

Money for Something: Music Licensing in the 21st Century

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Summary

Taylor Swift made headlines around the world when she pulled her entire catalog of recorded music from the digital steaming service Spotify in November 2014. She reportedly felt that Spotify devalued her music by making her entire albums available on its free service. As a songwriter, a composer, and a singer, Ms. Swift is entitled to get paid for (1) reproductions and public performances of the notes and lyrics she creates (the musical works), as well as (2) reproductions, distributions, and certain digital performances of the recorded sound of her voice combined with the instruments (the sound recordings). The amount Ms. Swift gets paid for her musical works and sound recordings depends on market forces, contracts among a variety of private-sector entities, and federal laws governing copyright and competition policy.

The laws that determine who pays whom in the digital world were written, by and large, at a time when music was primarily performed via radio broadcasts or distributed through physical media (such as sheet music and phonograph records), and when each of these forms of music delivery represented a distinct channel with unique characteristics. With the emergence of the Internet, Congress updated some copyright laws in the 1990s. It applied one set of legal provisions to digital services it viewed as akin to radio broadcasts and another set to digital services it viewed as akin to physical media. Since that time consumers have increasingly been consuming music via digital services that incorporate attributes of both radio and physical media. However, companies that compete in enabling consumers to access music may face very different costs to license music, depending on the technology they use and the features they offer. These differences in technology and features also affect the amount of money received by songwriters, performers, music publishers, and record companies.

U.S. copyright law allows performers and record labels to collectively designate an agent to receive payments and to negotiate the licensing fees that certain types of digital music services must pay to stream music to their customers. Groups representing public radio and educational stations reached voluntary agreements with the agent, SoundExchange, in 2015. Rates paid by parties that do not reach voluntary agreements with SoundExchange during a limited negotiation period are instead set by the Copyright Royalty Board (CRB), a panel of three judges appointed by the Librarian of Congress.

On December 16, 2015, the CRB set rates for online music streaming services for the period 2016 through 2020. For nonsubscription services, the CRB reduced the per-stream rate it had set in the previous rate proceeding, but the costs paid by several "small" music streaming services are likely to increase. Advocates of the small streaming services have launched a petition asking Congress to either allow their previous agreements to continue indefinitely or discontinue the requirement that small streaming services pay royalties to performers and record labels. SoundExchange has objected that the rates set by the CRB do not provide adequate compensation to performers and record labels.

Members have introduced several bills in the 114th Congress that would change the amounts various participants in the music industry pay or receive in royalties. These bills are controversial, as they could alter the cost structures and revenues of broadcast radio stations, songwriters, performers, and others at a time when the music industry's overall revenues are not growing. At the same time, the U.S. Department of Justice (DOJ) is continuing a review of consent decrees it entered into with music publishers in the 1940s. The outcome could affect the extent to which songwriters can control the use of their works.

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Introduction

Taylor Swift made headlines around the world when she, in conjunction with other holders of rights to her music, pulled her entire catalog of music from the digital steaming service Spotify in November 2014.[1] As a songwriter, a composer, and a singer, Ms. Swift is entitled under federal law to get paid for (1) reproductions and performances of the notes and lyrics she creates (musical works), as well as (2) reproductions, distributions, and certain digital performances of the recorded sound of her voice combined with the instruments (sound recordings). Reportedly, Spotify and Ms. Swift reached an impasse when Spotify declined to prevent listeners to its free, advertising-supported service from accessing her music, while still making Ms. Swift's music available to the paying subscribers of its Spotify Premium Service.[2]

Yet Ms. Swift does not have total control over her music. For example, a version of her album *1989* recorded by the artist Ryan Adams can be heard on Spotify, because her publisher, like some others, must make its music catalogs available pursuant to consent decrees with the U.S. Department of Justice (DOJ). Thus, as a singer who owns the rights to her sound recordings, Ms. Swift can withdraw her own recorded music from Spotify, but as a songwriter she cannot dictate how the music service uses other recorded versions of her musical works. Other songwriters, however, including some who have co-written songs with Taylor Swift, do have this power, because their publishers are *not* subject to the consent decrees.

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

With the emergence of music distribution on the Internet, Congress updated some copyright laws in the 1990s. It attempted to strike a balance between combatting unauthorized use of copyrighted content—a practice some refer to as "piracy"—and protecting the revenue sources of the various players 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 changed further, as online streaming of radio broadcasts and downloading of recorded albums have been joined by services that stream individual songs to subscribers under a variety of business models. The result, as the U.S. Copyright Office has noted, has been a "blurring of the traditional lines of exploitation."[3] In the meantime, the courts have been interpreting how to apply 20th-century copyright laws to a 21st-century music marketplace.

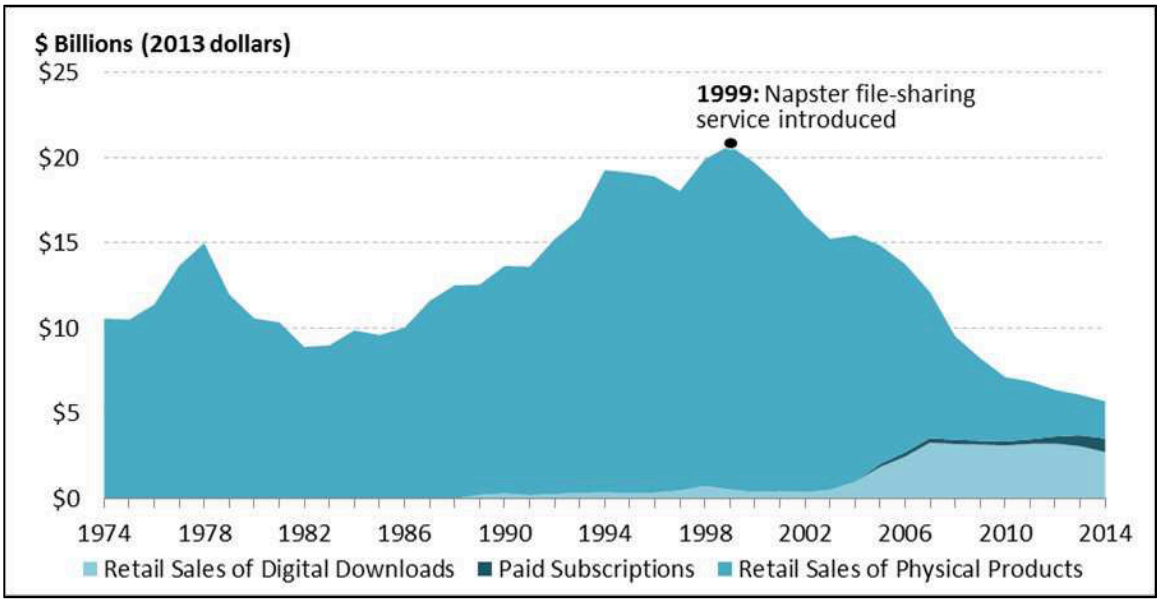
[1] Eric Pfanner and Takashi Mochizuki, "Sony Re-Evaluates Support for Free Music Streaming: Move Prompted by Swift Pulling Music from Spotify," *Wall Street Journal*, November 14, 2014; Steve Knopper, "Spotify Founder to Taylor Swift: 'Our Interests Are Totally Aligned with Yours,'" *Rolling Stone*, November 12, 2014, http://www.rollingstone.com/music/news/spotify-founder-to-taylor-swift-our-interests-are-totally-aligned-with-yours-20141112.

[2] Andy Fixmer, "Taylor Swift Record Company Says Spotify Paid a Lot Less Than $6 Million," *Mashable*, November 12, 2014, http://mashable.com/2014/11/12/taylor-swift-spotify-payout/.

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

These controversies have arisen in an environment of declining consumer spending on music. Since 1999, when the Napster file-sharing service was introduced, annual spending on music by U.S. consumers, adjusted for inflation, has fallen by two-thirds (see **Figure 1**).[4] Consumers are substituting the purchasing of albums and songs with the streaming of subscription and free online music services. Sorting out who is owed what money has become increasingly complex, and increasingly critical to performers, songwriters, record companies, and music publishers in a generally difficult business environment.

Figure 1. Trends in Consumer Spending on Music



Source: 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.

Overview of Legal Framework

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

Reproduction and Distribution Rights

Owners of musical works and owners of sound recordings possess, and may authorize others to exploit, several exclusive rights under the Copyright Act, including the following:[5]

[4] John Seabrook, "Revenue Streams: Is Spotify the Music Industry's Friend or Foe?," *The New Yorker*, November 23, 2014, http://www.newyorker.com/magazine/2014/11/24/revenue-streams.

[5] 2015 Copyright Office Report, p. 25. 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)).

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

In the context of music publishing, the combination of reproduction and distribution rights is known as a "mechanical right." This term dates back to the 1909 Copyright Law, when Congress required manufacturers of piano rolls to pay music publishing companies for the right to mechanically reproduce musical compositions.[6] As a result, music publishers began issuing "mechanical licenses" to, and collecting mechanical royalties from, piano-roll manufacturers.[7] While the means of transmitting music have gone through numerous changes since, including the production of vinyl records, cassette tapes, and compact discs (CDs), the term "mechanical rights" has stuck. For sound recordings, reproductions and distribution rights apply only to recordings originally made permanent, or "fixed,"[8] after February 15, 1972. Works that were fixed prior to this date are protected, if at all, pursuant to a patchwork of state laws and court cases.[9] In 2015, the Recording Industry Association of America reached agreements with Pandora Media, Inc. (which operates the Pandora online music service) and Sirius XM Holdings Inc. (which operates the SiriusXM satellite service) on fees for their use of pre-1972 sound recordings.[10]

Public Performance Rights

The Copyright Act also gives owners of musical works and owners of sound recordings the right to "perform" works publicly (17 U.S.C. §106(4) and 17 U.S.C. §106(6), respectively). However, for sound recordings, this right applies only to digital audio transmissions. Examples of digital audio transmission services include the SiriusXM satellite service, the Music Choice cable network, and online streaming services such as Pandora and Spotify.

Rights Required

Who pays whom in the digital world depends in part on the means by which people consume music. Consumers of compact discs purchase the rights to listen to each song on the disc as often as they wish (in a private setting). Rights owners of sound recordings (record labels and artists) must pay music publishers for the right to reproduce their musical works in a physical format (such as a CD or vinyl record) or digital download.[11] Retail outlets that sell CDs or digital files of

[6] A video demonstration of a player piano and mechanical roll in action is available at YouTube, "I'll See You in My Dreams—Lee Sims Piano Solo," published on August 14, 2010, https://www.youtube.com/watch?v=XauZT3GYbY8.

[7] Kevin Zimmerman, "Songwriter 101: Understanding Mechanical Royalties," *BMI*, March 27, 2005.

[8] A fixed work is one "in a tangible medium of expression when its embodiment in a copy or phonorecord, by or under the authority of the author, is sufficiently permanent or stable to permit it to be perceived, reproduced, or otherwise communicated for a period of more than transitory duration." 17 U.S.C. §101. Fixation is one of the many terms of art that the Copyright Act employs with meanings that differ from ordinary usage in everyday language.

