, 2023, H.Con.Res. 13 has 118 original cosponsors and 71 additional cosponsors; S.Con.Res. 5 has 19 original cosponsors and 4 additional cosponsors.

⁹⁸ CLOUDCOVER MEDIA, *Top 11 Licensing Questions: How to Play Legal Business in Music*, <https://cloudcovermusic.com/blog/licensing-questions-legal-business-music/#legal-1> (last visited Aug. 30, 2022).

⁹⁹ As of July 28, 2023, H.R. 791 has three original cosponsors and one additional cosponsor; S. 253 has three original cosponsors.

service announcements and local fund-raising efforts for worthy charitable causes, all of which are jeopardized if local radio stations are forced to divert revenues to pay for a new performance fee[.]”

“[T]here are many thousands of local radio stations that will suffer severe economic hardship if any new performance fee is imposed, as will many other small businesses that play music including bars, restaurants, retail establishments, sports and other entertainment venues, shopping centers and transportation facilities[.]”

“[T]he hardship that would result from a new performance fee would hurt American businesses, and ultimately the American consumers who rely on local radio for news, weather, and entertainment; and such a performance fee is not justified when the current system has produced the most prolific and innovative broadcasting, music, and sound recording industries in the world.”¹⁰⁰

LRFA then resolves that Congress is not to “impose any new performance fee, tax, royalty, or other charge relating to the public performance of sound recordings on a local radio station for broadcasting sound recordings over the air, or on any business for such public performance of sound recordings.”¹⁰¹

American Music Fairness Act

As explained above, current law provides a limited public performance right for sound recordings via digital audio transmission. AMFA would expand the public performance right for sound recordings to reach *any* “audio transmission,” whether digital, analog, or another format.¹⁰²

AMFA would eliminate the current exemption that applies to broadcast transmissions for FCC-licensed radio stations.¹⁰³ By deleting “digital” from the definition of “eligible nonsubscription transmissions” in Section 114, the bill would include terrestrial radio broadcasts in the statutory licensing scheme currently applicable to noninteractive, nonsubscription digital audio transmissions.¹⁰⁴ AMFA would direct the CRB to institute proceedings to set royalty rates for nonsubscription broadcast transmissions as soon as possible after enactment.¹⁰⁵

AMFA would cap on a sliding scale the royalty rates for individual broadcast stations that have annual revenues of less than \$1.5 million *and* that are owned, operated, and/or indirectly controlled by an organization—whether operating for-profit or not-for-profit—with annual revenues of less than \$10 million.¹⁰⁶ Thus, certain flat annual royalty rates would apply to smaller broadcasters.

¹⁰⁰ LRFA, H.Con.Res. 13.

¹⁰¹ *Id.*

¹⁰² AMFA § 2(a).

¹⁰³ *Id.* § 2(b).

¹⁰⁴ *Id.* § 2(b)–(c).

¹⁰⁵ *Id.* § 3.

¹⁰⁶ *Id.* § 4(ii). (Providing that the royalty rate for nonsubscription broadcast transmissions by an individual terrestrial broadcast station is a flat rate if, among other conditions, “(I) the revenue of the operation of that individual station was less than \$1,500,000 during the immediately preceding calendar year; [and] (II) the aggregate revenue of the owner and operator of the broadcast station and any person directly or indirectly controlling, controlled by, or under common control with such owner or operator, from any source, was less than \$10,000,000 during the immediately preceding calendar year....”

AMFA does not include provisions specific to business establishments publicly performing sound recordings within their premises or music services transmitting to those establishments.¹⁰⁷ AMFA also does not directly address whether a broadcast station would retain its limited exemption from paying for a single ephemeral recording under 17 U.S.C. § 112(a).¹⁰⁸

Supporters of public performance rights for sound recordings transmitted via broadcast radio generally, including the U.S. Copyright Office and the U.S. Patent and Trademark Office,¹⁰⁹ and AMFA specifically, have made the following arguments:

- The United States is one of the only developed countries in the world that does not require broadcast radio stations to compensate performers for the right to play their music.¹¹⁰ By making these rights reciprocal, AMFA would help ensure that performers receive compensation when their music is played by broadcast stations internationally.¹¹¹
- The bill would create regulatory parity between broadcast radio stations and their digital competitors (i.e., streaming services, satellite radio, and online radio services), which pay performance royalties for sound recordings.¹¹²
- As more people discover music online, the rationale that broadcasters provide free promotion for artists, which enables them to increase sales of recorded music and concert tickets, is less valid today than it was in the 1990s.¹¹³ Nevertheless, the bill would require the CRB to factor in any promotional benefits from radio airplay when setting copyright royalty rates.¹¹⁴
- The bill contains provisions intended to ensure that small commercial broadcast radio stations, as well as public, college, and other noncommercial stations, pay reduced royalty fees.

