Order Code RL33631

CRS Report for Congress
Received through the CRS Web

Copyright Licensing in Music Distribution, Reproduction, and Public Performance

August 30, 2006

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Copyright Licensing in Music Distribution, Reproduction, and Public Performance

Summary

This report provides an overview of the complexities of the Copyright Act's provisions concerning music licensing in the digital age. Copyright law provides protection for original works of authorship by conferring certain exclusive rights upon their creators. Music is an example of a kind of literary and artistic work that falls squarely within the scope of copyright law. The realm of music copyright is characterized by two types of copyright holders: the holder of the musical work and the holder of the sound recording. The musical work copyright holder is typically the one who composes the piece of music. The sound recording copyright holder is the recorder of a rendition of the musical work.

If a third party wants to use a copyrighted work in a particular way, he or she must seek permission from the copyright holder. However, for holders of copyrights in musical works and sound recordings, three of their rights (distribution, reproduction, and public performance) may be subject to a form of permission called "licensing." Licenses vary according to the type of user and the type of use. When the copyright law creates a compulsory license for a particular use of a copyrighted work, the parties need not negotiate the right to use the work. If the type of use or type of user does not qualify for the compulsory license, the parties must negotiate, voluntarily, its availability and the specific terms of use. The musical work copyright holder is subject to a compulsory license for the reproduction or distribution of mechanical copies of the work, including digital copies that come within the definition of a digital phonorecord delivery (DPD). The compulsory license is seldom used, however, because many music publishers authorize the Harry Fox Agency to issue licenses on their behalf. Public performance of a musical work is typically licensed through a performing rights organization, such as ASCAP or BMI.

The licensing system behind non-digital music differs from that of digital music. Whenever a user reproduces or distributes a non-digital or digital phonorecord, the sound recording copyright holder and musical work copyright holder are both entitled to payment. Whenever a user publicly performs a phonorecord via non-digital transmission, authorization from *only* the musical work copyright holder is needed. However, if the phonorecord is publicly performed through digital audio transmission, both the musical work copyright holder and the sound recording copyright holder have a right to receive royalties.

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

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

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Copyright Licensing in Music Distribution, Reproduction, and Public Performance

Introduction

Every essential Frank Sinatra collection contains the song "I've Got You Under My Skin." While Sinatra fans may know the words and the melody, how many of those fans understand the compensation structure behind this particular song? The answer is probably very few. The public may know that the proceeds of any given song flow to the record company and to the recording artist. However, the compensation structure is actually more complex and involves more parties than just the recording artist and the record label.

Further, there are increasingly steady pressures, economic and otherwise, that the compensation scheme for music be dynamic to adapt to frequent changes in music delivery methods. For instance, how consumers purchase and listen to music has undergone significant changes in the last 15 years with the advent of the computer and digital music deliveries. Thus, advancing technology has an important role in further complicating the music compensation regime.

Appreciating the intricacies of music compensation requires an understanding of the development of copyright law. What follows is an explanation of the music licensing provisions of copyright law, and why enforcing rights to a song like "I've Got You Under My Skin" can sound so complex.

The Music Copyrights

Copyright Law Basic Principles. The source of federal copyright law originates with the Copyright and Patent Clause of the U.S. Constitution, which authorizes Congress "[t]o promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries."[1] Copyright refers to the exclusive rights granted by law to authors for the protection of original works of authorship fixed in any tangible medium of expression.[2] Original works must be captured in some form beyond a transitory duration. The types of original works eligible for copyright protection include literary, musical, dramatic, and pictorial works; motion pictures; and sound recordings.[3] Copyright is based on authorship and exists separate and apart from its physical embodiment. For example, if a person purchases a collection

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[1] U.S. CONST. art. I, § 8, cl. 8.

[2] 17 U.S.C. § 102.

[3] *Id.*

of books or records, the purchaser owns those particular material objects but not the rights afforded to the copyright holder.

The rights conferred on copyright holders do not last forever. Copyrights are limited in the number of years that copyright holders may exercise their exclusive rights. An author of a work may enjoy copyright protection for the term of his or her life plus 70 additional years.[4] At the expiration of a term, the copyrighted work becomes part of the public domain. Works in the public domain are available for anyone to use without fear of infringement. The unauthorized use of a copyrighted work constitutes infringement of the particular exclusive right at issue, unless the action is permitted by a statutory exception, such as "fair use" for limited purposes.[5]

In the realm of music, there are two types of copyright: the musical work copyright and the sound recording copyright. Each of these copyrights confers a particular set of rights — some exclusive to a particular copyright holder. To understand these rights, one must first comprehend the difference between the two different copyright holders.

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

The Sound Recording. The sound recording is the recorded version of a musician singing or playing a musical work. The Copyright Act distinguishes the terms "sound recording" and "phonorecord." A sound recording is an original work of authorship that "result[s] from the fixation[6] of a series of musical, spoken, or other sounds" in a tangible medium of expression.[7] The sound recording copyright protects the elements of original authorship expressed in a particular recorded rendition. A phonorecord is the actual physical object from which the sound recording can be perceived, reproduced, or communicated directly or with a

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[4] 17 U.S.C. § 302. Other terms have been established for different works and different periods of time. For a concise chart explaining the different terms, see [http://www.copyright.cornell.edu/training/Hirtle_Public_Domain.htm].

[5] 17 U.S.C. § 107. This and other exceptions to infringement liability will be discussed *infra*.