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

[10] "Pandora's $90 Million Settlement on Pre-1972 Sound Recordings Has National Implications," *Warren's Washington Internet Daily*, October 26, 2015.

[11] Ari Herstand, "Why You Haven't Been Getting Your iTunes Match Mechanical Royalties," *Digital Music News*, October 14, 2014, http://www.digitalmusicnews.com/2014/10/09/havent-getting-itunes-match-mechanical-royalties/.

sound recordings pay record labels for distribution rights, and the record labels in turn pay the music publishers fees based on retail sales.[12]

Radio listeners have less control over when and where they listen to a song than they would if they purchased the song outright. The Copyright Act does not require broadcast radio stations to pay public performance royalties to record labels and artists, but it does require them to pay public performance royalties to music publishers and songwriters for notes and lyrics in broadcast music.[13] As described below in "Broadcast Radio Exception," Congress appears to have concluded in 1995 that the promotional value of broadcast radio airplay outweighs any revenue lost by record labels and artists. (See also "Webcaster Settlement Acts.")

Digital services need to pay record labels as well as music publishers for public performance rights. In practice, artists and record labels get most of the performance royalty from digital services, while music publishers and songwriters get only a small fraction.[14]

Users of an "on demand," or "interactive," digital radio service can listen to songs upon request, an experience similar in some ways to playing a CD and in other ways to listening to a radio broadcast. To enable multiple listeners to select songs, the service reproduces digital files on its servers. It pays both reproduction royalties and performance royalties to music publishers/songwriters and to record labels/artists.[15]

How the Industry Works

From the viewpoint of copyright law, the music industry comprises three distinct groups of interests: (1) songwriters and music publishers; (2) recording artists and record labels; and (3) the music licensees who obtain the right to reproduce, distribute, or publicly perform music. Examples of music royalty payers include broadcast radio stations; music retailers; digital music streaming services; bars, restaurants, and general retailers; and concert venues and promoters.

Songwriters and Music Publishers

Music publishers work for songwriters and composers (referred to collectively as "songwriters" in this report). They are responsible for licensing the intellectual property of their clients and ensuring that royalties are collected. Songwriters often contract with publishing companies to administer their musical work copyrights. For example, as a songwriter and composer, Ms. Swift has a contract with a music publisher (Sony/ATV Music Publishing),[16] with which she shares the rights to her musical works.

Under agreements between a songwriter and a publisher, the publisher may pay an advance to the songwriter against future royalty collections to help finance the songwriter's compositions. In

[12] 2015 Copyright Office Report, pp. 131-132.

[13] The rates may be based on a percentage of a radio station's revenues or other factors, depending on terms set by the performing rights organizations.

[14] John Seabrook, "Revenue Streams: Is Spotify the Music Industry's Friend or Foe?," *The New Yorker*, November 23, 2014, http://www.newyorker.com/magazine/2014/11/24/revenue-streams.

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

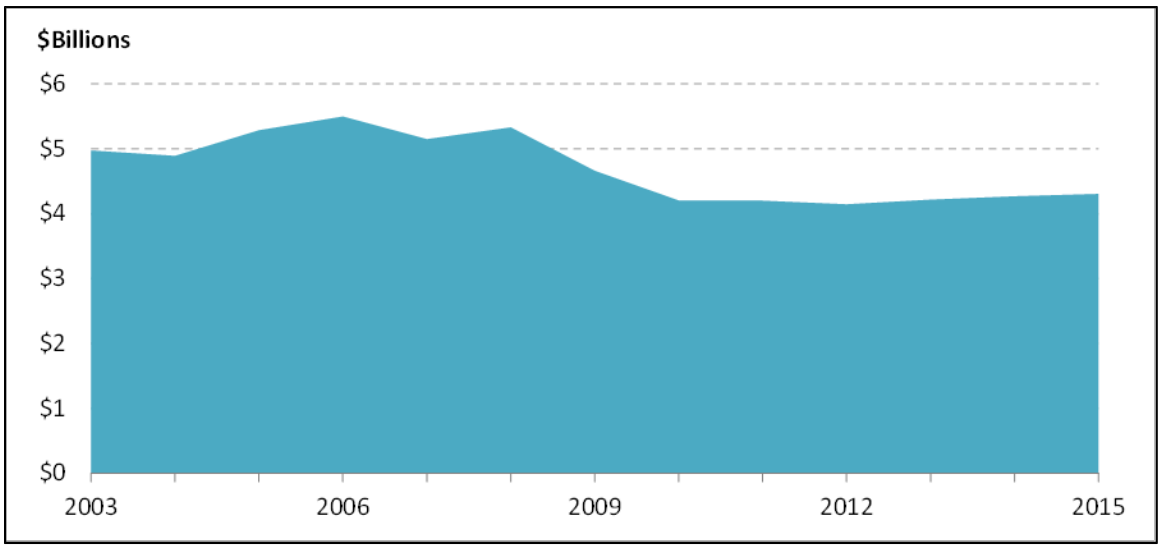
[16] Ben Sisaro, "Sony Threatens to Bypass Licensers in Royalties Battle," *New York Times*, July 10, 2014, http://www.nytimes.com/2014/07/11/business/media/sony-threatens-to-bypass-licensers-in-royalties-battle.html?_r=0.

exchange, the songwriter assigns a portion of the copyright in the compositions he or she writes during the term of the contract.[17] The publisher's role is to monitor, promote, and generate revenues from the use of music in formats that require mechanical licensing rights, including sheet music, compact discs, digital downloads, ringtones, interactive streaming services, and broadcast radio.

Songwriters and publishers derive royalty income at each step, but may need to share this income with sub-publishers and coauthors. For songwriters who are entering the music industry, the contract terms are generally standardized, with about a 50-50 division of income between the publisher and songwriter. In some cases a musical work has a single songwriter and publisher, so the division is relatively straightforward. Often, however, songs have multiple songwriters, each with his or her own publisher.[18] (See also "ASCAP and BMI Consent Decree Reviews.")

Within the United States, the music publishing industry earned about $4.3 billion in revenues and $628.6 million in profits during 2015, according to IBIS, a research firm. Three firms account for about 37.4% of the publishing industry's revenues: (1) Sony/ATV Music Publishing (19.2%), (2) Universal Music Publishing Group (12.2%), and (3) Warner Music Group (5.0%).[19] After several years of growth, revenues of the music publishing industry declined between 2008 and 2010, and then stayed relatively flat (see **Figure 2**).

Figure 2. U.S. Music Publishing Industry Revenue Trends



Source: 2015 IBISWorld Music Publishing Report.

Note: Figures not adjusted for inflation.

[17] 2015 Copyright Office Report, pp. 19-20.

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

[19] Nick Paetrillo, "Music Publishing in the US—Getting a Remix: Digital Media Outlets Have Opened Up New Revenue Streams," IBISWorld Industry Report 51223, October 2015, p. 4 (2015 IBISWorld Music Publishing Report).

IBIS predicts that over the next five years, as digital distribution becomes more prevalent, established songwriters may find it unnecessary to remain aligned with music publishers, and newer songwriters may be reluctant to sign long-term publishing contracts.[20]

Recording Artists and Record Labels

Record labels are responsible for finding musical talent, recording their work, and promoting the artists and their work. For example, as a performer, Ms. Swift has a contract with a record label (Big Machine Records, which has a partnership with Universal Music Group),[21] with which she shares the rights to her sound recordings.

Recording contracts (especially with the major labels—Sony Corporation, Warner Music Group, and Universal Music Group) generally require recording artists to transfer their copyrights to the record label for defined periods of time and defined geographic regions.[22] In return, the recording artist receives a share of royalties from sales and licenses of the sound recording. Record companies also finance recordings of music, lend and advance artists funds for expenses, and attempt to guide the artists' careers.[23] The record companies earn most of their profits from sales of a relatively small number of hit recordings.

Recording artists also work with independent producers to select material and a musical style.[24] Independent producers and independent labels often work with artists as subcontractors for major record companies under a variety of financial arrangements.[25] Technological innovations have enabled producers to "play with" and reimagine songs, leading to a blurring of the lines between producers and traditional composers.[26] For information about proposed legislation addressing how producers get compensated for their work, see "Bills Introduced in the 114th Congress."

The three major record labels earned about 42% of the industry's revenues: (1) Sony Corporation (11.4%), (2) Universal Music Group (12.8%), and (3) Warner Music Group (17.5%).[27] These

[20] Ibid., p. 21.

[21] Ed Christman, "Taylor Swift's Big Machine is Off the Market, Gets Republic Nashville," Billboard, July 2, 2015.

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

[23] Vogel, *Entertainment Industry Economics*, p. 280.

[24] For example, Madonna, for her album *Rebel Heart*, worked with multiple producers. In describing the recording process, Madonna said, "I didn't know exactly what I signed on for, so a simple process became a very complex process. Everyone I worked with is tremendously talented, [but each producer] has also agreed to work with 5,000 other people. I just had to get in where I could fit in." Jon Pareles, "Madonna on 'Rebel Heart,' Her Fall, and More," *New York Times*, March 5, 2015, http://www.nytimes.com/2015/03/06/arts/music/madonna-talks-about-rebel-heart-her-fall-and-more.html?_r=0.

[25] For detailed descriptions of financial arrangements, see Vogel, *Entertainment Industry Economics*, pp. 280-281.

[26] See, for example, Taige Jensen, Graham Roberts, Alicia Desantis and Yulia Parshina Kottas, "Bieber, Diplo and Skrillex Make a Hit," *New York Times*, August 25, 2015, http://www.nytimes.com/video/arts/music/100000003872410/bieber-diplo-and-skrillex-make-a-hit.html. The producers of "Where Are U Now," recorded by Justin Bieber, also received writing credits.

[27] Nick Petrillo, "Major Music Label Production in the U.S., Low Note: The Internet Will Continue to Decrease Album Sales, Hurting Revenue," IBISWorld Industry Report 51222, October 2015, p. 4 (2015 IBISWorld Major Label Music (continued...)

companies collectively earned about $6.9 billion in revenues and $397.8 million in profits from their recording businesses during 2015.[28] While there are many smaller record labels, few are truly independent, because they often rely on larger record companies for initial financing, manufacturing (at least of CDs), and distribution of sound recordings.[29]

Music Licensees

A very large number of entities, from neighborhood bars to broadcast radio stations, "perform" copyrighted musical works for the public. Such entities must pay royalties to copyright holders. The types of royalty payments owed and the way those payments are determined vary considerably, depending mainly upon the way a particular entity is treated under copyright law.

How Copyright Works

Songwriters and Music Publishers

Reproduction and Distribution Licenses (Mechanical Licenses)

Congress passed the first federal copyright act in 1790.[30] The act did not expressly protect musical compositions ("musical works"), but composers and songwriters could protect their works by registering them as "books." In 1831 Congress amended the law to expressly protect musical works printed and sold as sheet music.[31] With the 1909 Copyright Act, Congress added an exclusive right to make "mechanical" reproductions of songs in "phonorecords."[32] At the time, this exclusive right of mechanical reproduction applied to music in player pianos.