¹⁰⁷ Because the performance right that AMFA would create applies only to “audio *transmissions*,” nonbroadcast performances of sound recordings by businesses like restaurants or nightclubs would ordinarily fall outside of the right because they are not “received beyond the place from which they are sent.” See 17 U.S.C. § 101 (definition of “transmit”).

¹⁰⁸ AMFA would, however, amend § 112(e) by striking the phrase “a digital audio transmission” and inserting the phrase “an audio transmission.” Broadcasters who create multiple ephemeral recordings for the purpose of an over-the-air transmission would be subject to the same statutory licensing scheme that applies when they reproduce multiple ephemeral copies of a phonorecord for the purpose of streaming.

¹⁰⁹ Letter from Shira Perlmutter, Register of Copyrights and Director of the U.S. Copyright Office, and Kathi Vidal, Under Secretary of Commerce for Intellectual Property and Director of the U.S. Patent and Trademark Office, to the Honorable Dick Durbin, Chairman, Senate Committee on the Judiciary; the Honorable Chuck Grassley, Ranking Member, Senate Committee on the Judiciary; The Honorable Jerrold Nadler, Chairman, House Committee on the Judiciary; the Honorable Jim Jordan, Ranking Member, House Committee on the Judiciary; September 22, 2022, <https://copyright.gov/laws/hearings/joint-performance-right-letter-signed.pdf>.

¹¹⁰ Press Release, Rep. Darrell Issa, *Rep. Issa and House and Senate Colleagues Reintroduce Bill to Ensure Artists Fair Pay for Radio Airplay* (Feb. 2, 2023), <https://issa.house.gov/media/press-releases/rep-issa-and-house-and-senate-colleagues-reintroduce-bill-ensure-artists-fair>.

¹¹¹ RECORDING ACADEMY, *Advocacy: Why the American Music Fairness Act Will Give Music Creators What They Deserve* (June 24, 2021), <https://www.grammy.com/advocacy/news/why-american-music-fairness-act-will-give-music-creators-what-they-deserve>. See also World Intellectual Property Organization (WIPO) Performances and Phonograms Treaty (WPPT), art. 4, Dec. 20, 1996, 2186 U.N.T.S. 245, 36 I.L.M. 76; (1997) (2014).

¹¹² See Issa Press Release, *supra* note 110.

¹¹³ *New Radio Royalty Bill Shifts Tactic to Focus on Big Groups. Music Industry Concedes Radio Helps Promotion*, INSIDERADIO (June 25, 2021), http://www.insideradio.com/new-radio-royalty-bill-shifts-tactic-to-focus-on-big-groups-music-industry-concedes-radio/article_3520ac50-d52c-11eb-9836-6b4dbd4d2e8b.html (quoting Rep. Peter Doyle).

¹¹⁴ *Id.* (quoting Rep. Darrell Issa).

Opponents of AMFA—who also support LRFA—when arguing against AMFA’s enactment, reiterate points outlined within LRFA’s preamble (described in “Supporting the Local Radio Freedom Act”).¹¹⁵

Policy Considerations

Potential Impact of AMFA on Radio Stations

In some instances, a broadcast station may pay a rate set by the CRB, even if the station generates less than \$1.5 million per year in revenue, because its parent organization—which may be in one or more lines of business other than radio broadcasting—generates more than \$10 million in revenues per year.

In the case of noncommercial stations,¹¹⁶ the CRB may set lower rates than it might for commercial stations, just as it currently does for webcasters (see “Noninteractive Services”). The CRB set lower rates for noncommercial webcasters than it did for commercial webcasters. In addition, broadcast licensees may separately negotiate royalty rates that the CRB subsequently adopts. For example, the CRB set rates for stations affiliated with College Broadcasters, Inc. (CBI), the Corporation for Public Broadcasting (CPB), and NPR based on their negotiated agreements with SoundExchange.¹¹⁷

Potential Impact on Broadcast Radio Newsroom Investment

According to the National Association of Broadcasters, imposing any additional royalty fees on broadcast radio stations would “financially cripple local radio stations, harming the millions of listeners who rely on local radio for news, emergency information, weather updates and entertainment every day.”¹¹⁸