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

[7] *Id.*

machine's aid.[8] Examples of phonorecords include compact discs, vinyl albums, and MP3 files. A holder of a sound recording copyright is typically a recording artist or the recording artist's record label.[9]

An Example: Part One. Different rights attach to different uses and expressions of copyrighted work. The convergence of copyright interests in a sound recording is a prime illustration. Using the example of Cole Porter's song "I've Got You Under My Skin,"[10] the composer of this musical work was Cole Porter, represented by the music publisher Warner/Chappell Music, Inc.[11] Warner/Chappell Music holds the copyright in the musical work for "I've Got You Under My Skin."

When a performance of the musical work is then recorded to a phonorecord, as was done by Frank Sinatra, a new sound recording copyright attaches to the Sinatra version so captured, separate from the musical work copyright of the composer/publisher. Typically, a recording label (Reprise Records, in this example) may own the sound recording copyright.

The Exclusive Rights in Music Copyrights

The Rights of the Musical Work Copyright Holder. The Copyright Act confers discrete, exclusive rights for each type of music copyright. Holders of copyright in musical works have the right to do or to authorize the

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

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[8] *Id.*

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

[10] The leading music licensing treatise, as well as other copyright law scholars, use this example. See, Al Kohn & Bob Kohn, KOHN ON MUSIC LICENSING 11 (3rd ed. 2002). See also, Bob Kohn, *A Primer on the Law of Webcasting and Digital Music Delivery*, 20 ENT.L.REP. 4 (1998).

[11] The Harry Fox Agency lists Warner/Chappell Music as the publisher of and Cole Porter as the writer of "I've Got You Under My Skin." See [http://www.harryfox.com/songfile/public/public search.jsp]. The HFA song code for this song is I60620.

- *performance* of the musical work *publicly*; and
- *display* of the musical work *publicly*.[12]

The Rights of the Sound Recording Copyright Holder. Holders of rights in sound recordings have exclusive right to control the

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

In addition, holders of sound recording copyrights have a qualified and limited public performance right. The Act covers the *performance* of the sound recording *publicly* by means of a *digital* audio transmission only.[13]

An Example: Part Two. Different uses of Sinatra's "I've Got You Under My Skin" implicate the rights of the musical work copyright holder, Warner/Chappell, and the sound recording copyright holder, Reprise Records, in different ways.

As the musical work copyright holder, Warner/Chappell Music has the exclusive right, among other rights, to authorize the reproduction, distribution, and public performance of the "I've Got You Under My Skin" musical work.

As the holder of the copyright in the sound recording, Reprise Records (Sinatra's recording label) has the right to authorize the reproduction, distribution, and *digital audio* public performance of Sinatra's sound recording of "I've Got You Under My Skin."

The Traditional Licensing System

Permission and the License. At the core of a copyright holder's bundle of rights is the concept of exclusivity. This exclusivity allows a copyright holder to exercise particular rights for the sole benefit of the holder. However, a copyright holder may confer these rights onto other users through permission; in some circumstances, statutes allow use by others under a specified compensation scheme.

Permission is often granted in the form of a license. In the context of copyright, a license permits a third party to do something with a copyrighted work that implicates a copyright holder's exclusive right, possibly for a fee, without concern of infringing the copyright holder's rights. Some licenses are negotiated instruments

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[12] 17 U.S.C. §§ 106(1)-(5). These five rights comprise the copyright holder's so-called "bundle of rights," which are cumulative and may overlap in some cases.

[13] 17 U.S.C. § 106(6). This right was added pursuant to the Digital Performance Right in Sound Recordings Act of 1995, which is discussed *infra*.

between a copyright holder and a third party (referred to as "voluntary licenses"). Other licenses are created by statute. Statutory licenses are instruments that compel copyright holders to allow others to exercise a holder's rights without negotiated permission. In copyright law, these are commonly referred to as "compulsory" licenses. When statutory requirements are satisfied by the party interested in using the copyrighted work, a compulsory license is available at statutory rates. Three Copyright Royalty Judges (CRJs) establish these copyright statutory licenses and rates.[14]

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

The Core Rights of Music Copyright. Among the rights granted to copyright holders, three rights are essential in the music licensing context: the reproduction right, the distribution right, and the public performance right.

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

The right of distribution establishes the right to distribute copies or phonorecords of a copyrighted work to the public by sale or other transfer of ownership, or by rental, lease, or lending.[15] In the context of music copyrights, the right of distribution permits the sale of copies (sheet music) or phonorecords (sound recordings) to the public. Infringement of this right would be any unauthorized public distribution of a copy or phonorecord.

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[14] With the enactment of the Copyright Royalty and Distribution Reform Act of 2004 (P.L. 108-419) on Nov. 30, 2004, the Copyright Arbitration Royalty Panel (CARP) system that had been part of the U.S. Copyright Office since 1993 was replaced with a board of three Copyright Royalty Judges. The CRJs are full-time employees of the Library of Congress who are appointed for six-year terms with an opportunity for reappointment. For more information on this law, see CRS Report RS21512, *The Copyright Royalty and Distribution Reform Act of 2004*, by Robin Jeweler.

[15] 17 U.S.C. § 106(3).

The right of public[16] performance means the exhibition, rendition, or playing of a copyrighted work, either directly or by means of any device or process.[17] Public performance not only covers the initial rendition, but also any further act by which the rendition is transmitted or communicated to the public. In the context of music copyrights, the public performance right allows promotion and performance of the music. Infringement of this right would be the public performance of a copyrighted work without the consent of the copyright holder.