By 1909, however, Congress was concerned about allegations that one player piano manufacturer—the Aeolian Company—was seeking to create a monopoly by buying up exclusive rights from music publishers.[33] To address this concern, Congress established the first compulsory license in U.S. copyright law,[34] requiring music publishers to make mechanical reproductions of their works available to *all* piano player manufacturers at 2 cents per "part manufactured," regardless of how many piano rolls were actually sold.

As technology developed, both mechanical rights and this rate of 2 cents per record subsequently applied to music distributed via vinyl records, cassette tapes, and compact discs. Prior to Congress's adoption of the 1976 Copyright Act, the Register of Copyrights had proposed eliminating the compulsory license, but record companies, which pay music publishing companies for the right to reproduce the musical works in physical (and now digital) media,

(...continued)

Production Report). In 2013 Sony acquired EMI Group's publishing division in a partnership with private investors.

[28] Ibid., p. 4.

[29] Vogel, *Entertainment Industry Economics*, p. 281.

[30] Act of May 31, 1790, Ch. 15, Stat. 124.

[31] Act of Feb. 3, 1831, Ch. 16, 4 Stat. 436.

[32] U.S. Congress, House Committee on Patents, *To Amend and Consolidate the Acts Respecting Copyright*, committee print, 60th Cong., 2nd sess., February 22, 1909, Rep. 2222, pp. 6-8.

[33] U.S. Congress, House Committee on Patents, *To Amend and Consolidate the Acts Respecting Copyright*, committee print, 59th Cong., 2nd sess., March 2, 1907, Rep. 7083, Part 2, Views of the Minority, p. 5.

[34] 2015 U.S. Copyright Office Report, p. 26.

opposed the proposal. They argued that recording artists needed unhampered access to musical material on nondiscriminatory terms, and that repeal would result in a great upheaval in the sound recording industry with no benefit to the public. The music publishers countered that the compulsory licensing scheme was no longer necessary to meet the antitrust problems that existed in 1909. While they much preferred outright repeal of a compulsory license, they were willing to compromise by accepting a higher royalty rate in lieu of repeal.[35]

Congress ultimately concluded in 1976 that the compulsory licensing system was still warranted, but, based on the prevalence of records that offered multiple songs (i.e., albums), directed the Copyright Office to apply the rate on a per-song basis instead of a per-record basis.[36] This enabled music publishers to earn more money from each record sale. Although Congress has amended the law several times, this compulsory license remains in effect today. In the Copyright Act of 1976, Congress recodified the compulsory license in 17 U.S.C. Section 115. The 1976 Copyright Act raised the statutory rate, which had originally been set in 1909, from $0.02 per record[37] to the greater of (a) $0.275 per song embedded in each record or (b) $0.005 cents per minute of playing time, or fraction thereof.[38] The increase became effective on January 1, 1978. Congress also created a tribunal (consisting of five commissioners appointed by the President) to adjust the royalty rates thereafter.[39] After replacing the tribunal with an arbitration panel in 1993, Congress established the Copyright Royalty Board (CRB) in 2004.[40]

The CRB, which is composed of three administrative judges appointed by the Librarian of Congress, establishes the royalty rates that licensees pay publishers and songwriters for the mechanical rights to their works, unless such rates are voluntarily negotiated between a copyright owner and a user.[41] The CRB sets rates every five years for Section 115 licenses, as required by the Copyright Act.[42] While copyright owners and users are free to negotiate voluntary licenses that depart from the statutory rates and terms, the CRB-set rate effectively acts as a ceiling for

[35] U.S. Congress, House Committee on the Judiciary, *Copyright Law Revision*, committee print, 83rd Cong., 2nd sess., March 8, 1967, H.Rept. 90-183, pp. 66-67.

[36] Ibid., U.S. Congress, House Committee on the Judiciary, *Copyright Law Revision*, committee print, 94th Cong., 2nd sess., September 3, 1976, pp. 110-111. See also Scott Thill, "1948: Columbia's Microgroove LP Makes Albums Sound Good," *Wired*, June 10, 2010, http://www.wired.com/2010/06/0621first-lp-released/.

[37] Copyright Act of 1909, P.L. 60-349, §1(e), 35 Stat. 1075, 1075-76.

[38] Copyright Act of 1976, P.L. 94-553, §115(c)(2). 17 U.S.C. §115(c)(2). The report from the House Judiciary Committee stated that "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.

[39] P.L. 94-553, §§801-810.

[40] 17 U.S.C. §§801-805; Copyright Royalty and Distribution Reform Act of 2004, P.L. 108-419. See also Copyright Royalty Tribunal Reform Act of 1993, P.L. 103-198.

[41] 17 U.S.C. §115(c)(3)(E)(i). Section 115 provides that voluntarily negotiated rates for mechanical licenses supersede those set by the CRB.

[42] 17 U.S.C. §§801(b)(1) and 804(b)(4).

what the owner may charge.[43] The CRB establishes rates for Section 115 licenses based on policy objectives set forth in Section 801(b)(1) of the 1976 Copyright Act.[44]

In 1995, Congress enacted the Digital Performance Rights in Sound Recordings Act (DPRSRA).[45] Among other provisions, this act amended 17 U.S.C. §115 to expressly cover the reproduction and distribution of musical works by digital transmission (digital phonorecord deliveries, or DPDs).[46] Congress directed that rates and terms for DPDs should distinguish between "(i) digital phonorecord deliveries where the reproduction or distribution of a phonorecord is incidental to the transmission which constitutes the digital phonorecord delivery, and (ii) digital phonorecord deliveries in general."[47] This distinction prompted an extensive debate about what constitutes an "incidental DPD." For several years, the Copyright Office deferred moving forward on a rulemaking, urging that Congress resolve the matter. In July 2008 the Copyright Office proposed new rules, determining that "[while] it seems unlikely that Congress will resolve these issues in the foreseeable future ... the Office believes resolution is crucial in order for the music industry to survive in the 21st Century."[48]

In November 2008, the Copyright Office, recognizing that streaming services make and store reproductions of musical works on computer servers to facilitate streaming, concluded that these services could utilize the Section 115 compulsory licensing process.[49] The Copyright Office declined to specify whether the temporary reproductions of musical works were an interim step in public performances (making some streaming services akin to noninteractive digital services described in Section 112), or a reproduction and distribution that required mechanical licenses (making some streaming services akin to compact discs and permanent digital downloads).

In 2009 and again in 2013, the CRB established the statutory rates and terms that interactive streaming services must pay for mechanical licensing based on an agreement negotiated among representatives of music publishers and songwriters, record labels, and the streaming services.[50]

The CRB rate proceedings for mechanical licenses are separate from those for public performance licenses. When Congress originally established compulsory license rate proceedings

[43] 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." Copyright Royalty Board, Library of Congress, "Mechanical and Digital Phonorecord Delivery Rate Determination Proceeding," 74 *Federal Register* 4510, 4513, January, 26, 2009.

[44] These factors include (1) maximizing the availability of public works to the public, (2) affording copyright owners a fair return on their creative works and copyright users a fair income under existing economic conditions, (3) reflecting the relative contributions of the copyright owners and users in making products available to the public, and (4) minimizing any disruptive impact on the structure of the industries involved and on generally prevailing industry practices. 17 U.S.C. §801(b)(1).

[45] P.L. 104-39.

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

[47] 17 U.S.C. §115(c)(3)(D).

[48] 2008 NPRM, p. 40806.

[49] 2008 Interim Rule, p. 66174.

[50] Copyright Royalty Board, Library of Congress, "Mechanical and Digital Phonorecord Delivery Rate Determination Proceeding," 74 *Federal Register* 4510, January, 26, 2009; Copyright Royalty Board, Library of Congress, "Adjustment of Determination of Compulsory License Rates for Mechanical and Digital Phonorecords," 78 *Federal Register* 67938, November 13, 2013.

in 1976, the House Judiciary Committee explained that it chose to stagger the various rate-setting proceedings in order to balance the workload of (what is now) the CRB.[51]

Interactive streaming services, including Spotify, obtain both mechanical and privately negotiated public performance licenses (described in "Musical Work Public Performance Royalties") for the musical works they use. Noninteractive services such as Pandora, however, do not pay mechanical royalties to music publishers. In its annual report for 2014, Pandora Media, Inc. stated the following:

> We do not currently pay so-called "mechanical royalties" to music publishers for the reproduction and distribution of musical works embodied in server copies or transitory copies used to make streams audible to our listeners. Although not currently a matter of dispute, if music publishers were to retreat from the publicly stated position of their trade association that non-interactive streaming does not require the payment of a mechanical royalties, and a court entered final judgment requiring that payment, our royalty obligations could increase significantly, which would increase our operating expenses and harm our business and financial conditions.[52]

According to the Copyright Office, interactive streaming services represent only a small percentage of mechanical royalties received by music publishers.[53]

Table 1 describes the rates that manufacturers and distributors of different types of media pay music publishers for mechanical rights. There are currently 17 distinct categories of media and services under the Section 115 license, each with its own specific rate. Under the current regime, at the outset of a rate-setting proceeding, parties must identify every "business model" that might be relevant in the next five years so the CRB can establish a rate for that use. The rates that interactive services pay the publishers are tied to the rates that the services pay record labels for mechanical rights, which are negotiated in the free market. According to National Music Publishers Association president David Israelite, "If they get a better deal, we get a better deal."[54]

[51] U.S. Congress, House Committee on the Judiciary, *Copyright Law Revision*, committee print, 94th Cong., 2nd sess., September 3, 1976, 94-1476, p. 173.

[52] Pandora Media, Inc. 2014 SEC Form 10-K, p. 13. See also Spotify Ltd., "Spotify Explained, Royalties: in Detail," http://www.spotifyartists.com/spotify-explained/#royalties-in-detail.

[53] 2015 Copyright Office Report, p. 162.

[54] Ed Christman, "Copyright Royalty Board to Set Mechanical Royalty Rates for Digital Music Services," *Billboard*, April 12, 2012, http://www.billboard.com/biz/articles/news/publishing/1098005/copyright-royalty-board-to-set-mechanical-royalty-rates-for.

Table 1. Compulsory Royalty Rates for Mechanical Rights

Applies to Physical Media, Digital Download Services, Digital Interactive, Interactive Streaming

Medium	Description	Amount	Notes
CDs, LPs, cassettes, and other recordings embodied in a physical medium	Payable royalty is linked to the number of copies made and distributed	$0.091 per song	Songs > 5 minutes in length have a rate of $0.0175 per minute or fraction thereof. Record labels pay music publishers for these rights.
Permanent digital downloads (e.g., iTunes)	Payable royalty is linked to the number of copies made and distributed	$0.091 per song	Songs > 5 minutes in length have a rate of $0.0175 per minute or fraction thereof. Record labels pay music publishers for these rights.
Ringtones	Payable royalty is linked to the number of copies made and distributed	$0.24 per ringtone	Prior to 2006, music publishers negotiated for ringtone rates directly. Publishers introduced these rates to the CRB as benchmarks, resulting in higher rates for ringtones than for full-length songs. Record labels pay music publishers for these rights.
Interactive subscription streaming services (e.g., Spotify's $4.99/month service for personal computers only)	A formula based on (1) an "all-in" royalty pool (payable to music publishers for performance and mechanical rights); (2) a calculation of the payable mechanical royalty pool (after deducting public performance royalties); (3) an allocation based on the total number of plays on the streaming service	The total amount of royalties payable to music publishers is (1) at least 10.5% of the music service's revenue; (2) tied to terms of negotiated agreements between interactive subscription streaming services and record labels Payments to each songwriter based on the total number of song's monthly plays	Formula adopted by CRB pursuant to 2008 and 2013 settlements reached by trade associations representing music publishers, record labels, songwriters, and digital streaming services. Codified in 37 C.F.R. 385 (Subpart B). Streaming services pay music publishers for these rights.
Free interactive nonsubscription, advertising-supported services (e.g., Spotify's advertising-supported service)	Same as above.	Similar to above.	Same as above.

