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# Money for Something: Music Licensing in the 21<sup>st</sup> Century

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## Summary

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 streaming service Spotify in November 2014. As a songwriter, a composer, and a singer, Ms. Swift is entitled to get paid for (1) the reproductions and performances of the notes and lyrics she creates (the musical works), as well as (2) the reproductions and performances of the 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 and on contracts among a variety of private-sector entities. These forces and contracts are greatly affected by federal copyright law.

The laws that determine who pays whom in the digital world were written, by and large, at a time when music was distributed mainly via radio broadcasts or physical media, such as sheet music and phonograph records, and when each of these forms of distribution 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 laws 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, however, consumers have increasingly been consuming music via digital services that incorporate attributes of both radio and physical media. Under existing law, the companies that compete in delivering music to listeners face very different cost structures, depending on the royalty provisions applicable to their unique business models. The royalties received by songwriters, performers, music publishers, and record companies for one play or sale of a particular song may vary greatly, depending upon the particular business model of the company delivering the music.

Congress granted a nonprofit company called SoundExchange the authority to negotiate with digital music services on behalf of record labels and to agree to royalty schemes that could be binding on all copyright owners. Several digital services have reached agreements with SoundExchange. The authority of SoundExchange to reach such agreements expires at the end of 2015.

In February 2015 the U.S. Copyright Office published a report, *Copyright and the Music Marketplace*, offering Congress a series of recommendations for changing copyright law in light of music industry developments. It advocates for greater parity among rights holders and different licensing services, and greater transparency when they reach privately negotiated agreements. Music streaming services Spotify and Tidal have reportedly received equity investments from record labels in exchange for the rights to license their music catalogs. Such investments could impact the amount of royalties available to artists like Ms. Swift.

Efforts are actively under way, both in Congress and within the executive branch, to update the legal framework governing the music industry. In the meantime, the courts have been interpreting how to apply 20<sup>th</sup>-century copyright laws to a 21<sup>st</sup>-century music marketplace. This report describes the current legal framework governing licensing and rate-setting in the music industry. It also examines the changes in technology and consumer behavior that have reshaped the industry.

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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 streaming service Spotify in November 2014.<sup>1</sup> As a songwriter, a composer, and a singer, Ms. Swift is entitled under federal law to get paid for (1) the reproductions and performances of the notes and lyrics she creates (the musical works), as well as (2) the reproductions and performances of the recorded sound of her voice combined with the instruments (the sound recordings). Reportedly, Spotify and Ms. Swift reached an impasse when Spotify declined to prevent listeners of 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.<sup>2</sup>

The amount Ms. Swift gets paid for her musical works and sound recordings depends on market forces and on contracts among a variety of private-sector entities. These relationships are strongly influenced by federal laws that affect the licensing of rights to music, particularly copyright and antitrust laws, as well as the courts' interpretations of them. Congress wrote these laws, by and large, at a time when music was distributed mainly via radio broadcasts or physical media, such as sheet music and phonograph records, and when each of these forms of distribution represented a distinct channel with unique characteristics.

With the emergence of 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 laws 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, the emergence of services such as Spotify has, as the U.S. Copyright Office noted, led to the “blurring of the traditional lines of exploitation.”<sup>3</sup> Sorting out who is owed what money has become increasingly complex. In the meantime, the courts have been interpreting how to apply 20<sup>th</sup>-century copyright laws to a 21<sup>st</sup>-century music marketplace.

Efforts are actively under way, both in Congress and within the executive branch, to update the legal framework governing the music industry, even as the courts continue to make their mark. This report describes the current legal framework governing licensing and rate-setting in the music industry. It also examines the changes in technology and consumer behavior that have reshaped the industry.

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<sup>1</sup> 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>. Ms. Swift was not the first artist to withdraw music from Spotify; Thom Yorke, the lead singer of the band Radiohead, did so in 2013. See Geoff Duncan, “Why is Thom Yorke Pulling His Music from Spotify? In a Word: Royalties,” *Digital Trends*, July 15, 2013, <http://www.digitaltrends.com/music/how-do-music-royalties-work-and-why-does-everyone-complain/>.

<sup>2</sup> 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/>.

<sup>3</sup> 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.