The Licensing of Reproduction and Distribution Rights. The legal landscape concerning music copyrights and licensing originates in the 1908 Supreme Court case of *White Smith v. Apollo Music*.[18] In *White Smith*, a composer challenged piano roll technology[19] as a violation of a musical work copyright holder's right to make copies of a work.[20] The Court ruled that the rolls were not copies of musical compositions, but rather component parts of a player piano machine.[21] Hence, there was no infringement of the composer's copyright.[22]

Through legislation, Congress overturned *White Smith* in 1909 by granting to musical work copyright holders the right to control the "mechanical[23] reproduction" of their works.[24] As a consequence, piano rolls would be infringements of the musical composition copyright. However, piano roll companies could still acquire the rights to make the rolls from musical work holders. To prevent monopolization by a large manufacturer of piano rolls, Congress subjected the mechanical reproduction right to a compulsory license, allowing any manufacturer of piano rolls to mechanically reproduce a musical work in exchange for a payment of a royalty fee, without negotiating with the copyright holder for permission. Thus, the compulsory license for the reproduction of musical works is commonly referred to as a "mechanical license."

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

[17] 17 U.S.C. §§ 106(4), 101.

[18] 209 U.S. 1 (1908).

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

[20] *Id.* at 9.

[21] *Id.* at 12.

[22] *Id.*

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

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

Section 115 of the Copyright Act of 1976, as amended, is the current authority for a compulsory license (or a statutory mechanical license) for reproduction and distribution of musical works.[25] The license protects the musical work copyright holder's right to control certain reproductions of the work (e.g., copying the sheet music) but permits the recording of a song by a third party on "mechanical" media such as a piano roll or record.[26] In its present form, it essentially allows reproduction of musical compositions that may be heard with the aid of a mechanical device.[27] The mechanical license is validly obtained only after a musical work has been initially distributed publicly under the authority of the copyright holder. The license is authorized when the licensee's (recipient or user) primary purpose is to distribute the work publicly for private use. Currently, the mechanical license rate is 9.1 cents for songs 5 minutes or less, or 1.75 cents per minute or fraction thereof for songs over 5 minutes.[28]

Although the §115 mechanical license compensates the *musical work* copyright holder for reproduction and distribution rights, it does *not* authorize the duplication of a *sound recording*.[29] Permission to duplicate a sound recording must be obtained from whoever owns the sound recording copyright — likely either the recording artist or record studio.

Most phonorecord creators do not use the compulsory license system to obtain permission to use musical works. In 1927, the National Music Publishers Company (NMPC)[30] created the Harry Fox Agency (HFA) to issue and administer mechanical licenses. Currently, most mechanical licenses are obtained through HFA because there is a reduction in the transaction costs offered by HFA. Although HFA has the right to authorize licenses only for musical works it represents, HFA represents 27,000 music publishers, which represent more than 160,000 songwriters.[31]

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[25] 17 U.S.C. § 115. In 1995, the Digital Performance Right in Sound Recordings Act (DPRSRA) amended the compulsory license to include the reproduction and distribution of digital phonorecord deliveries (DPDs) over the Internet. DPDs will be discussed *infra*.

[26] 2 MELVILLE B.NIMMER & DAVID NIMMER, NIMMER ON COPYRIGHT § 8.04[A] (2006).

[27] KOHN ON MUSIC LICENSING, *supra* note 10 at 677.

[28] This is the statutory rate effective from January 1, 2006, to December 31, 2007. U.S. Copyright Office, Copyright Royalty Rates, Section 115, the Mechanical License, available on June 30, 2006, at [http://www.copyright.gov/carp/m200a.html]. However, the Harry Fox Agency, a wholly owned subsidiary of the National Music Publisher's Association, typically negotiates and issues these licenses on behalf of songwriters, and the mechanical license is seldom used for the permission to make or distribute copyrighted musical compositions; such rate rarely exceeds that set by the U.S. Copyright Office. See [http://www.harryfox.com/public/FAQ.jsp].

[29] 17 U.S.C. § 115(a)(1) ("A person may not obtain a compulsory license for the use of the work in the making of phonorecords duplicating a sound recording fixed by another, unless (i) such sound recording was fixed lawfully; and (ii) the making of the phonorecords was authorized by the owner of copyright in the sound recording....").

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

[31] *Oversight Hearing on the Discussion Draft of H.R. ____, the "Section 115 Reform Act*

(continued...)

The Licensing of Public Performances. Prior to the 1909 Copyright Act, Congress granted musical works copyright holders the right to control the public performance of their works.[32] The 1909 Act further recognized a public performance right but limited the right only to performances engaged in for profit.[33] Not until 1976 was the for-profit limitation removed.

Despite possessing the right to control public performance, musical work copyright holders had difficulty in collecting licensing fees for performances. This problem was alleviated by the creation of performing rights organizations (PROs). In 1914, a group of nine music business leaders established the American Society of Composers, Authors, and Publishers (ASCAP).[34] ASCAP licenses thousands of musical compositions for public performances under blanket license agreements.[35] For business owners, these blanket licenses significantly reduce the transaction costs involved in complying with the requirements of the Copyright Act. For musical work copyright holders, these licenses allow receipt of a share of the royalties that were previously not of much value.

Due to ASCAP's attempt to raise the royalty rates charged to radio stations, Broadcast Music, Inc. (BMI), became a new PRO in 1939.[36] The Society for European Stage Authors and Composers (SESAC), another PRO, was formed in 1930.[37] Each PRO can only license public performances of musical works under contract with that PRO.