Source: 37 C.F.R. §§358.3(a)-(b), §§385.12-385.14, §385.23, Harry Fox Agency, "Rate Charts," https://www.harryfox.com/find_out/rate_charts.html; 2015 Copyright Office Report, p. 30. Ari Herstand, "Why Exactly is Spotify Being Sued and What Does This Mean?," *Digital Music News*, December 30, 2016, http://www.digitalmusicnews.com/2015/12/30/why-exactly-is-spotify-being-sued-and-what-does-this-mean/.

In the United States, music publishers collect mechanical royalties from recorded music companies and streaming services via third-party administrators. The two major administrators are the Harry Fox Agency, a nonexclusive licensing agent, and Music Reports, Inc. After charging an administrative fee, these agencies distribute the mechanical royalties to the publishers, which in turn distribute them to songwriters. In September 2015, the performing rights organization Society of European Stage Authors and Composers (SESAC) acquired the Harry Fox Agency from the National Music Publishers Association trade organization.[55] (For a description of SESAC and other performing rights organizations, see "Musical Work Public Performance Royalties.") Music publishers may also directly issue and administer mechanical licenses themselves.[56]

Musical Work Public Performance Royalties

Depending on who collects public performance royalties on behalf of publishers and songwriters, the rates are either subject to oversight by the federal district courts in New York City or are based on marketplace negotiations between the publishers and licensees.

Congress granted songwriters the exclusive right to publicly perform their works in 1897.[57] While this right represents a way for copyright owners to profit from their musical works, the sheer number and fleeting nature of public performances make it impossible for copyright owners to individually negotiate with each user for every use, or detect every case of infringement.[58] Performing rights organizations (PROs) address the logistical issue of how to license and collect payment for public performances in a wide range of settings.[59] The American Society of Composers, Authors and Publishers (ASCAP) was formed in 1914, SESAC was founded in 1930, Broadcast Music, Inc. (BMI) was founded in 1939, and Global Music Rights (GMR) was established in 2013. After charging an administrative fee, the PROs split the public performance royalties among the publishers and songwriters.

In contrast to the mechanical right, the public performance of musical works is not bound by compulsory licensing under the Copyright Act. As described in "ASCAP and BMI Consent Decree Reviews," ASCAP and BMI are subject to government antitrust regulation through long-standing consent decrees. Music publishers may affiliate with multiple PROs; songwriters, however, may choose only one.[60]

Entities that "publicly perform" a musical work—including terrestrial, satellite and Internet radio stations, broadcast and cable television stations, online services, bars, restaurants, and live

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

[56] 2015 Copyright Office Report, p. 21.

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

[58] *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).

[59] Ibid. and 2015 Copyright Office Report, p. 20.

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

performance venues—may obtain a license from a songwriter or publisher through a PRO.[61] Most commonly, licensees obtain a blanket license, which allows the licensee to publicly perform any of the musical works in a PRO's catalog for a flat fee or a percentage of total revenues. Broadcast radio stations obtain blanket licenses from songwriters or publishers, which are negotiated on their behalf by the Radio Music License Committee (RMLC). In 2012, RMLC reached settlements with ASCAP and BMI on the amounts that radio stations pay to these two PROS for the use of music through the end of 2016.[62] The settlements encompass the stations' traditional radio broadcast service as well as their noninteractive streaming services.

The U.S. District Court for the Southern District of New York, acting as the rate court, approved these settlements. After Pandora Media, Inc. filed a motion claiming that the ASCAP settlement with the RMLC violated the terms of the ASCAP antitrust consent decree, a judge ruled, and in May 2015 the U.S. Court of Appeals for the Second Circuit affirmed, that Pandora Media, Inc. should pay ASCAP 1.85% of the revenues of its Pandora service.[63] This is less than the 3% of revenues ASCAP originally demanded, but more than the 1.7% paid by radio broadcast stations and the online streaming services operated by broadcast radio groups. There are now several such services (see **Table 2**). In 2015, Pandora Media, Inc. completed the purchase of KXMZ-FM in Rapid City, SD, so it, too, could be covered by the terms of the RMLC settlements.[64]

[61] 2015 Copyright Office Report, p. 33.

[62] Radio Music License Committee, "Federal Court Approves Radio Industry Settlement with ASCAP," press release, January 27, 2012, http://www.radiomlc.org/pages/4795848.php; Radio Music License Committee, "Federal Court Approves Radio Industry Settlement with BMI," press release, August 12, 2012, http://www.radiomlc.org/pages/6282052.php. See also David Oxenford, "Details of the ASCAP Settlement with the Radio Industry—What Will Your Station Pay?," *Broadcast Law Blog*, January 30, 2012, http://www.broadcastlawblog.com/2012/01/articles/details-of-the-ascap-settlement-with-the-radio-industry-what-will-your-station-pay/.

[63] Ben Sisario, "Pandora Wins a Battle, but the War Over Royalties Continues," *New York Times*, March 20, 2014, http://www.nytimes.com/2014/03/21/business/media/pandora-wins-a-battle-but-the-war-over-royalties-continues.html?_r=0. *Pandora Media, Inc. v. American Society of Composers, Authors and Publishers et al*, Nos. 14-1158, 14-1161, 14-1246 (2nd Cir. May 6, 2015). Pandora is involved in a similar suit with BMI. Ed Christman, "Pandora Appeals BMI Rate Court Ruling," *Billboard*, October 20, 2015, http://www.billboard.com/articles/business/6737437/pandora-appeals-ruling-bmi-royalty-rate.

[64] Andrew Flanagan, "FCC Sweeps Aside a Final Obstacle to Pandora's Radio Station Buy," *Billboard*, September 17, 2015, http://www.billboard.com/articles/business/6700463/fcc-ascap-pandora-radio-station-south-dakota.

Table 2. Online Radio Services Owned/Operated by Selected Broadcast Radio Groups

Broadcast Radio Group	Broadcast Radio Stations Owned and Operated	Online Radio Service	Notes
iHeartMedia, Inc.	781	iHeart Radio	Free ad-supported service. Offers live streaming of broadcast radio stations and personalized stations, based on artist or genre.
CBS Corporation	113	Last.fm	Free ad-supported service. Offers live streaming of broadcast radio stations and personalized stations, based on artist or genre.
Univision Communications Inc.	60	Uforia Musica	Free ad-supported service. Offers live streaming of broadcast radio stations and personalized stations, based on artist or genre.
Pandora Media, Inc.[a]	1	Pandora (free) and Pandora One (subscription)	Free ad-supported service; offers personalized stations, based on artist or genre. Premium tier service for $4.99 per month or $54.89 per year (ad-free, more skips, fewer timeouts, premium quality audio).

Source: SNL Kagan; Robin Flynn et al., *Economics of Internet Music and Radio, 2015 Edition*; Pandora.

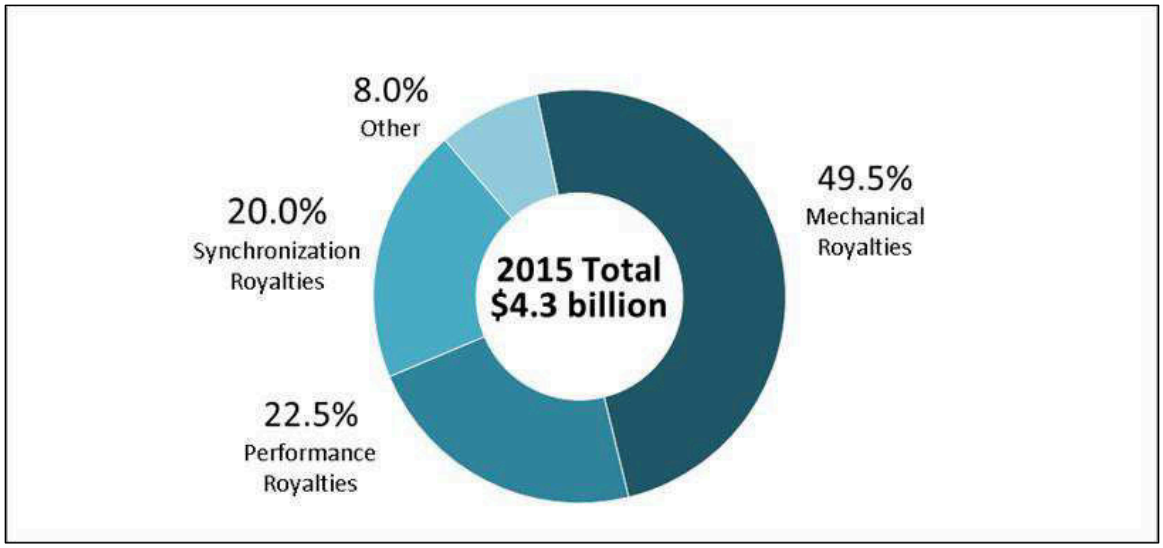
a. In November 2015, Pandora Media, Inc. purchased the assets of the streaming media service Rdio, in which the radio broadcasting company Cumulus had a partial ownership interest. Pandora subsequently shut down the Rdio service.

Current law, 17 U.S.C. Section 114(i), prohibits judges or other government officials from considering rates paid to record labels and artists for public performances of sound recordings when setting or adjusting public performance rates payable to music publishers and songwriters. This provision was included when Congress created a public performance right for sound recordings with the 1995 enactment of the DPRSRA. This provision may contribute to a disparity between the rates interactive services pay music publishers for performance rights, which *cannot* be tied to the prices they pay record labels, and the rates they pay music publishers for mechanical rights, which *are* tied to the rates they pay record labels.

Figure 3 represents how the different sources of royalties contribute to music publishers' revenues.[65]

[65] Figures reported from the National Music Publishers Association (NMPA) for its members are lower than those reported by the research firm IBIS. NMPA reported that in 2014 its member organizations received a total of $2.1 billion in U.S. revenues, a decline from the $2.2 billion generated in 2013. Ed Christman, "Music Publishing Leader Says Revenues Down, Looks to Apple Music for Hope," *Billboard*, June 17, 2015,

Figure 3. Breakout of Music Publishers' U.S. Revenues, by Type of Royalty



Source: IBISWORLD.com, 2015 IBISWorld Music Publishing Report; 2014 IBISWorld Music Publishing Report; Broadcast Music, Inc., "Broadcast Music, Inc. Reports Record-Breaking Revenues of $977 Million," press release, September 18, 2014, http://www.bmi.com/news/entry/broadcast_music_inc._reports_record_breaking_revenues_of_977_million; American Society of Composers, Authors and Publishers, "ASCAP Is the First PRO in the World to Report $1 Billion in Revenues," press release, March 13, 2015, http://www.ascap.com/press/2015/0302-ascap-hits-a-high-note-in-its-100th-year.aspx.