Evidence regarding the extent to which local radio serves as a sole or key source of news is inconclusive. According to a 2022 survey from Pew Research Center, “Americans turn to [broadcast] radio and print publications for news far less frequently than to digital devices and television.”¹¹⁹ About 13% of U.S. adults surveyed said they received news “often” from broadcast radio, compared with 51% who said they received news often from digital devices and 36% who said they received news often from television.¹²⁰

The relatively low employment of news employees by radio stations in comparison to other media also reflects the role of radio in providing news and information. In comparison to broadcast television stations and newspapers, radio stations employ relatively few people who

¹¹⁵ NATIONAL ASSOCIATION OF BROADCASTERS, *Advocacy: A Performance Tax Threatens Local Jobs*, <https://www.nab.org/advocacy/issue.asp?id=1889&issueid=1002>. See also Press Release, Senator Maggie Hassan, *Senators Hassan and Barrasso Introduce the Bipartisan Local Radio Freedom Act* (Mar. 9, 2023), <https://www.hassan.senate.gov/news/press-releases/senators-hassan-and-barrasso-introduce-the-bipartisan-local-radio-freedom-act>.

¹¹⁶ Public broadcasting stations that generated at least \$100,000 but less than \$1.5 million in the preceding calendar year would pay \$100 per year, pursuant to § 4(a) of AMFA.

¹¹⁷ Web V Proceeding at 59,589, *supra* note 86.

¹¹⁸ NAT’L ASS’N OF BROADS., *Advocacy: A Performance Tax Threatens Local Jobs*, <https://www.nab.org/advocacy/issue.asp?id=1889&issueid=1002> (last visited Aug. 30, 2022).

¹¹⁹ Naomi Forman-Katz & Katerina Eva Matsa, *News Platform Factsheet*, PEW RSCH. CTR. (Sept. 20, 2022), <https://www.pewresearch.org/journalism/fact-sheet/news-platform-fact-sheet/>.

¹²⁰ *Id.*

report on and produce local news stories. The Bureau of Labor Statistics estimates that of the 47,100 news analysts, reporters, and journalists employed nationwide in 2021 (most recent data available), about 2,000 (4.2%) were employed by radio broadcasters.¹²¹ This total represents less than the number employed by television broadcasters (14,500 or 30.8%) and newspapers (13,500 or 28.7%) and the number who were self-employed (7,800 or 16.5%).

Potential Impact on Religious Radio Broadcasters

Because many religious broadcast licensees operating as nonprofits are not required by the Internal Revenue Service to disclose their revenues publicly, the Congressional Research Service cannot readily predict whether they would fall below the benchmarks that would enable them to pay flat royalty rates if AMFA were enacted, in lieu of rates set by the CRB. To qualify for the flat fees, the owner or operator of a station would be required to submit to a nonprofit collective designated by the CRB (e.g., SoundExchange) a written and signed certification of eligibility.¹²²

In the CRB's Webcaster V ratemaking proceeding, of the four entities representing noncommercial entities that participated, three entered into negotiated settlements with SoundExchange. The other entity, National Religious Broadcasters Noncommercial Music Licensing Committee (NRBNMLC), participated actively.¹²³ NRBNMLC subsequently appealed the CRB's rate, claiming that it is too high. NRBNMLC also argues that the CRB violated the Religious Freedom Restoration Act and the First Amendment of the U.S. Constitution by discriminatorily charging religious radio stations more than secular, NPR-affiliated stations, which reached a separate settlement for lower rates.¹²⁴ The CRB contends that NRBNMLC has not sufficiently supported its proposal that its stations pay the same rate as public radio stations with evidence or expert testimony. The case, *National Religious Broadcasters Noncommercial Music License Committee v. CRB, et al.*, remains pending at the U.S. Court of Appeals for the District of Columbia Circuit.¹²⁵

Potential Impact on Business Establishments

LRFA stipulates businesses would not pay any additional royalties to record labels and artists for transmitting music within their establishments. AMFA, as introduced in the 118th Congress, does not appear to apply to services that transmit to business establishments or to a business that transmits music within its premises and/or the immediately surrounding vicinity, as the bill leaves intact those current statutory exemptions.¹²⁶

¹²¹ U.S. BUREAU OF LAB. STAT., Employment Projections; National Employment Matrix-Occupation; 27-3023 News Analysts, Reporters, and Journalists; Employment by Industry, Occupation, and Percent Distribution, 2021 and Projected 2031, <https://data.bls.gov/projections/nationalMatrix?queryParams=27-3023&ioType=o> (last visited April 27, 2023).

¹²² AMFA, § 4(a).

¹²³ Web V Proceeding, *supra* note 86, at 59,565.