An Example: Part Three. In the landscape of traditional licensing, the example of "I've Got You Under My Skin" demonstrates the intricacies of gaining permission through licensing. Prior to Frank Sinatra recording "I've Got You Under My Skin," Reprise Records must get permission to use Cole Porter's work from

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[31] (...continued)
(SIRA) of 2006": Hearing Before the House Subcommittee on Courts, the Internet, and Intellectual Property, 109th Cong., 2nd Sess. (2006)(statement of David Israelite, President and CEO of NMPA), at 4, available on July 20, 2006 at [http://judiciary.house.gov/media/pdfs/israelite051606.pdf] ("However, even though HFA represents most commercially relevant musical works, it does not currently represent all music publishers or all musical works, and, therefore, digital music services cannot receive all the licenses they need from HFA.").

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

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

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

[35] A blanket license is a single license that covers multiple works or all works permitted to be licensed. For an explanation of ASCAP's blanket license calculations, see [http://www.ascap.com/about/payment/royalties.html].

[36] For a background of BMI and its development, see [http://www.bmi.com/about/backgrounder.asp]. For a summation of BMI's royalty calculation system, see [http://www.bmi.com/songwriter/resources/pubs/royalty_print.asp].

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

Warner/Chappell. This permission may be in the form of a mechanical license (under § 115) paid to Porter (or, more likely, to the Harry Fox Agency). Once this fee is paid, Reprise can reproduce and distribute Frank Sinatra's version of "I've Got You Under My Skin" on phonorecords. If another artist, DJ, wants to sell a remix version of "I've Got You Under My Skin," DJ would have to obtain a mechanical license to use Porter's work (pursuant to § 115) but would, in addition, have to negotiate a voluntary license with Reprise (the holder of sound recording copyright).

If traditional radio wanted to play Sinatra's version of "I've Got You Under My Skin," radio would have to pay a royalty to Warner/Chappell to get permission for the public performance of Porter's musical work. This royalty would likely be paid to a PRO such as ASCAP or BMI. However, traditional radio would not have to pay royalties to Reprise Records because sound recording copyright holders do not have a public performance right for non-digital transmissions.

The Licensing of Jukeboxes. The licensing structure for the public performance of music using jukeboxes has a unique history. Under the Copyright Act, a "jukebox" is called a "coin-operated phonorecord player."[38] To qualify, a player must perform only non-dramatic musical works activated by the insertion of a coin or token, must be located in an establishment making no charge for admission, must have an accompanying list of titles available to the public, and must allow for a choice of works to be made by patrons.[39]

Under the Copyright Act of 1909, owners of jukeboxes were exempted from paying public performance fees unless a fee was charged for admission to a place where such jukebox performances occurred.[40] Over the course of 67 years, jukeboxes made substantial profits through popularity and widespread growth. As a result, § 116 of the Copyright Act of 1976 established a compulsory license for operators of "coin operated phonorecord players" to compensate musical work copyright holders for the loss of substantial profits.

In 1993, Congress repealed § 116 of the Copyright Act of 1976 and replaced it with a voluntary licensing scheme between copyright holders and jukebox operators.[41] The intent of the provision is to grant PROs (ASCAP, BMI, and SESAC) the right to negotiate licenses for music played through jukeboxes with the trade group representing jukebox owners (the Amusement and Music Operators of America [AMOA]).[42]

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[38] 17 U.S.C. § 116(d)(1).

[39] 17 U.S.C. §§ 116(d)(1)(A)-(D).

[40] 17 U.S.C. § 1(e) (1909 Act).

[41] 17 U.S.C. § 116(b)(1).

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

The Digital Music Licensing System

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

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

Amending the Licensing System: The DPRSRA. The new methods of digital music delivery caused sound recording copyright holders to fear that the ability to make perfect copies of music and the ease of distribution would damage revenues from record sales. In 1995, Congress enacted the Digital Performance Right and Sound Recordings Act[43] (DPRSRA) to fill the void in legislation for the protection of copyrighted works that are digitally transmitted over the Internet. The DPRSRA addresses the licensing of digital reproduction and distribution of music works and the digital performance and distribution of sound recordings.

Traditionally, only public performances of musical works were eligible for performance royalties. The DPRSRA created a public performance right for sound recordings performed through digital audio transmissions, thereby establishing a mechanism for controlling digital deliveries that posed a threat to the sales of CDs. Because sound recording copyright holders do not have a general public performance right, the DPRSRA established an actionable right in "digital audio transmissions" for sound recorders.[44]

The Licensing of Digital Reproduction and Distribution. Under the language of § 115 prior to the DPRSRA, each distributed "mechanical" copy of a musical work entitled the musical work copyright holder to a royalty payment.[45] The

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

[44] 17 U.S.C. § 101 defines "to 'transmit' a performance" as "to communicate [a performance] by any device or process whereby images or sounds are received beyond the place from which they are sent." A "digital transmission" is a "transmission in whole or in part in a digital or other non-analog format."

[45] 17 U.S.C. § 115(a)(1).

DPRSRA amended the statute to encompass digital downloads under the mechanical license.

The Copyright Act refers to digital downloads as "digital phonorecord deliveries," or DPDs. A DPD is "each individual delivery of a phonorecord by a digital transmission of a sound recording which results in a specifically identifiable reproduction."[46] Thus, a downloaded digital file of a "phonorecord" is a DPD. In addition to DPDs, the § 115 mechanical license distinguishes a different royalty rate for DPDs "where the reproduction or distribution of a phonorecord is incidental to the transmission which constitutes a [DPD]."[47] However, real-time transmissions, where no reproduction of a sound recording is made for the purposes of the transmission, does not constitute a DPD.[48] Because of this exclusion, a streamed transmission[49] is not considered a DPD.