Notes: Synchronization refers to the use of music incorporated in audiovisual works, such as movies, television programs, and video games. In 2014, songwriters, composers, and music publishers collectively received $840 million from BMI and $883 million from ASCAP in performance royalties. Assuming standard contractual terms applied, publishers received about 50% of each distribution.

Record Labels and Recording Artists

Reproduction and Distribution Licenses

Congress did not recognize sound recordings as a distinct class of copyrighted works until 1971, when it adopted the 1971 Sound Recording Amendment.[66] This law granted sound recordings made after its effective date a reproduction right analogous to that provided for other works of authorship.[67] The effective date of the Sound Recording Amendment was February 15, 1972, four months after Congress passed it. Today, copyright protection of pre-1972 sound recordings remains governed by a patchwork of state and common law.

Recognizing that noninteractive digital services (including SiriusXM satellite service, Music Choice, and Pandora) may need to make ephemeral server reproductions of sound recordings, in 1998 Congress established a related license under Section 112 of the Copyright Act specifically to authorize the creation of these copies. The rules governing licenses for temporary reproductions of sound recordings are somewhat analogous to those governing incidental reproduction and

[66] P.L. 92-140. See also Maria A. Pallante, Register of Copyrights and Director et al., *Federal Copyright Protection for Pre-1972 Sound Recordings*, U.S. Copyright Office, December 2011, http://copyright.gov/docs/sound/ (2011 Copyright Office Report).

[67] 2011 Copyright Office Report.

distribution of musical works described in Section 115(c)(3)(C)(i).[68] The rates and terms of the Section 112 license are established by the CRB. Through SoundExchange, described below in "Sound Recording Public Performance Royalties," copyright owners of sound recordings (usually the record labels) receive Section 112 fees. Recording artists who do not own the copyrights, however, do not.[69]

With the limited exception described above, Congress did not empower the government to oversee the rates that record labels and artists may charge for the mechanical rights to sound recordings (i.e., to manufacture and distribute CDs, sell digital downloads of music and ringtones, or operate an interactive music service). Instead, these rates are subject to private negotiations in the marketplace.

Sound Recording Public Performance Royalties

Noninteractive Services

Until 1995, the Copyright Act did not afford public performance rights to record labels and recording artists for their sound recordings. Record labels and artists primarily earned income from reproduction and distribution royalties based on retail sales of physical products such as CDs. With the inception and public use of the Internet in the early 1990s, the recording industry became concerned that existing copyright law was insufficient to protect the industry from music piracy.[70] Two amendments to the Copyright Act, the Digital Performance Rights in Sound Recordings Act (DPRSRA) in 1995 and the Digital Millennium Copyright Act (DMCA) in 1998, addressed this concern.[71]

In the DPRSRA, Congress granted record labels and recording artists an exclusive public performance right for their sound recordings, but limited this right to digital audio transmissions. Congress made noninteractive subscription services, specifically satellite and cable radio (Music Choice and Muzak) services, eligible for compulsory licensing under Section 114.[72] The CRB applies the same four-factor policy-oriented standards described in Section 801(b)(1) of the 1976 Copyright Act that have applied to music publishers' licensing of mechanical rights.

The DMCA expanded the statutory licensing provisions in Section 114 to cover noninteractive online radio services.[73] The law set up a bifurcated system of rate-setting standards for the CRB:

- Services that *existed as of July 31, 1998*, prior to the enactment of the DMCA (i.e., SiriusXM satellite service as well as the Music Choice and Muzak subscription services), remained subject to the Section 801(b)(1) standard.

[68] 17 U.S.C. §112(e)(1); U.S. Congress, House Committee on the Judiciary, *Digital Millennium Copyright Act*, committee print, 106th Cong., 2nd sess., October 8, 1998, H.Rept. 105-796, pp. 89-90.

[69] 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.

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

[71] Melville B. Nimmer and David Nimmer, "Ch. 8.21 Digital Performance," in *Nimmer on Copyright: A Treatise on the Law of Literary, Musical, and Artistic Property, and the Protection of Ideas*, vol. 2 (New York: M. Bender, 2015).

[72] 17 U.S.C. §114(d)(2). 2015 Copyright Office Report, p. 49.

[73] P.L. 105-304.

- Online radio and other digital music services (including both subscription and advertising-supported music streaming services) that entered the music marketplace *after July 31, 1998*, are subject to rates and terms "that most clearly represent the rates and terms that would have been negotiated in the marketplace between a willing buyer and a willing seller."[74]

The CRB administers the ratemaking proceedings for (1) satellite radio and "preexisting" satellite subscription services (which it terms the "SDARS" rate proceedings) and (2) online radio and digital music services (which it terms the "Webcaster" or "Web" rate proceedings).

SoundExchange also administers the Section 114 fees that noninteractive digital services pay record labels for public performance rights. The Copyright Act specifies how record labels and recording artists divide the public performances they receive from noninteractive digital music services via SoundExchange.[75]

One challenge with the willing buyer/willing seller standard is, as Senator Patrick Leahy stated in 2002,

> [that it] may have the may be having the unfortunate and unintended result that webcasters and copyright owners are concerned that the rates and terms of any voluntary licensing agreements will be applied industry-wide. The [willing buyer/willing seller] standard appears to be making all sides cautious and reluctant to enter into, rather than facilitating, voluntary licensing agreements.[76]

As discussed in "CRB Rates for 2016-2020," CRB's use of privately negotiated agreements as benchmarks for setting industrywide rates has been controversial.

Interactive Services

The DPRSRA enabled owners of sound recordings (i.e., record labels and/or artists) to negotiate directly with interactive digital transmission services for public performance rights at marketplace-determined rates. The term "interactive service" covers only services in which an individual can arrange for the transmission or retransmission of a specific recording.[77]

The Senate Judiciary Committee in 1995 explained that

> [C]ertain types of subscription and interactive audio services might adversely affect sales of sound recordings and erode copyright owners' ability to control and be paid for use of their work.... Of all of the new forms of digital transmission services, interactive services are the most likely to have a significant impact on traditional record sales, and therefore pose the greatest threat to the livelihoods of those whose income depends on revenues derived from traditional record sales.[78]

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[74] 17 U.S.C. §114(f)(2)(B).

[75] 17 U.S.C. §114(g). 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."

[76] Sen. Patrick Leahy, "Small Webcaster Settlement Act of 2002," *Congressional Record*, daily edition, vol. 148, part 2 (November 20, 2002), p. S11727.

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

[78] Ibid., pp. 14-16.

Thus, while Taylor Swift and her record label have the legal right to withdraw her catalog from an interactive service such as Spotify, they cannot, pursuant to the compulsory license exemptions set forth in Section 114, refuse to allow the use of her recordings by noninteractive services such as Pandora. Similarly, Adele is not immune from compulsory licensing, even though she reportedly did not wish to make her newest album, *25*, available for streaming.[79]

Broadcast Radio Exception

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

> 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.[80]

The Senate Judiciary Committee further distinguished broadcast radio from other services by stating that "[F]ree 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."[81]

In addition to maintaining that artists continue to benefit from the promotional value of broadcast radio airplay, broadcasters assert that a performance royalty fee would hurt them financially, and effectively force them to subsidize the recording industry.[82] Representatives of recording artists and record labels argue that they are the ones subsidizing the broadcast radio industry, because they are prohibited from exercising their property rights.[83] A 2010 report published by the Government Accountability Office "found the relationship between radio airplay and music sales to be unclear."[84] Pandora Media, Inc. claims that its advertising-supported service is similar to broadcast radio service, and that the requirement that it pay record labels and artists for each "stream," while services owned by broadcast radio operators do not, represents an unfair legal disparity.[85]

Members of the band Pink Floyd counter that in order to increase parity with broadcast radio, it would be more beneficial to artists if Congress were to require broadcast radio stations to pay royalties.[86] The Copyright Office supports such a requirement, arguing that adding this

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[79] Jacob Kastrenakes, "Pandora is Streaming Adele's 25 and Her Label Can't Stop It," *The Verge*, November 25, 2015, http://www.theverge.com/2015/11/25/9800508/25-streaming-pandora-radio-service-licensing.

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

[81] Ibid., p. 15.

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

[83] Music First, *The Truth About Performance Rights*, http://musicfirstcoalition.org/performancerights.

[84] U.S. Government Accountability Office, *The Proposed Performance Rights Act Would Result in Additional Costs for Broadcast Radio Stations and Additional Revenue for Record Companies, Musicians, and Performers*, 10-826, August 2010, p. 12, http://www.gao.gov/assets/310/308569.pdf.

[85] Tim Westergren, founder, Pandora, *Pandora and Royalties* (blog), June 26, 2013, http://blog.pandora.com/2013/06/26/pandora-and-royalties/.

[86] Roger Waters, David Gilmour, and Nick Mason, "Pink Floyd: Pandora's Internet Radio Ripoff," *USA Today*, June 25, 2013, http://www.usatoday.com/story/opinion/2013/06/23/pink-floyd-royalties-pandora-column/2447445/.

requirement would enable U.S. artists and record labels to collect performance royalties from foreign radio broadcasts. The Copyright Office states that most countries condition payment of such royalties on reciprocity. The National Association of Broadcasters contends that an expansion of performance rights will be insufficient to invoke copyright reciprocity from other nations.[87]

For information about bills that would address this exception, see "Bills Introduced in the 114th Congress."

SoundExchange

Congress intended the rate-setting process to permit voluntary industry agreements when possible. Congress provided antitrust exemptions to statutory licensees and copyright owners of sound recordings so that they could designate common agents to collectively negotiate with digital radio services and agree upon royalty rates for public performance rights.[88] The Recording Industry Association of America (RIAA) established SoundExchange as a designated common agent for the record labels in 2000 and spun it off in 2003 as an independent entity. In 2015, SoundExchange reached agreements with public radio stations and college radio stations covering the rates paid to stream recordings online; the CRB approved the settlement agreements.[89]

The Copyright Act does not include record producers in the statutorily defined split of royalties for public performances of sound recordings by digital noninteractive services. As a result, record producers must rely on contracts with one of the parties specified in the statute, often the featured recording artist, in order to receive royalties from digital performances.

In general, the CRB has adopted "per-performance" rates for public performances of sound recordings for digital music services, rather than the percentage-of-revenue rates typically charged by PROs to license public performances of musical works.[90] That per-performance approach has proven controversial.[91]

Webcaster Settlement Acts

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

[87] 2015 Copyright Office Report, pp. 89-90.

[88] 17 U.S.C. §112(e)(2), 114(e)(1), 115(c)(3)(B).

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

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

[91] 2015 Copyright Office Report, pp. 51-52.

CRB-set rates.[92] The most recent agreements reached under SoundExchange's authority to do this expired at the end of 2015, pursuant to 17 U.S.C. §114(f)(5)(A).