¹²⁴ Katie Buehler, *DC Circuit Wary of Webcaster Royalty Rate Challenges*, LAW360 (Feb. 17, 2023), <https://www.law360.com/articles/1575601/dc-circ-wary-of-webcaster-royalty-rate-challenges>.

¹²⁵ *National Religious Broadcasters Noncommercial Music License Committee v. CRB*, No. 21-1243 (appeal filed Nov. 24, 2021).

¹²⁶ AMFA § 2(b) (striking 17 U.S.C. § 114(d)(1)(A) but not § 114(d)(1)(C)).

Role of Broadcast Radio in Promoting Songs and Driving Record Industry Revenues

Music industry professionals and observers differ in their views of broadcast radio's role in promoting new songs and driving record industry revenues. As the trade publication *Variety* stated in a 2021 article, "During the many decades when physical sales drove the music business, radio promotion was crucial—and accounted for a huge percentage of major label budgets."¹²⁷

For several decades, in a practice widely known as "payola," record labels paid radio stations and disc jockeys to play songs, and the stations failed to notify the public.¹²⁸ Notably, for about 60 years during that period—the mid-1920s through the mid-1980s—two major broadcast radio networks and station owners, NBC and CBS, were subsidiaries of corporations that also owned record labels: RCA Records¹²⁹ and CBS Records, respectively.¹³⁰ According to a 1959 statement submitted by ASCAP to the House Special Committee on Legislative Oversight, both NBC and CBS used their broadcast facilities, in conjunction with payola, to favor promotion of their own record labels' songs over those of competitors.¹³¹ According to a 2022 article from the trade publication *Billboard*, several promotions executives its reporter interviewed stated that it is still common for record labels to pay in money or goods to convince a radio station to add a song to its playlist or increase the frequency of airplay.¹³²

Regarding the importance of radio airplay, *Billboard* reports the following:

While radio rarely breaks hits in the streaming era outside of country music, it remains important in building recognition at a mass scale, as well as raising awareness in local markets for artists on tour. Radio airplay charts continue to be a metric of success in the music industry internally, and airplay remains one of the components of the *Billboard* charts.¹³³

A promotion executive at an independent label quoted in the report claimed that promotional costs prevent smaller record labels from getting airplay for their songs: "[t]he airwaves are

¹²⁷ Geoff Mayfield, *As Streaming Dominates the Music World, is Radio's Signal Fading*, VARIETY (Feb. 10, 2021), <https://variety.com/2021/music/news/radio-signal-fading-streaming-1234904387/>.

¹²⁸ For more about the historical practice and federal government agencies' efforts to combat it, see Richard Kielbowicz and Linda Lawson, *Unmasking Hidden Commercials in Broadcasting: Origins of the Sponsorship Identification Regulations, 1927–1963*, FED. COM. L.J. 347–350, 327 (2004), Elias Leight, *Want to Get on the Radio? Have \$50,000?*, ROLLING STONE (Aug. 6, 2019), <https://www.rollingstone.com/pro/features/radio-stations-hit-pay-for-play-867825/>.

¹²⁹ RADIO CORPORATION OF AMERICA, *Our Legacy*, https://www.rca.com/us_en/our-legacy-266-us-en. William K. Knoedelseder Jr., *GE Agrees to Sell Its 75% Interest in Record Firm: W. German Conglomerate Would Become Sole Owner of RCA/Ariola Operations*, LOS ANGELES TIMES (Sept. 10, 1986), <https://www.latimes.com/archives/la-xpm-1986-09-10-fi-13152-story.html>.

¹³⁰ COMPANIESHISTORY.COM, *CBS Corporation*, <https://www.companieshistory.com/cbs/>. Geraldine Fabrikant, *CBS to Sell Record Unit to Sony*, New York Times (Nov. 19, 1987) <https://www.nytimes.com/1987/11/19/business/cbs-to-sell-record-unit-to-sony.html>.

¹³¹ Letter from Burton Lane, President, American Guild of Authors and Composers, to Robert W. Lishman, Subcommittee Counsel (Oct. 29, 1959), in *Investigation of Television Quiz Shows, pts. 1&2: Hearings Before the Spec. Subcomm. On Legislative oversight of the House Comm. On Interstate and Foreign Commerce*, 86th Cong. 1142, 1145–1147 (1959).

¹³² Elias Leight, *Why Indie Artists Are a Rarity: 'If You Don't Pay, You Don't Move Up*, BILLBOARD, Sept. 19, 2022, <https://www.billboard.com/pro/indie-labels-radio-pay-for-play/>.