Although the § 115 mechanical license applies to DPDs for musical work copyright holders, the license does not authorize the reproduction or distribution of a sound recording because that right belongs to another holder — the sound recorder.[50] The sound recording copyright holder's authorization acts as a condition for the mechanical licensing of a DPD.

Engaging in an authorized DPD requires payment to the musical work copyright holder (pursuant to the mechanical license) and the sound recording copyright holder (through a voluntary license) for the distribution or reproduction of the DPD. However, if the DPD constitutes a performance,[51] permission must separately be obtained from the musical work copyright holder (a royalty paid to a PRO) and the sound recording copyright holder (through a compulsory or voluntary license).

The Licensing of Digital Public Performances. In addition to amendments made to § 115, the DPRSRA grants sound recording copyright holders a *limited* public performance right in digital transmissions.[52] Among the *limitations*

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[46] 17 U.S.C. § 115(d).

[47] 17 U.S.C. §§ 115(c)(3)(C), (D).

[48] 17 U.S.C. § 115(d).

[49] Although the term "stream" or "streaming" is nowhere defined in the Copyright Act, a music licensing reform bill introduced in the 109th Congress does offer a definition: "The term 'stream' means the digital transmission of a sound recording embodying a musical work for one-time listening by the end user using technology such that the transmission is not intended or designed to result in a substantially complete reproduction of the sound recording, other than an incidental reproduction made in the normal course of such activity, including a cached, network, or RAM buffer reproduction, to permit such one-time listening." H.R. 5553, 109th Cong., 2nd Sess. (2006)(bill as introduced).

[50] 17 U.S.C. §§ 115(c)(3)(H)(i)(I).

[51] 17 U.S.C. §§ 115(d), 115(c)(3)(A), and 115(c)(3)(K). For a discussion of how performances are classified digitally, see *infra*.

[52] 17 U.S.C. § 106(6).

on a sound recording owner's exclusive right to digital public performance under 106(6) are

- a non-subscription broadcast transmission (i.e., traditional over-the-air radio and television broadcasts and qualified retransmission)[53] and
- internal transmissions by a business on or around its premises, including "on-hold music" transmissions via telephone to a caller waiting for a response.[54]

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

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

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

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

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[53] 17 U.S.C. §§ 114(1)(A), (B).

[54] 17 U.S.C. §§ 114(d)(1)(C)(ii), (iv). Usages included within this exception are background music played in offices, retail stores, and restaurants; this activity is sometimes called "storecasting." 2 NIMMER ON COPYRIGHT § 8.22[B][3]. As the Senate Report reveals, the drafters of the DPRSRA were aware of the Copyright Act's § 110(5) performance right limitations, which relate to circumstances under which certain businesses may be eligible for publicly performing music without obtaining permission from copyright holders. The new § 106(6) right provided to sound recorders was not intended by the law's drafters to alter the performance right limitations in § 110(5); thus, establishments desiring to storecast music to their patrons may qualify for the § 110(5) exemption, regardless of whether the music is performed by digital or non-digital means. S.Rept. 104-128, 104th Congress, 1st Sess. 22-23 (1995).

- Interactive services[55] transmit digital sound recordings at a user's request. These services are within the voluntary licensing tier; they do not qualify for the § 114 statutory license.

- Non-interactive, subscription services[56] transmit digital sound recordings through streaming the audio, but for a fee. These non-interactive, subscription transmissions are subject to a statutory (compulsory) licensing fee.[57]

- Non-interactive, non-subscription services are audio transmissions often delivered via streaming that are free to the consumer recipient *and* the transmitting entity.[58] Like non-digital broadcast services (AM and FM radio), these services are exempt from a licensing fee for using the sound recording.

The royalties from statutory and voluntarily negotiated licenses under the DPRSRA and the Digital Millennium Copyright Act (DMCA)[59] to make digital transmissions of sound recordings are administered on behalf of sound recording copyright holders by SoundExchange.[60] SoundExchange is a nonprofit entity created

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

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

[57] The complex system of statutory rates for new subscription services and eligible non-subscription, non-interactive services (see *infra*) are set by the Copyright Royalty Board of the Library of Congress. See, Digital Performance Right in Sound Recordings and Ephemeral Recordings, 69 Fed. Reg. 5693 (Feb. 6, 2004), *available on July 20th, 2006 at* [http://www.copyright.gov/fedreg/2004/69fr5693.html].

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

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

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

by the Recording Industry Association of America (RIAA)[61] that collects and makes distributions to sound recording copyright holders, artists, the American Federation of Musicians (non-featured musicians),[62] and the American Federation of Television and Radio Artists (non-featured vocalists).[63] The payments are based on actual performance data furnished by subscription service providers, webcasters, and other licensees.

Amending the Licensing System: The DMCA. In 1998, Congress enacted the Digital Millennium Copyright Act (DMCA) as a comprehensive addition to copyright law to accommodate the growth of digital technologies.[64] Among several other changes to copyright law, the DMCA contains provisions designed to codify licensing for certain performances conveyed via digital media, including satellite radio[65] and Internet radio. It renamed the subscription services covered in the DPRSRA as "pre-existing subscription services" and created three additional categories of service that could operate under a statutory license:

- Pre-existing satellite digital radio services.
- New subscription services.
- Eligible non-subscription services.[66]

The DMCA also clarified the parameters of "ephemeral recordings" — copies made for the specific purpose of making licensed transmissions — and created a statutory license for multiple ephemeral recordings.[67]

The DMCA's addition of the three new categories of services removed some transmitting entities from the benefit of the licensing exemptions created by the DPRSRA.[68] Under the DMCA, non-interactive, non-subscription service providers now must meet statutory eligibility requirements to avoid paying a license fee for the public performance of digital sound recordings.[69] One affected group was small

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

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

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

[64] P.L. 105-304.