The Webcaster Settlement Act of 2008 ("2008 WSA") gave SoundExchange temporary authority (which expired on February 15, 2009), to negotiate directly with services that stream music over the Internet ("webcasters"). The law prohibited the agreements from extending beyond December 31, 2015. Broadcast radio stations that stream their stations over the Internet (represented by the National Association of Broadcasters) and "small webcasters" reached privately negotiated agreements with SoundExchange at the deadline.[93] Small webcasters transmitting less than 5 million hours of music programming per month could pay the greater of

1. 10% of the small webcaster's first $250,000 gross revenues, and 12% of gross revenues in excess of $250,000 during the applicable year, or
2. 7% of the small webcaster's expenses during the applicable year.[94]

The Webcaster Settlement Act of 2009 ("2009 WSA") reinstated SoundExchange's authority to negotiate settlement agreements for a 30-day period starting on July 1, 2009. SoundExchange reached agreements with several digital music services prior to the deadline. This settlement is commonly known as the "Pureplay Settlement." Any qualifying noninteractive streaming service (webcaster) could avail itself of the rates and terms of the agreement by filing an initial notice of election with SoundExchange, followed by annual notices, through 2015. Pandora chose this option.[95] Pandora agreed to pay the greater of 25% of the service's gross revenues or $0.14 per 100 streams. Had Pandora not selected this option, it would have paid the CRB default rate of $0.23 per 100 streams.

iHeart Media, Inc. and Pandora Media, Inc. subsequently reached directly negotiated licensing agreements with individual labels (direct agreements) rather than with SoundExchange. In 2012, iHeart Radio's parent company, then known as Clear Channel, reached an agreement with Big Machine Label Group whereby it would pay performance rights for performances on its broadcast radio stations as well as its streaming services.[96] In 2013, Clear Channel struck an agreement with Warner Music Group that also included fees for performances on all of Clear Channel's assets, including broadcast radio stations.[97] In 2014, Pandora Media, Inc. reached an agreement with

[92] P.L. 110-435. See also CRS Report RL34020, *Statutory Royalty Rates for Digital Performance of Sound Recordings: Decision of the Copyright Royalty Board*, by Brian T. Yeh. Previously Congress had passed the Small Webcaster Settlement Act of 2002, P.L. 107-321; the Webcaster Settlement Act (WSA) of 2008, P.L. 110-435, and the Webcaster Settlement Act of 2009, P.L. 111-36. The 2009 WSA extended the window of time during which parties were authorized to reach settlements under the 2008 WSA.

[93] Library of Congress, U.S. Copyright Office, "Notification of Agreements Under the Webcaster Settlement Act of 2008," 74 *Federal Register* 9293, March 3, 2009, The group of "small webcasters" that reached the agreement included Attention Span Radio; Blogmusik (Deezer.com); Born Again Radio; Christmas Music 24/7; Club 80's Internet Radio; Dark Horse Productions; Edgewater Radio; Forever Cool (Forevercool.us); Indiwaves (Set YourMusicFree.com); Lundlow Media (MandarinRadio.com); Musical Justice; My Jazz Network; PartiRadio; Playa Cofi Jukebox (Tropicalglen.com); Soulsville Online; taintradio; Voice of Country; and Window to the World Communications (WFMT.com). Ibid., p. 9294, n. 1.

[94] Ibid., p. 9303.

[95] Pandora Media, Inc., SEC Form 10-K, for the fiscal year ended January 31, 2013, p. 9.

[96] Clear Channel Media and Entertainment, "Big Machine Label Group and Clear Channel Announce Groundbreaking Agreement to Enable Record Company and Its Artists to Participate in All Radio Revenue Streams and Accelerate Growth of Digital Radio," press release, June 5, 2012, http://www.businesswire.com/news/home/20120605005867/en/Big-Machine-Label-Group-Clear-Channel-Announce#.VRxaMuHQJUE. In 2014 Clear Channel renamed itself iHeartMedia.

[97] Clear Channel Media and Entertainment, "Warner Music Group and Clear Channel Announce Landmark Music (continued...)

Merlin, a coalition representing independent labels, in which Pandora agreed to "steer" listeners of its online service toward Merlin-label recordings in exchange for discounted rates.[98]

CRB Rates for 2016-2020

In April 2015, the CRB began the hearing phase of its proceeding to set the royalty rates paid by noninteractive digital music services to SoundExchange for the years 2016-2020.[99] 17 U.S.C. Section 114(f)(5)(C) barred the CRB from taking into consideration the provisions of the Pureplay Settlement. During the CRB's rate proceeding, questions arose about the proper interpretation of this provision. Pandora Media, Inc., Clear Channel, and SoundExchange disagreed over whether the direct agreements, which were based in part on the Pureplay settlement, could be introduced as evidence in the CRB rate proceeding. SoundExchange argued that Congress enacted a "very broad rule of exclusion" to prevent the terms of a WSA agreement from being used against a settling party in subsequent proceedings. Pandora Media, Inc. and Clear Channel contended that SoundExchange's interpretation would require disregarding every benchmark agreement proposed by parties, as all agreements are to some degree impacted by the prevailing rates and terms negotiated pursuant to the 2009 WSA.[100] The CRB determined that these questions were novel material questions of substantive law and, as required by the Copyright Act, referred them to the Register of Copyrights for resolution.[101] In September 2015, the Register ruled that the CRB may consider directly negotiated licenses that incorporate or otherwise reflect provisions in a WSA agreement.[102]

On December 16, 2015, the CRB issued its decision regarding rates for the 2016-2020 period.[103] For 2016, streaming services (including those of broadcast radio stations as well as Pandora) must pay $0.17 per 100 streams on nonsubscription services.[104] In a break from its past practice of setting rate increases in advance, CRB tied the annual rate increases from 2017 through 2020 to the Consumer Price Index.

(...continued)

Partnership," press release, September 12, 2013, http://www.iheartmedia.com/pages/Warner-Music-Group-and-Clear-Channel-Announce-Landmark-Music-Partnership.aspx.

[98] Brad Hill, "Pandora Proposes Lowering Music Royalty Rates Based on 'Steering' in Merlin Agreement," *Radio and Internet News*, October 27, 2014, http://rainnews.com/pandora-proposes-lowered-music-royalty-rates-based-steering-merlin-agreement/.

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

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

[101] 17 U.S.C. §802(f)(1)(b).

[102] 2015 Copyright Office Web IV Memo, p. 10.

[103] Copyright Royalty Board, *Web IV Determination, Exhibit A*, December 16, 2015, http://www.loc.gov/crb/web-iv/web-iv-terms.pdf. The CRB subsequently amended the regulatory language codifying the terms of the decision. Copyright Royalty Board, *Web IV Determination, Exhibit A*, December 24, 2015, http://www.loc.gov/crb/web-iv/amended-web-iv-terms.pdf.

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

Rather than setting forth ephemeral recording fees separately, the CRB includes them with the Section 114 royalties. For the 2016-2020 period, the CRB set ephemeral royalties fees at 5% of the total Section 114 royalties paid by streaming services.

For nonsubscription services such as Pandora, the CRB reduced the per-performance rate it set in the previous rate proceeding: the 2016 per performance rate is $0.17 per 100 streams, while the 2015 per performance rates was $0.23 per 100 streams.[105] Several music streaming services, including Pandora, welcomed the ruling,[106] but others did not. Some "small" online music services may face increased royalty rates of 8 to 14 times what they had paid previously.[107] Advocates representing the small webcasters have launched a campaign to petition Congress to make the 2008 WSA agreement permanent or discontinue the sound recording performance royalties altogether for small online services.[108] Without such an action, the advocates claim, small webcasters may go out of business.

In addition, SoundExchange objected that the rates set by the CRB do not provide adequate compensation to performers and record labels. It asserted that the rates did not reflect the market price of music and were unfair to artists and record labels.[109]

The Copyright Act specifies how royalties collected under Section 114 are to be distributed: 50% goes to the copyright owner of the sound recording, typically a record label; 45% goes to the featured recording artist or artists; 2½% goes to an agent representing nonfeatured musicians who perform on sound recordings; and 2½% goes to an agent representing nonfeatured vocalists who perform on sound recordings.[110] Prior to distributing royalty payments, SoundExchange deducts costs incurred in carrying out its responsibilities. In 2014, SoundExchange collected a total of $773 million in statutory royalties, compared with $20 million in 2005 and $462 million in 2012.[111] According to SoundExchange "this tremendous growth suggests that digital radio has become the fastest-growing segment of music consumption." **Table 3** describes how public performance rates vary, depending on the type of music service and when it began operating.

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[105] Library of Congress, Copyright Royalty Board, "Determination of Royalty Rates for Digital Performance Right in Sound Recordings and Ephemeral Recordings, Final Rule and Order" 79 *Federal Register* 23102, April 25, 2014. The CRB decision's in 2014 retroactively set rates for the 2011- 2015 period, because its original 2010 decision was subsequently ruled invalid. The U.S. Court of Appeals, D.C. Circuit, had determined that the CRB judges were acting as principal officers of the U.S. government in violation of the Appointments Clause of the U.S. Constitution, and that their decision therefore could not take effect. *Intercollegiate Broadcasting Sys., Inc. v. Copyright Royalty Board*, 684 3d 1332 (D.C. 2012), *cert. denied* 133 S. Ct. 2735 (2013).

[106] "CRB's 2016-2020 Webcasting Rate-setting Ruling Mainly Benefits Pandora and Broadcasters, Lawyers Say," *Warren's Washington Internet Daily*, December 18, 2015.

[107] Brad Hill, "CRB: Small Webcasters Face January 1 with Fear, Anger, Hope, and Strategies," *RAIN News*, December 28, 2015, http://rainnews.com/crb-small-webcasters-face-january-1-with-fear-anger-hope-and-strategies/.

[108] Savenetradio 3.0, "Save Net Radio! We Need Your Help to Petition Congress. 100,000+ Stations Will Perish" https://www.change.org/p/u-s-house-of-representatives-u-s-senate-save-net-radio-we-need-your-help-to-petition-congress-100-000-stations-will-perish.

[109] SoundExchange, "SoundExchange Statement on Web IV Rate Decision," press release, December 16, 2015, http://www.soundexchange.com/pr/soundexchange-statement-on-web-iv-rate-decision/.

[110] 17 U.S.C. §114(g)(2). See also SoundExchange, *Artist & Copyright Owner: About Digital Royalties*, http://www.soundexchange.com/artist-copyright-owner/digital-royalties/.

[111] SoundExchange, *SoundExchange Annual Report for 2014 Provided Pursuant to* 37 C.F.R. §370.5(c), March 31, 2015, http://www.soundexchange.com/wp-content/uploads/2015/03/2014-SoundExchange-Fiscal-Report-_FINAL-REPORT_ISSUED_3-31-2015.pdf; *Digital Radio Report, Q4 2014*, http://digitalradioreport2014q4.soundexchange.com/.