¹³³ *Id.*

designed not to be built for all.... You can only come to the table if you're spending the right amount of money and you know the right people."¹³⁴

¹³⁴ *Id.*

Appendix A. Glossary

The following is a list of definitions relevant to music licensing contained in the Copyright Act and the *Code of Federal Regulations* (C.F.R.).

Term	Definition	Source(s)
Aggregate Tuning Hours (ATH)	Total hours of programming that the Licensee has transmitted during the relevant period to all listeners within the United States from all channels and stations that provide audio programming consisting, in whole or in part, of eligible nonsubscription transmissions or noninteractive digital audio transmissions as part of a new subscription service, less the actual running time of any sound recordings for which the Licensee has obtained direct licenses apart from 17 U.S.C. § 114(d)(2) or which do not require a license under Title 17, United States Code. By way of example, if a service transmitted one hour of programming containing Performances to 10 listeners, the service's ATH would equal 10 hours. If three minutes of that hour consisted of transmission of a directly licensed recording, the service's ATH would equal nine hours and 30 minutes (the product of three minutes times 10 listeners creates a deduction of 30 minutes). As an additional example, if one listener listened to a service for 10 hours (and none of the recordings transmitted during that time was directly licensed), the service's ATH would equal 10 hours.	37 C.F.R. § 380.7
Broadcast Transmission	A transmission made by a terrestrial broadcast station licensed as such by the Federal Communications Commission.	17 U.S.C. § 114(j)
Business Establishment Service	Service making transmissions of sound recordings under the limitation on exclusive rights specified by 17 U.S.C. § 114(d)(1)(C)(iv).	37 C.F.R. §§ 370.1, 384.2
Collective	Collection and distribution organization that is designated by the Copyright Royalty Judges.	37 C.F.R. §§ 370.1, 380.7, 384.2
Commercial Webcaster	Licensee, other than a Noncommercial Webcaster, Noncommercial Educational Webcaster, or Public Broadcaster, that makes Ephemeral Recordings and eligible digital audio transmissions of sound recordings pursuant to the statutory licenses under 17 U.S.C. § 112(e) and § 114(d)(2).	37 C.F.R. § 380.7
Digital Audio Transmission	Digital transmission, as defined in 17 U.S.C. § 101, that embodies the transmission of a sound recording. This term does not include the transmission of any audiovisual work.	17 U.S.C. § 114(j)(5); 37 C.F.R. § 380.7
Digital Transmission	Transmission in whole or in part in a digital or other non-analog format.	17 U.S.C. § 101
Display	To show a copy of a work, either directly or by means of a film, slide, television image, or any other device or process or, in the case of a motion picture or other audiovisual work, to show individual images nonsequentially.	17 U.S.C. § 101
Dramatic Musical Work	Musical work created for use in a motion picture or a dramatic work, including musical plays and operas.	U.S. COPYRIGHT OFF., COMPENDIUM OF U.S. COPYRIGHT OFFICE PRACTICES § 802.2(A) (3d ed. Jan. 2021), https://www.copyright.gov