[65] For a detailed discussion of music licensing and satellite radio, see CRS Report RL33538, *Satellite Digital Audio Radio Services and Copyright Law Issues*, by Brian T. Yeh.

[66] P.L. 105-304, Section 405. See Kimberly L. Craft, *The Webcasting Music Revolution is Ready to Begin, as Soon as We Figure Out the Copyright Law: The Story of the Music Industry at War with Itself*, 24 HASTINGS COMM. & ENT. L.J. 1, at 9-19 (2001).

[67] Ephemeral recordings are addressed in 17 U.S.C. § 112 and will be discussed *infra*.

[68] Under the DPRSRA, non-interactive, non-subscription services have statutory exemption from licensing of public performances.

[69] 17 U.S.C. § 114(j)(6) defines an "eligible nonsubscription transmission" as:

> a non-interactive non-subscription digital audio transmission not exempt under subsection (d)(1) that is made as part of a service that provides audio

(continued...)

webcasters, who argued that their non-subscription, non-interactive services should qualify as eligible non-subscription transmissions and not be considered to fall within the scope of a statutory (compulsory) license, because such license payments would be too burdensome to pay and administer.

In attempting to resolve this dispute, in December 2002, President Bush signed into law the Small Webcaster Settlement Act (SWSA).[70] The Act set no specific royalty rates or fees, but instead granted both small webcasters and copyright holders the right to enter into voluntary licensing agreements and permitted SoundExchange, the receiving agent designated in the earlier legislation, to negotiate on behalf of the sound recording copyright holders.[71]

An Example: Part Four. To build on the prior examples, Online Music Store (OMS) has decided to sell some of Frank Sinatra's sound recordings through its music download service. One of the recordings is "I've Got You Under My Skin." Because a delivery of a phonorecord by OMS via digital transmission results in a specifically identifiable reproduction, "I've Got You Under My Skin" would be considered a DPD under § 115.

Before OMS could place Sinatra's version online for distribution and reproduction, permission is to be obtained from the music copyright holders. For the musical work copyright holder (Warner/Chappell), OMS would pay a mechanical license fee to obtain permission to reproduce and distribute the DPD. For the sound recording copyright holder (Reprise Records), OMS would have to negotiate a voluntary license to obtain permission.

In addition to offering music downloads for purchase or rental, OMS maintains a subscription digital radio service that streams over the Internet. To be able to stream Sinatra's "I've Got You Under My Skin," OMS is to obtain permission for the public performance. OMS would have to negotiate a voluntary license with the musical work copyright holder (Warner/Chappell). However, assuming that OMS maintains a non-interactive subscription service, OMS would have the benefit of a compulsory license under § 114 and thus need not seek the permission of the sound recording copyright holder (Reprise Records).

The Licensing of Ephemeral Recordings. Ephemeral recordings are reproductions of a work produced solely for the purpose of its transmission by an entity legally entitled to publicly perform the work. Section 112 authorizes a

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[69] (...continued)

> programming consisting, in whole or in part, of performances of sound recordings, including retransmissions of broadcast transmissions, if the primary purpose of the service is to provide to the public such audio or other entertainment programming, and the primary purpose of the service is not to sell, advertise, or promote particular products or services other than sound recordings, live concerts, or other music-related events.

[70] P.L. 107-321.

[71] For more information on the SWSA, see CRS Report RL31626, *Copyright Law: Statutory Royalty Rates for Webcasters*, by Robin Jeweler.

compulsory license to enable those who webcast a sound recording to make a temporary or "ephemeral" reproduction or copy of the recording, which is generally stored in the hard drive of computers (i.e., servers that facilitate the performance). Section 114 is concerned with the public performance right for digitally transmitted sound recordings. Thus, a statutory license under § 114 applies to a public performance, whereas the statutory license under § 112(e) applies to a reproduction. The latter covers only those ephemeral recordings of phonorecords used for transmissions in connection with a statutory license under § 114(d) or (f).[72]

Amending the Licensing System: The AHRA. Although the DPRSRA concentrates on establishing a licensing system for the delivery of DPDs, the Audio Home Recording Act (AHRA) concentrates on establishing a licensing system for the manufacture of equipment that facilitates the copying or selling of digital recordings. The AHRA amends the Copyright Act by adding chapter 10, "Digital Audio Recording Devices and Media."[73]

The introduction of the Digital Audio Tape (DAT) by Sony and Philips in the mid-1980s prompted passage of the Audio Home Recording Act (AHRA) in 1992.[74] A DAT recorder can record CD-quality sound onto a specialized digital cassette tape. The DAT is the tape counterpart to a CD that is smaller than the traditional cassette tape and permits double the programming time (two hours) of a normal CD. Unlike a CD, the DAT is susceptible to deterioration over time. However, the DAT has the capacity to record CD quality sound onto a cassette with ease. Through the RIAA, sound recording copyright holders turned to Congress for legislation in response to this technology, fearing that a consumer's ability to make perfect digital copies of music would displace sales of sound recordings in the marketplace.[75]

The AHRA requires manufacturers of certain types of digital audio recording devices to incorporate into each device copyright protection technology — a form of digital rights management scheme called the Serial Copying Management System, or SCMS, which allows the copying of an original digital work but prevents the practice of "serial copying" — making a copy from a copy. In exchange, the AHRA exempts consumers from copyright infringement liability for private, noncommercial home recordings of music. Manufacturers of audio equipment, sellers of digital recording devices, and marketers of blank recordable media are also protected from infringement liability upon payment of the statutory royalty fee.[76] The appointing and

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

[73] 17 U.S.C. § 1001.