Table 3. Royalty Rates Payable to Record Labels for Public Performance Rights

Applies to Selected Digital Noninteractive Music Services

Music Service Type	Fees	Price per Performance	Notes
Preexisting subscription service as of July 31, 1998 (Music Choice, Muzak)	8% of monthly gross revenue 2013; 8.5% monthly gross revenue 2014-2017	Not applicable	Rate set by CRB based on 17 U.S.C. §801(b)(1) factors.
Preexisting satellite digital audio radio service as of July 31, 1998 (SiriusXM)	9% of gross revenues in 2013; increasing by 0.5% annually until 11% in 2017	Not applicable	Rate set by CRB based on 17 U.S.C. §801(b)(1) rate standards.
Licensed AM or FM broadcast radio stations that simulcast their terrestrial programming (e.g., via Radio.com; or iHeart Radio Live radio service; or channels broadcast with HD radio digital technology)	Annual minimum fee: $500 per station or channel; maximum of $50,000 per year. CBS will base royalty fees increases between 2017-2020 on CPI	$0.17 per 100 streams for nonsubscription services; $0.22 per 100 streams for subscription services Royalties for ephemeral recordings = 5% of total fee payable	Rate set by CRB based on willing seller/willing buyer standard. Pursuant to 2008 WSA, NAB had reached a separate agreement with SoundExchange, which was effective through 2015.[a] 2015 rate was $0.25 per 100 streams.
Webcasters (iHeart Radio and Pandora)	Same as above	Same as above	Pursuant to 2009 WSA, Pandora opted in to the PurePlay settlement with Sound Exchange, which was effective through 2015.[b] 2015 rate for services earning more than $1.25 million annual revenue was greater of $0.14 per 100 streams or 25% of total annual gross revenues.
"Small" Webcasters (defined by total amount of music programming hours transmitted to listeners)[c]	Same as above	Same as above	Pursuant to 2008 WSA, several "small" webcasters reached a separate agreement with SoundExchange.[a] 2015 rates for services offering less than 5 million hours of music programming monthly were the greater of (a) 10% of first $250,000 annual revenues or 12% of revenues in excess of $250,000, or (b) 7% of webcaster's annual expense. Other services subject to CRB rates.

Source: *Music Choice v. Copyright Royalty Board*, 774 F. 3d 1000 (District of Columbia 2014). SoundExchange, http://www.soundexchange.com/service-provider/rates/, http://www.soundexchange.com/artist-copyright-owner/digital-royalties/, http://www.soundexchange.com/service-provider/commercial-webcaster/; Radio.com, *Listen Live*, http://radio.com/ http://www.iheart.com/live/country/US/city/new-york-ny-159/; Kevin Goldberg, Library of Congress, Copyright Office, "Notification of Agreements Under the Webcaster Settlement Act of 2009," 74 *Federal Register* 40614, August 12, 2009, Appendix A (Agreement with Sirius XM Radio Inc.). 37 C.F.R. §382.

a. Library of Congress, Copyright Office, "Notification of Agreements Under the Webcaster Settlement Act of 2008," 74 *Federal Register* 9293, Appendix B, March 3, 2009.

b. Library of Congress, Copyright Office, "Notification of Agreements Under the Webcaster Settlement Act of 2009," 74 *Federal Register* 34796, Appendix A, July 9, 2009. Pandora Media, Inc., SEC Form 10-K, for the fiscal year ended January 31, 2013, p. 9.

c. The formal definition of "aggregate tuning hours" is available at 37 C.F.R. §280.2.

Industry Developments and Issues

"Interactive" Versus "Noninteractive" Music Services

The distinction between interactive and noninteractive services has been a matter of debate.[112] For the purposes of defining the process by which owners of sound recordings can set rates for public performance rights, 17 U.S.C. §114 provides that an interactive service is one that enables a member of the public to receive either "a transmission of a program specially created for the recipient," or, "on request, a transmission of a particular sound recording, whether or not as part of a program, which is selected by or on behalf of the recipient."[113] As discussed in "Reproduction and Distribution Licenses (Mechanical Licenses)," 17 U.S.C. Section 115 does not distinguish between interactive and noninteractive services for the purposes of specifying when a digital service must obtain mechanical rights from music publishers. The CRB has adopted these distinctions in setting or approving rates for mechanical licenses.[114]

In 2009, the U.S. Court of Appeals for the Second Circuit ruled that a custom radio service—one that relies on user feedback to play a personalized selection of songs that are within a particular genre or similar to a particular song or artist the user selects—is not an "interactive" service.[115] Noting that Congress's original intent in making the distinction was to protect sound recording copyright holders from cannibalization of their record sales, the court's decision rested on the following analysis:

> If a user has sufficient control over an interactive service such that she can predict the songs she will hear, much as she would if she owned the music herself and could play each song at will, she will have no need to purchase the music she wishes to hear. Therefore, part and parcel of the concern about a diminution in record sales is the concern that an interactive service provides a degree of predictability—based on choices made by the user—that approximates the predictability the music listener seeks when purchasing music.[116]

The court noted that the LAUNCHcast online radio service offered by the defendant, Launch Media, Inc., which at the time was owned by Yahoo!, Inc., created unique playlists for each of its users.[117] Nevertheless, the court reasoned that uniquely created playlists do not ensure predictability. Therefore, the court determined, LAUNCHcast was a noninteractive service.[118]

In addition, in order to be eligible for compulsory licensing, noninteractive services (other than broadcast radio, SiriusXM, Music Choice, and Muzak) must limit the features they offer

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[112] 2015 Copyright Office Report, pp. 48-49.

[113] 17 U.S.C. §114(j)(7).

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

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

[116] Ibid., p. 164.

[117] LAUNCHcast subsequently ceased operations.

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

consumers, pursuant to the Copyright Act. For example, these services are prohibited from announcing in advance when they will play a specific song, album, or artist.[119] Another example is the "sound recording performance complement," which limits the number of tracks from a single album or by a particular artist that a service may play during a three-hour period.[120]

Free Versus Subscription Services and Sales of Music Downloads

The *Launch Media* decision affirmed that personalized music streaming services such as Pandora and iHeartRadio could obtain statutory licenses as noninteractive services for their public performances of sound recordings.[121] The CRB-established rates do not currently distinguish between such customized services and other services that simply transmit undifferentiated, radio-style programming over the Internet. Because broadcast radio stations do not pay performance fees for over-the-air broadcasts, overall the royalties paid by companies that own several broadcast radio stations may be lower than those such as Pandora Media, Inc., which only owns one. (See "CRB Rates for 2016-2020.")

Spotify's services, on the other hand, allow users access to specific albums, songs, and artists on demand. For no charge, consumers can have limited access to songs if they use the site on their personal computers and see or hear an advertisement every few songs. In exchange for paying a monthly fee of about $10 per month, users can listen to songs without advertisement interruption, use Spotify on mobile devices as well as personal computers, or listen to music offline. Spotify also offers exclusive track-by-track commentaries by artists on select albums.[122]

The songwriter and artist Jay Z operates, among other divisions, a record label and music publishing company through his company, Roc Nation. On March 30, 2015, he announced, together with 15 other musicians, the launch of a new music subscription service called TIDAL.[123] TIDAL offers two subscription levels: $9.99 per month for standard music quality and $19.99 per month for music with a higher-quality sound.[124] Artists on TIDAL will offer windows of limited exclusive access to their music. TIDAL has not revealed specifics about how the service will pay its owners or participating artists, except that it will pay more to artists than free advertising-supported services.[125]

In June 2015, Apple launched a new subscription service called Apple Music.[126] After a three-month free trial, users can pay a monthly fee of $9.99 (or $14.99 for a family subscription of up to six people) to access Apple's library of 30 million songs, recommended music curated to their

[119] 17 U.S.C. §114(d)(2)(B)-(C).

[120] 17 U.S.C. §114(d)(2)(B)(i), (d)(2)(C)(i), (j)(13). For a more detailed discussion, see Melville B. Nimmer and David Nimmer, "Ch. 5.03 Works Made for Hire," in *Nimmer on Copyright: A Treatise on the Law of Literary, Musical, and Artistic Property, and the Protection of Ideas*, vol. 2 (New York: M. Bender, 2015).

[121] 2015 Copyright Office Report, p. 164.

[122] See, for example, Diego Planas Rego, Spotify, Ltd, *M83 and Ringo Starr Album Commentaries and This Week's Music News* (blog), Feb. 2, 2012, https://news.spotify.com/uk/2012/02/02/m83-and-ringo-starr-album-commentaries-and-this-weeks-music-news/.

[123] Andrew Flanagan and Andrew Hampp, "It's Official: Jay Z's Historic Tidal Launches with 16 Artist Stakeholders," *Billboard*, March 30, 2015, http://www.billboard.com/articles/news/6509498/jay-z-tidal-launch-artist-stakeholders.

[124] TIDAL, "Stream of Consciousness: How Does TIDAL Generate Revenues?," http://tidal.com/soc/.

[125] Ben Sisario, "Jay Z Enters Streaming Music with Artist-Owned Service," *New York Times*, March 31, 2015, http://www.nytimes.com/2015/03/31/business/media/jay-z-reveals-plans-for-tidal-a-streaming-music-service.html.

[126] Tom Huddleston, Jr., "Apple Music Could Catch Up to Spotify in 2016," *Fortune*, December 17, 2015, http://fortune.com/2015/12/17/apple-music-spotify-subscribers.

tastes (by people rather than algorithms), and connect with artists through social networking features.[127] Initially, Apple did not intend to compensate artists during the three-month free trial. After Taylor Swift publicly requested that Apple change its policy, Apple reversed course.[128] In December 2015, Ms. Swift and Apple announced that Apple Music would be the exclusive outlet for her *1989 World Tour LIVE Concert Film* beginning December 20, 2015.[129]

Division of Royalty Payments

Noncash types of consideration may be involved as the price interactive services pay for access to music. For example, the major labels acquired a reported combined 18% equity stake in Spotify in a transaction that reportedly hinged on their willingness to grant Spotify rights to use their sound recordings on its service.[130] The record labels have also reportedly bought minority stakes in the music streaming service TIDAL.[131]

As described in "Reproduction and Distribution Licenses (Mechanical Licenses)," the rates that interactive services pay are tied to the rates that the services pay record labels for mechanical rights, which are negotiated in the free market. This means that if a record label's deal includes an equity stake in an interactive digital music service provider or a guaranteed allotment of advertising revenues, those items are assigned a value when estimating the total cost, thereby enabling music publishers to participate in such deals when negotiating for mechanical royalties.[132]

The Copyright Office recommends that Congress require greater transparency regarding how such equity deals are reported to songwriters and artists, and how such deals impact royalty distribution. Organizations representing songwriters and recording artists have expressed concern that payments received by music publishers and record labels from digital music services as part of direct deals are not being shared fairly, potentially resulting in lower payments than they might receive under statutory licensing schemes.[133]

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[127] Leah Yahmshon, "Apple Music FAQ: The Ins and Outs of Apple's New Streaming Music Service," *MacWorld*, September 27, 2015, http://www.macworld.com/article/2934744/software-music/apple-music-faq-the-ins-and-outs-of-apples-new-streaming-music-service.html.

[128] Josh Duboff, "Taylor Swift: Apple Crusader, #GirlSquad Captain, and the Most Infuential 25-Year Old in America," *Vanity Fair*, August 31, 2015, http://www.vanityfair.com/style/2015/08/taylor-swift-cover-mario-testino-apple-music.