Term	Definition	Source(s)
Ephemeral Recording	For purposes of enforcing Section 112 of the Copyright Act of 1976, as amended (17 U.S.C. § 112), a reproduction of a sound recording made for the sole purpose of facilitating statutory licensees' permitted transmissions of performances of sound recordings.	v/comp3/ [hereinafter COPYRIGHT OFF. COMPENDIUM] 37 C.F.R. § 384.2
Establishment	Store, shop, or any similar place of business open to the general public for the primary purpose of selling goods or services in which the majority of the gross square feet of space that is nonresidential is used for that purpose, and in which nondramatic musical works are performed publicly.	17 U.S.C. § 101
Food Service or Drinking Establishment	Restaurant, inn, bar, tavern, or any other similar place of business in which the public or patrons assemble for the primary purpose of being served food or drink, in which the majority of the gross square feet of space that is nonresidential is used for that purpose, and in which nondramatic musical works are performed publicly.	17 U.S.C. § 101
Gross Square Feet of Space	Establishment's entire interior space, and any adjoining outdoor space used to serve patrons, whether on a seasonal basis or otherwise.	17 U.S.C. § 101
Infringe	To violate the exclusive rights of a copyright owner, as provided by the Copyright Act of 1976, as amended.	17 U.S.C. § 501
License	Authorization given by a copyright owner to use their work, usually in exchange for payment.	BLACK'S LAW DICTIONARY (11 th ed. 2019)
Musical Work (Musical Composition)	For purposes of copyright registration, original works of authorship consisting of music and any accompanying words. Music is a succession of pitches or rhythms, or both, usually in some definite pattern.	COPYRIGHT OFF. COMPENDIUM § 802.1
Noncommercial Educational Webcaster	A webcaster that . . . Is directly operated by or is affiliated with and officially sanctioned by, and the digital audio transmission operations of which are staffed substantially by students enrolled at, a domestically accredited primary or secondary school, college, university or other post-secondary degree-granting educational institution; Is not a 'public broadcasting entity' (as defined in 17 U.S.C. 118(f)) qualified to receive funding from the Corporation for Public Broadcasting pursuant to its criteria; and Takes affirmative steps not to make total transmissions in excess of 159,140 Aggregate Tuning Hours (ATH) on any individual channel or station in any month, if in any previous calendar year it has made total transmissions in excess of 159,140 ATH on any individual channel or station in any month.	37 C.F.R. § 380.20
Noncommercial Webcaster	Webcaster that—(I) is exempt from taxation under Section 501 of the Internal Revenue Code of 1986 (26 U.S.C. 501); (II) has applied in good faith to the Internal Revenue Service for exemption from taxation under Section 501 of the Internal Revenue Code and has a commercially reasonable expectation that such exemption shall be granted; or (III) is operated by a State or possession or any governmental entity or subordinate	37 C.F.R. § 380.7 (which states term has same meaning as in 17 U.S.C. § 114(f)(4)(E), but excludes a Noncommercial

Term	Definition	Source(s)
Nondramatic Musical Work	thereof, or by the United States or District of Columbia, for exclusively public purposes; but excludes a Noncommercial Educational Webcaster or Public Broadcaster.	Educational Webcaster or Public Broadcaster)
Nonsubscription Transmission Service	Musical work that was not created for use in a motion picture or a dramatic work, such as a ballad intended for distribution solely on an album or an advertising jingle intended solely for performance on the radio.	COPYRIGHT OFF. COMPENDIUM § 802.2(A)
Originating Public Radio Station	<p>A service that makes noninteractive nonsubscription digital audio transmissions that are not exempt under Section 114(d)(1) of Title 17 of the United States Code and are made as part of a service that provides audio programming consisting, in whole or in part, of performances of sound recordings, including transmissions of broadcast transmissions, if the primary purpose of the service is to provide to the public such audio or other entertainment programming, and the primary purpose of the service is not to sell, advertise, or promote particular products or services other than sound recordings, live concerts, or other music-related events.</p> <p>Noncommercial terrestrial radio broadcast station that—</p> <ol style="list-style-type: none"> (1) Is licensed as such by the Federal Communications Commission; (2) Originates programming and is not solely a repeater station; (3) Is a member or affiliate of NPR, American Public Media, Public Radio International, or Public Radio Exchange, a member of the National Federation of Community Broadcasters, or another public radio station that is qualified to receive funding from CPB pursuant to its criteria; (4) Qualifies as a “noncommercial webcaster” under 17 U.S.C. § 114(f)(4)(E)(i); and (5) Either— <ol style="list-style-type: none"> (i) Offers website Performances only as part of the mission that entitles it to be exempt from taxation under Section 501 of the Internal Revenue Code of 1986 (26 U.S.C. § 501); or (ii) In the case of a governmental entity (including a Native American Tribal governmental entity), is operated exclusively for public purposes. 	37 C.F.R. § 380.7 (which states term has same meaning as in 17 U.S.C. § 114(j))
Perform	To recite, render, play, dance, or act a work, either directly or by means of any device or process or, in the case of a motion picture or other audiovisual work, to show its images in any sequence or to make the sounds accompanying it audible.	17 U.S.C. § 101
Performing Rights Society (a.k.a. Performing Rights Organization)	Association, corporation, or other entity that licenses the public performance of nondramatic musical works on behalf of copyright owners of such works, such as the American Society of Composers, Authors and Publishers (ASCAP), Broadcast Music, Inc. (BMI), and SESAC, Inc.	17 U.S.C. § 101
Phonorecords	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	17 U.S.C. § 101