[74] P.L. 102-563 (1992).

[75] H.REPT. 102-873, at 18-19 (1992).

[76] The fee takes the form of a surcharge, collected much like a tax.

distributing agent for fees paid pursuant to the AHRA is the Alliance of Artists and Recording Companies (AARC).[77]

In *Recording Industry Assoc. of America v. Diamond Multimedia Systems*, the U.S. Court of Appeals for the Ninth Circuit held that the Rio, a hand-held portable audio device capable of storing and re-playing digital audio files (e.g., MP3s) stored on the hard drive of a personal computer, was not a "digital audio recording device" within the meaning of the AHRA.[78] Therefore, manufacturers of computers with recordable compact disc drives are exempt from having to pay the royalties under the AHRA and are not required to implement the SCMS copy protection technology, but consumers who use their computers to reproduce copyrighted music without prior authorization of the copyright holder may potentially be held liable for their infringing actions.

Exceptions to Licensing Requirements

Although most uses of copyrighted materials require permission from the copyright holder (or compliance with "compulsory license"), the Copyright Act provides several exceptions for the use of copyrighted material, regardless of the holder's permission. There are five particular exceptions[79] that could apply to certain uses of musical works and sound recordings: fair use,[80] teaching exemptions,[81] public performances without commercial advantage,[82] public reception of a transmission using a home receiving apparatus,[83] and eligible establishment transmissions.[84]

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[77] For more information on the AARC, visit [http://www.aarcroyalties.net/new/index2.html].

[78] 180 F.3d 1072, 1076 (9th Cir. 1999) ("[T]o be a digital audio recording device, the Rio must be able to reproduce, either 'directly' or 'from a transmission,' a 'digital music recording.' ... The typical computer hard drive from which a Rio directly records is, of course, a material object. However, hard drives ordinarily contain much more than 'only sounds, and material, statements, or instructions incidental to those fixed sounds.' Indeed, almost all hard drives contain numerous programs (e.g., for word processing, scheduling appointments, etc.) and databases that are not incidental to any sound files that may be stored on the hard drive. Thus, the Rio appears not to make copies from digital music recordings, and thus would not be a digital audio recording device under the Act's basic definition...") (citations omitted).

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

[80] 17 U.S.C. § 107. Fair use applies in both non-digital and digital music contexts.

[81] 17 U.S.C. §§ 110(1)-(2). Sections 110(1) and 110(2) apply to both non-digital and digital music.

[82] 17 U.S.C. § 110(4). Section 110(4) applies to both non-digital and digital music.

[83] 17 U.S.C. § 110(5)(A). Section 110(5)(A) applies only to non-digital music. While the

(continued...)

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

Because the language of the fair use statute is illustrative, determinations of fair use are often difficult to make in advance. However, the statute recognizes fair use "for purposes such as criticism, comment, news reporting, teaching, scholarship, or research."[85] A determination of fair use considers four factors:

- The purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes.
- The nature of the copyrighted work.
- The amount and substantiality of the portion used in relation to the copyrighted work as a whole.
- The effect of the use upon the potential market for or value of the copyrighted work.[86]

The U.S. Supreme Court has previously explained that this four-factor test cannot be simplified by "bright-line rules," but rather that the doctrine of fair use calls for "case-by-case" analysis.[87]

In the context of digital music downloads and transmissions, some alleged copyright infringers have attempted to use the doctrine of fair use to avoid liability for activities such as sampling,[88] "space shifting,"[89] and peer-to-peer file sharing.[90]

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[83] (...continued)
text of the statute does not explicitly exempt only non-digital music, a commonly used apparatus would likely be a traditional home stereo, which receives an analog signal.

[84] 17 U.S.C. § 110(5)(B). Section 110(5)(B) applies only to non-digital music. The text of the statute exempts those transmissions by entities licensed by the FCC, thus including terrestrial radio and implicitly excluding satellite and Internet radio.

[85] 17 U.S.C. § 107.

[86] 17 U.S.C. §§ 107(1)-(4).

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

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

[89] *Id.* Space shifting is the process in which users access CD sound recordings for personal (continued...)

These attempts have not been very successful: several federal appellate courts have ruled against the applicability of the fair use doctrine for these purposes.[91] The difficulty behind any fair use determination, however, is the irresolute nature of the exception — one court's determination of fair use may be another's determination of infringement. Even to the extent of home audio recording of a broadcast or phonorecord, no litigation has settled the propriety of the issue as a fair use. However, where there is doubt regarding the applicability of the exception, the most prudent choice is always the application of a license from the copyright holder. (The fair use exception may strengthen the bargaining power of the applicant.)

The Teaching Exemptions. Under the Copyright Act, teachers are exempt from infringement for performing copyrighted works in certain contexts. Performance of a work done in the course of face-to-face instruction in a classroom (or a similar place devoted to instruction), or performances done as part of instructional activities of a nonprofit institution, may not be an infringement of copyright.[92] Another teaching exemption removes particular works from infringement of the performance right in the context of distance education.[93]

Public Performance Without Commercial Advantage. Although fair use provides a statutory exception to any of a copyright holder's exclusive rights, § 110(4) provides an exception to only the performance right of a copyright holder.[94] The § 110(4) exception in the Copyright Act allows public performances to take place without payment so long as the performance is done without the intent of making commercial gain.[95] In addition, the performers, promoters, and organizers must not be compensated beyond expenses. The statute does not require the performance to be free if the proceeds are used exclusively for educational, religious, or charitable purposes. If none of these purposes are available, the performance must be free for the audience. Examples of these public performances include eligible benefit concerts, school performances, and religious festivities.