[129] Mitchell Peters, "Taylor Swift '1989 World Tour Live' Concert Film Coming to Apple Music: Watch Trailer," *Billboard*, December 13, 2015; http://www.billboard.com/articles/columns/pop/6805739/taylor-swift-1989-world-tour-live-concert-film-apple-music-dec-20.

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

[131] James Vincent, "Jay Z Takes on Spotify with $56 Million Purchase of Aspiro," *The Verge*, January 30, 2015, http://www.theverge.com/2015/1/30/7950317/Jay-z-buys-tidal-wimp-aspiro-to-take-on-spotify.

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

[133] 2015 Copyright Office Report, pp. 128-130.

Policy Developments and Issues

ASCAP and BMI Consent Decree Reviews

Together, ASCAP and BMI, which operate on a not-for-profit basis, represent about 90% of songs available for licensing in the United States.[134] SESAC appears to have about a 5% share of songs, but it may be higher. GMR, established in 2013, handles performance rights licensing for a limited number of songwriters.[135] When ASCAP and BMI originally formed (in 1914 and 1939, respectively), they acquired the exclusive right to negotiate on behalf of their members (music publishers and songwriters) and forbade members from entering into direct licensing agreements.[136] Both offered music services only blanket licenses covering all songs in their respective catalogs.

In the 1930s, the Department of Justice (DOJ) Antitrust Division investigated ASCAP for anticompetitive conduct—specifically, whether ASCAP's licensing arrangements constituted price-fixing and/or unlawful tying. The government subsequently filed federal court actions, arguing that the exclusive blanket license—as the only license offered at the time—was an unlawful restraint of trade, and that ASCAP was charging arbitrary prices. It pursued antitrust claims against BMI as well. The government settled with both ASCAP and BMI by entering into consent decrees in 1941.

Since entering into these consent decrees, the Antitrust Division 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.

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

Publishers allege that they are not receiving a fair share of the performance royalty revenues from streaming services, pointing to a 12-to-one royalty ratio weighted toward record labels and artists over songwriters and publishers.[137] For example, Pandora Media, Inc. reported that in 2014, it paid 44% of its total revenues of $921 million to license sound recordings but 4% of its revenues to license musical works.[138] Beginning in 2011, publishers began pressuring ASCAP and BMI to allow them to withdraw their digital rights from their blanket licenses so that they could negotiate direct deals with digital services.[139]

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[134] 2015 Copyright Office Report, p. 33.

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

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

[137] In contrast to record labels, however, publishers receive performance royalties from radio broadcasts.

[138] Pandora Media, Inc. 2014 SEC Form 10-K, pp. 12, 39, 48.

[139] Ed Christman, "Pandora vs. BMI's Court Battle Reveals Long-Term Strategies, Licensing Arms," *Billboard*, (continued...)

In 2011 and 2013, respectively, ASCAP and BMI each responded by amending their rules to allow music publishers the right to license their public performance rights for "new media" uses—that is, both interactive and noninteractive digital streaming services, so they could negotiate with digital stream services at market prices in lieu of rates subject to oversight by the federal district court. As a result, Pandora Media, Inc.—faced with a potential loss of PRO licensing authority for the major publishers' catalogs—proceeded to negotiate licenses directly with EMI Music Publishing Ltd., Sony/ATV, and Universal Music Publishing Group at rates that brought the publishers higher fees than they were receiving under the PRO system.[140] Pandora Media, Inc., however, challenged the publishers' partial withdrawal of rights before both the ASCAP and BMI rate courts in the Southern District of New York. In each case—though applying slightly differing logic—the court ruled that under the terms of the consent decrees, music publishers could not withdraw selected rights; rather, a publisher's song catalog must be either "all in" or "all out" of the PRO.[141]

The Antitrust Division announced in June 2014 that it would evaluate the consent decrees. It has solicited and received extensive public comments on whether and how to modify the consent decrees.[142] Specifically, both ASCAP and BMI seek to modify the consent decrees to permit partial grants of rights, to replace the current rate-setting process with expedited arbitration, and to allow ASCAP and BMI to provide bundled licenses that include multiple rights (e.g., mechanical as well as public performance in musical works). The DOJ has expressed its intent to "examine the operation and effectiveness of the Consent Decrees," particularly in light of the changes in the way music has been delivered and consumed.

Although publishers covered by the current consent decrees cannot withdraw licenses for musical works as long as they are members of BMI or ASCAP, they can strike separate performance rights agreements. In November 2015, Pandora Media, Inc. reached an agreement with Sony/ATV, and in December 2015 it reached an agreement with Warner/Chappell Music.[143] The multi-year agreements enable the streaming service to hedge against the possibility that the DOJ will permit members of ASCAP and BMI to withdraw digital performance rights.[144]

The fact that many songs have several writers, each with his/her own publisher, can make the acquisition of performance rights complex. Industry practice has been that each publisher licenses

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(...continued)

February 17, 2015, http://www.billboard.com/articles/business/6473027/pandora-vs-bmg-strategies-licensing-aims.

[140] Not long afterward, Sony/ATV bought EMI's music catalog.

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

[142] The U.S. Department of Justice, Antitrust Consent Decree Review: American Society of Composers, Authors and Publishers/Broadcast Music, Inc., http://www.justice.gov/atr/cases/ascap-bmi-decree-review.html.

[143] Paul Resnikoff, "Lawyers Profoundly Confused by 'Landmark' Pandora, Sony/ATV Licensing Deal," *Digital Music News*, November 5, 2015, http://www.digitalmusicnews.com/2015/11/05/lawyers-confused-by-landmark-pandora-sonyatv-licensing-deal/.

[144] Glenn Peoples, "Pandora and Sony/ATV Reach Multi-Year Agreement," *Billboard*, November 5, 2015. Pandora, "Warner/Chappell Music and Pandora Sign Licensing Agreement," press release, December 15, 2015, http://www.businesswire.com/news/home/20151215005433/en/WarnerChappell-Music-Pandora-Sign-Licensing-Agreement. Pandora Media, Inc. has also reached direct licensing agreements with independent publishers SONGS Music Publishing and Downtown Music Publishing in December 2015. Glenn Peoples, "Pandora's Latest Direct Deal Is With Downtown Music Publishing," *Billboard*, December 21, 2015, http://www.billboard.com/articles/business/6814194/pandora-direct-deal-downtown-music-publishing.

only a portion of a song. For Spotify to include Ryan Adam's recorded version of "Shake It Off" in its catalog, it needed to pay both BMI (which collects royalties on behalf of Taylor Swift) and ASCAP (collects royalties on behalf of co-writer Max Martin and Shellback). Taylor Swift's publisher, Sony/ATV, and Max Martin and Shellback's publisher, Kobalt, are members of both ASCAP and BMI.[145] One alternative to this process would be "100% licensing," in which any writer or rights holder of a musical work can issue a performance license without the consent of the other rights holders. Under 100% licensing, Pandora Media, Inc. might be able to obtain the performance rights to "Shake it Off" from ASCAP and pay Sony/ATV the compulsory rate set by the New York court rather than negotiating with Sony/ATV. Thus, 100% licensing would likely weaken music publishers' negotiating leverage.[146]

In December 2015, however, Pandora Media, Inc. reached separate direct multi-year licensing agreements with ASCAP and BMI for their combined catalogs of more than 20 million musical works. The terms are confidential. As part of the deal, Pandora agreed to withdraw its appeal of the 2015 order in the BMI rate case.[147]

Bills Introduced in the 114th Congress

Legislators have introduced several measures related to the music industry.

In February 2015, Senators John Barrasso and Heidi Heitkamp introduced S.Con.Res. 4, and Representative Michael Conaway, along with dozens of cosponsors, introduced H.Con.Res. 17, supporting the Local Radio Freedom Act. The resolutions would direct Congress to refrain from imposing 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.

In March 2015, Representatives Joe Crowley and Tom Rooney introduced the Allocation for Music Producers Act (AMP Act), H.R. 1457, with support from the Recording Academy and SoundExchange. The AMP Act would grant producers the statutory right to seek payment of their royalties via a designated agent (such as SoundExchange) when they have a letter of direction from a featured artist. The bill has been referred to the House Committee on the Judiciary.

Also in March 2015, the Songwriter Equity Act of 2015 was introduced as S. 662 by Senator Orrin Hatch and H.R. 1283 by Representative Doug Collins. Among other provisions, the bills would require the CRB, when setting royalty rates under the compulsory license available for the reproduction and distribution of musical works, to establish rates and terms that most clearly represent the rates and terms that would have been negotiated in the marketplace between a willing buyer and seller in lieu of the Section 801(b)(1) factors. Songwriters, publishers, and the Copyright Office support such a change.[148]

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

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

[147] ASCAP, "Pandora Signs Licensing Agreements with ASCAP and BMI," press release, December 22, 2015, http://www.ascap.com/press/2015/12-22-pandora-licenses-ascap-bmi.aspx?print=1.

[148] 2015 Copyright Office Report, pp. 3, 153. Testimony of National Music Publishers' Association President and Chief Executive Officer David M. Israelite in U.S. Congress, House Committee on the Judiciary, Subcommittee on Courts, Intellectual Property, and the Internet, *Music Licensing Under Title 17 (Part I & II)*, hearings, 113th Cong., 2nd sess., (continued...)

In April 2015, Representatives Jerrold Nadler, John Conyers Jr., Marsha Blackburn, and Ted Deutch introduced the Fair Play Fair Pay Act of 2015, H.R. 1733. The bill would adopt several of the Copyright Office's proposals with respect to sound recording royalties. These provisions include (1) extending the public performance right in sound recordings to broadcast radio (with a cap on payments made by small broadcasters, public and educational radio, religious services, and incidental uses of music), (2) including sound recordings made prior to February 15, 1972, among the body of works requiring royalty payments under federal law (and continuing to rely on state law for copyright protection), and (3) directing the CRB to adopt a uniform market-based rate-setting standard for public performance rights for all types of radio services (i.e., eliminate the Section 801(b)(1) four factors test). In determining the rates, the CRB would have to consider whether the audio services would enhance or interfere with the copyright owner's other sources of revenue.

Also in April 2015, Representatives Marcia Blackburn and Anna Eshoo introduced H.R. 1999, the Protecting the Rights of Musicians Act (PRMA). The bill would amend the Communications Act of 1934 by prohibiting companies that own both broadcast television and broadcast radio stations from seeking retransmission consent payments from multichannel programming distributors (i.e., cable and satellite operators) unless their radio stations pay performance royalties for sound recordings.[149]

As discussed in "Broadcast Radio Exception," while music publishers and songwriters *do* receive a performance royalty for over-the-air radio broadcasts, record labels and artists do *not*. Therefore, if, Congress were to pass both the Fair Play Fair Pay Act and the Songwriter Equity Act, the New York district court could factor in performance royalties for over-the-air radio broadcasts paid to record labels and artists when setting rates payable to publishers and composers for licenses covered by BMI and ASCAP that remain subject to the consent decrees.

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June 10 and June 25, 2014, H. Hrg. 113-105 (Washington, DC: GPO, 2014), p. 27. Testimony of National Songwriters President Lee Miller, Ibid., p. 16.

[149] For more information about retransmission consent, see CRS Report R43490, *Reauthorization of the Satellite Television Extension and Localism Act (STELA)*, by Dana A. Scherer.