Term	Definition	Source(s)
	communicated, either directly or with the aid of a machine or device. The term “phonorecords” includes the material object in which the sounds are first fixed.	
Public Broadcasters	For purposes of enforcing Sections 112 and 114 of the Copyright Act, National Public Radio, American Public Media, Public Radio International, and Public Radio Exchange, and up to 530 Originating Public Radio Stations as named by the Corporation for Public Broadcasting (CPB). CPB shall notify SoundExchange annually of the eligible Originating Public Radio Stations to be considered Public Broadcasters per this definition (subject to the numerical limitations set forth in this definition). The number of Originating Public Radio Stations treated per this definition as Public Broadcasters shall not exceed 530 for a given year without SoundExchange’s express written approval, except that CPB shall have the option to increase the number of Originating Public Radio Stations that may be considered Public Broadcasters as provided in 37 C.F.R. § 380.31(c).	37 C.F.R. § 380.30
Public Performance	To perform a work at a place open to the public or at any place where a substantial number of persons outside of a normal circle of a family and its social acquaintances is gathered; or to transmit or otherwise communicate a performance of the work: (1) to a place open to the public; or (2) to the public, by means of any device or process. Members of the public may be capable of receiving the performance: (1) in the same place or separate places and (2) at the same time or at different times.	17 U.S.C. § 101
Publication	Distribution of copies or phonorecords of a work to the public by sale or other transfer of ownership, or by rental, lease, or lending. The offering to distribute copies or phonorecords to a group of persons for purposes of further distribution, public performance, or public display, constitutes publication. A public performance or display of a work does not of itself constitute publication.	17 U.S.C. § 101
Report of Use	Report required to be provided by a Service that is transmitting sound recordings pursuant to the statutory license set forth in Section 114(d)(2) of Title 17 of the United States Code or making ephemeral phonorecords of sound recordings pursuant to the statutory license set forth in Section 112(e) of Title 17 of the United States Code, or both.	37 C.F.R. § 370.1
Royalty	Compensation to the owner of intellectual property for the right to use the work, often paid per copy made or sold.	BLACK’S LAW DICTIONARY (11 th ed. 2009)
Service	Entity engaged in either the digital transmission of sound recordings pursuant to Section 114(d)(2) of Title 17 of the United States Code or making ephemeral phonorecords of sound recordings pursuant to Section 112(e) of Title 17 of the United States Code or both. The definition of a Service includes an entity that transmits an AM/FM broadcast signal over a digital communications network such as the Internet, regardless of whether the transmission is made by the broadcaster that originates the AM/FM signal or by a third party, provided that such transmission meets the applicable requirements of the statutory license set forth in 17 U.S.C. § 114(d)(2). A Service may be further characterized as either a subscription service, satellite digital audio radio service, nonsubscription transmission service, business establishment service or a combination of those.	37 C.F.R. § 370.1

Term	Definition	Source(s)
Sound Recordings	Works that result from the fixation of a series of musical, spoken, or other sounds, but not including the sounds accompanying a motion picture or other audiovisual work, regardless of the nature of the material objects, such as disks, tapes, or other phonorecords, in which they are embodied.	17 U.S.C. § 101
Statutory License	A license created by law that allows others to make specified uses of copyrighted material without the explicit permission of the copyright owner in exchange for a specified royalty. Because the copyright owner <i>must</i> grant a license, statutory licenses are sometimes called “compulsory licenses.” In some instances, a compulsory license has a statutory rate. In other instances, the rates are negotiated or set by the CRB.	BLACK’S LAW DICTIONARY (11 th ed. 2019); COPYRIGHT OFF. COMPENDIUM § 101.3(D), <i>Glossary</i> at p.3
Transmit	To communicate a [P]erformance by any device or process whereby images or sounds are received beyond the place from which they are sent.	17 U.S.C. § 101
Work Made for Hire	A work: (1) prepared by an employee within the scope of his or her employment; or (2) specially ordered or commissioned for use as a contribution to a collective work, as a part of a motion picture or other audiovisual work, as a translation, as a supplementary work, as a compilation, as an instructional text, as a test, as answer material for a test, or as an atlas, if the parties expressly agree in a written instrument signed by them that the work shall be considered a work made for hire.	17 U.S.C. § 101
Webcaster	A person or entity that has obtained a compulsory license under Section 112 or 114 [of the Copyright Act of 1976, as amended] and the implementing regulations therefor to make eligible nonsubscription transmissions and ephemeral recordings.	Small Webcaster Settlement Act of 2002, P.L. 107-321, § 4(E)(iii) (codified at 17 U.S.C. § 114 note).
	Noninteractive, nonsubscription service streaming music over the internet.	Public Performance of Sound Recordings: Definition of a Service, 65 Fed. Reg. 77,292, 77,296 (Dec. 11, 2000).