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[89] (...continued)
computer use.

[90] For more information on legal decisions regarding file sharing and peer-to-peer networks, see CRS Report RL31998, *File Sharing Software and Copyright Infringement: Metro-Goldwyn-Mayer Studios, Inc. v. Grokster, Ltd.*, by Brian T. Yeh and Robin Jeweler.

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

[92] 17 U.S.C. § 110(1).

[93] 17 U.S.C. § 110(2). This provision is known as the Technology, Education, and Copyright Harmonization Act (TEACH Act). For more information, see CRS Report RL33516, *Copyright Exemptions for Distance Education: 17 U.S.C. 110(2), the Technology, Education, and Copyright Harmonization Act of 2002*, by Jared A. Huber, Brian T. Yeh, and Robin Jeweler.

[94] 17 U.S.C. § 110(4).

[95] *Id.*

The Home Receiving Apparatus. Another performance licensing exception is the communication to the public of a transmission embodying a performance using a "single receiving apparatus of a kind commonly used in private homes."[96] This is known as the "home-style" radio exception to performance licensing requirements. The single apparatus exception is subject to two statutory conditions that (1) there be no charge to hear the transmission and (2) the transmission is not further performed to the public.[97]

Eligible Establishment Transmissions. In 1998, Congress passed the Fairness in Music Licensing Act (FMLA) to clarify the performance right exemptions for eligible establishments.[98] The scope of the exemption is limited to performances "intended to be received by the general public, originated by a radio or television broadcast station licensed as such by the Federal Communications Commission, or, if an audiovisual transmission, by a cable system or satellite carrier."[99] The Act covers transmissions embodying performances by food and drink establishments and by non-food and drink establishments.

To be eligible for a performance exemption under the FMLA, three criteria must be satisfied. The first two criteria mirror those under the home receiving apparatus exemption: there must be no direct charge to hear the transmission, and the transmission must not be further transmitted beyond the establishment where it is received.[100] The third criterion states that the transmission must be "licensed by the copyright owner of the work so publicly performed or displayed."[101] The latter criterion thus potentially creates liability if the transmitting entity (the radio station) itself broadcasts infringing content. In such a scenario, the music copyright holder would likely bring suit against the infringing radio station, rather than the establishment that played the radio.[102]

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

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[96] 17 U.S.C. § 110(5)(A). A small radio, stereo receiver, or portable boom box may fit within this definition. It is uncertain, however, whether a satellite radio would gain the benefit of this exception.

[97] 17 U.S.C. §§ 110(5)(A)(i-ii).

[98] P.L. 105-298.

[99] 17 U.S.C. § 110(5)(B). This statute does not cover webcasters, satellite radio, or other digital music services that fall outside the scope of FCC regulation. Because television programming can include musical works (e.g., movie soundtracks), an establishment may publicly perform the music on a soundtrack accompanying a motion picture that is broadcast by an FCC-licensed television station, without concern for copyright infringement liability.

[100] 17 U.S.C. §§ 110(5)(B)(iii)-(iv).

[101] 17 U.S.C. § 110(5)(B)(v).

[102] 2 MELVILLE B. NIMMER & DAVID NIMMER, NIMMER ON COPYRIGHT § 8.18[C][2][b][iv] (2006).

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

Type of Establishment	Size of Establishment
Food Service/Drinking "[A] restaurant, inn, bar, tavern, or any other similar place of business in which the public or patrons assemble for the primary purpose of being served food or drink, in which the majority of the gross square feet of space that is nonresidential is used for that purpose, and in which nonaromatic musical works are performed publicly."[103]	If less than 3,750 square feet (excluding parking), the exemption applies.[104] If more than 3,750 square feet (excluding parking), the exemption applies only if there are no more than six loudspeakers, of which not more than four are located in any one room or adjoining outdoor space.[105]
Other "[A] store, shop, or any similar place of business open to the general public for the primary purpose of selling goods or services in which the majority of the gross square feet of space that is nonresidential is used for that purpose, and in which nonaromatic musical works are performed publicly."[106]	If less than 2,000 square feet (excluding parking), the exemption applies.[107] If more than 2,000 square feet (excluding parking), the exemption only applies if there are no more than six loudspeakers, of which not more than four are located in any one room or adjoining outdoor space.[108]

[103] 17 U.S.C. § 101.

[104] 17 U.S.C. § 110(5)(B)(ii).

[105] *Id.*

[106] *Id.*.

[107] 17 U.S.C. § 110(5)(B)(I).

[108] *Id.*

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

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

Appendix B. Glossary

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

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

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

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

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

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

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

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

A work is **fixed** in a tangible medium of expression when its embodiment in a copy or phonorecord, by or under the authority of the author, is sufficiently permanent or stable to permit it to be perceived, reproduced, or otherwise

communicated for a period of more than transitory duration. A work consisting of sounds, images, or both being transmitted is "fixed" for purposes of this title if a fixation of the work is being made simultaneously with its transmission.

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

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

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

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

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

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

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

(2) to transmit or otherwise communicate a performance or display of the work to a place specified by clause (1) or to the public, by means of any device or process, whether the members of the public capable of receiving the performance or display

receive it in the same place or in separate places and at the same time or at different times.

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

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

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

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

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

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