Appendix B. Chronology

Chronology of Key Dates Related to U.S. Enactment and Enforcement of Copyrights for Musical Works and Sound Recordings

- 1790 United States enacts first federal copyright law, the Copyright Act of 1790. 1 Stat. 124.
- 1831 Congress amends copyright law to explicitly protect musical compositions. 4 Stat. 436.
- 1856 Congress enacts amendment to the Copyright Act, 11 Stat. 138, that adds, for the first time in the United States, a public performance right for authors of dramatic works (i.e., playwrights) “designed or suited for public representation.” Rather than creating a separate playwright protection distinct from general copyright protection, the law treats public performance as an additional exclusive right.
- 1883 U.S. authors form the American Copyright League to lobby Congress to enact adoption of international copyright law and abolish any legal discriminations between U.S. and foreign authors of dramatic works. The league becomes influential in shaping copyright legislation that subsequently includes composers.
- 1885 In *Carte v. Duff* (a.k.a. *The Mikado Case*), 25 F. 183 (C.C.S.D. N.Y. 1885), the circuit court for the Southern District of New York finds that the music of an opera (or operetta) originally written for an orchestra is not a dramatic work under the 1856 amendment to the Copyright Act. Public performance rights thus do not apply to musical works.
- 1895 The American Music Publishers Association of the United States forms as a trade organization to promote the interests of publishers and composers and lobbies Congress to amend copyright laws to add public performance rights for authors and publishers of musical works, including dramatic musical works.
- 1897 Congress enacts an amendment to the Copyright Act, 29 Stat. 489, that adds a public performance right for authors of dramatic and musical works, with statutory damages and injunctions as available remedies for violations of that right.
- 1909 Congress enacts a general revision of the Copyright Act, 35 Stat. 1075, that gives authors of musical works (i.e., composers) exclusive rights to reproduce those musical works mechanically. This establishes first statutory (“compulsory”) copyright license, requiring composers to license musical works for mechanical reproductions to others in exchange for \$0.02/part (e.g., a player piano roll).
- 1914 Composers found the American Society of Composers, Authors, and Publishers (ASCAP) to issue and collect royalties for public performance licenses of nondramatic musical works.
- 1930 Immigrant composer Paul Heinecke founds the Society of European Stage Authors and Composers (SESAC) to administer public performances of nondramatic musical works on behalf of European composers.
- 1939 Radio broadcasters found and finance Broadcast Music Inc. (BMI) to compete with ASCAP, thereby enabling them to pay lower fees for the right to publicly perform musical works.
- 1940 Disagreements with ASCAP over proposed royalty rates prompt three-quarters of the 800 radio stations in existence to boycott ASCAP-affiliated musical works.
- 1941 The U.S. Department of Justice threatens to sue ASCAP and BMI for violating antitrust laws. ASCAP and BMI enter into consent decrees. Rates charged by ASCAP and BMI must be approved by district court judges in the Southern District of New York.
- 1971 Congress enacts a 1971 amendment to the Copyright Act (P.L. 92-140), the first copyright law that specifically applies to sound recordings. Record labels and performing artists may sue for unauthorized duplication and reproduction of phonorecords (physical objects in which sound recordings are fixed).

- 1976 Congress enacts the Copyright Act of 1976 (P.L. 94-553), a comprehensive revision and reorganization of copyright laws. Section 112 of the act permits broadcast radio stations to make “ephemeral recordings” of phonorecords (temporary reproductions), without risking infringement, under limited circumstances. The act also establishes a new royalty tribunal to set rates for mechanical licenses, in lieu of the \$.02/part fee codified in 1909. Newly created Section 114 covers sound recordings.
- 1995 Congress enacts the Digital Performance Right in Sound Recordings Act (DPRSRA; P.L. 104-39), creating an exclusive right for copyright owners of sound recordings, subject to certain limitations, to perform publicly their sound recordings by means of digital audio transmissions. Among the limitations on the performance right was the creation of a new statutory license for nonexempt, noninteractive digital subscription transmissions (e.g., cable music channels).
- 1998 Congress enacts the Digital Millennium Copyright Act (DMCA; P.L. 105-304), expanding the scope of statutory licenses for public performances of sound recordings (amending § 114). The DMCA enables eligible nonsubscription transmissions (e.g., Pandora) and digital satellite radio services (e.g., Sirius-XM) to publicly perform sound recordings pursuant to a statutory license.
- The DMCA amends Section 112 to create a new statutory license for the making of ephemeral recordings by certain transmitting organizations. Entities that transmit performances of sound recordings to business establishments, pursuant to the limitations set forth in Section 114(d)(1)(C)(iv), may make an ephemeral recording of a sound recording for purposes of a later transmission.

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