## Overview of Legal Framework

Under copyright law, creators and performers of musical works have certain legal rights to their works. They typically license those rights to third parties, which, subject to contracts, may exercise them 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, among other rights, the following exclusive rights under the Copyright Act:<sup>4</sup>

- the right to reproduce the work (e.g., make multiple copies of sheet music or multiple copies of 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, sell copies of digital files on iTunes or Google Play, or distribute temporary server copies via certain streaming services such as Spotify) (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.<sup>5</sup> As a result, music publishers began issuing “mechanical licenses” to, and collecting mechanical royalties from, piano-roll manufacturers.<sup>6</sup> 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,”<sup>7</sup> after February 15, 1972.

### 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 Sirius-XM satellite network, the Music Choice cable network, and online streaming services such as Pandora and Spotify.

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<sup>4</sup> 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)).

<sup>5</sup> 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>.

<sup>6</sup> Kevin Zimmerman, “Songwriter 101: Understanding Mechanical Royalties,” *BMI*, March 27, 2005.

<sup>7</sup> 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. See CRS Report RL33631, *Copyright Licensing in Music Distribution, Reproduction, and Public Performance*, by Brian T. Yeh.

The Copyright Act does not require broadcast radio stations to pay public performance royalties for broadcasts of sound recordings.<sup>8</sup> As described below in “Broadcast Radio,” Congress reasoned, and broadcasters assert, that the promotional value of broadcast radio airplay outweighs any revenue lost by record labels and artists due to a lack of public performance rights for sound recordings.

## **Rights Required**

Who pays whom in the digital world depends 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). Manufacturers of CDs or digital files of songs (typically record labels) need to pay music publishers for reproduction rights. Retail outlets that sell CDs or digital files of songs pay record labels for distribution rights, and the record labels in turn pay the music publishers fees based on retail sales.<sup>9</sup>

Listeners of radio services have less control over when and where they listen to a song than they would if they purchased the song outright. Broadcast radio stations only need to pay music publishers and songwriters for public performance rights.<sup>10</sup> Digital services, including the satellite radio service Sirius XM and the online radio service Pandora, 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.<sup>11</sup>

Users of an “on demand,” or “interactive” digital radio service (e.g., Spotify’s free and subscription services and the Vevo music video website) can listen to songs upon request, thereby experiencing a hybrid of playing a CD and listening to a radio broadcast. To enable multiple listeners to select songs, the service makes temporary reproductions of digital files on servers. It pays both reproduction royalties and performance royalties to music publishers/songwriters and to record labels/artists.<sup>12</sup>

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<sup>8</sup> The record label Big Machine Music Group, however, reached a comprehensive licensing agreement with Clear Channel Media and Entertainment, which operates both broadcast and Internet radio services under the iHeartMedia brand, in June 2012. 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>.

<sup>9</sup> 2015 Copyright Office Report, pp. 131-132.

<sup>10</sup> The rates may be based on a percentage of a radio station’s revenues or other factors, depending on terms set by the performance rights organizations.

<sup>11</sup> 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>.

<sup>12</sup> 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](https://www.harryfox.com/find_out/faq.php).

## How the Industry Works

From the viewpoint of copyright law, the music industry comprises three distinct groups of interests: songwriters and music publishers; recording artists and record labels; and 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; and bars, restaurants, and general retailers; as well as 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),<sup>13</sup> with which she shares the rights to her musical works.

Typically, the songwriter of a musical work retains ownership of the copyright. Nevertheless, the publisher might ultimately control the licensing of the musical work.<sup>14</sup> 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.

Record labels pay music publishing companies for the right to manufacture CDs and other physical media. 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 split of royalties, but songwriters with proven track records may be able to (re)negotiate more favorable contractual terms, perhaps a 75-25 or 80-20 split.<sup>15</sup>

Within the United States, the music publishing industry earned about \$3.9 billion in revenues and \$600.2 million in profits during 2014, according to IBIS, a research firm. Three firms account for about 44% of the publishing industry’s revenues: (1) Sony/ATV Music Publishing (20.7%), (2) Universal Music Publishing Group (17.7%), and (3) Warner Music Group (6.4%).<sup>16</sup> After several years of growth, revenues of the music publishing industry declined between 2008 and 2014 (see **Figure 1**).

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<sup>13</sup> 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](http://www.nytimes.com/2014/07/11/business/media/sony-threatens-to-bypass-licensers-in-royalties-battle.html?_r=0).

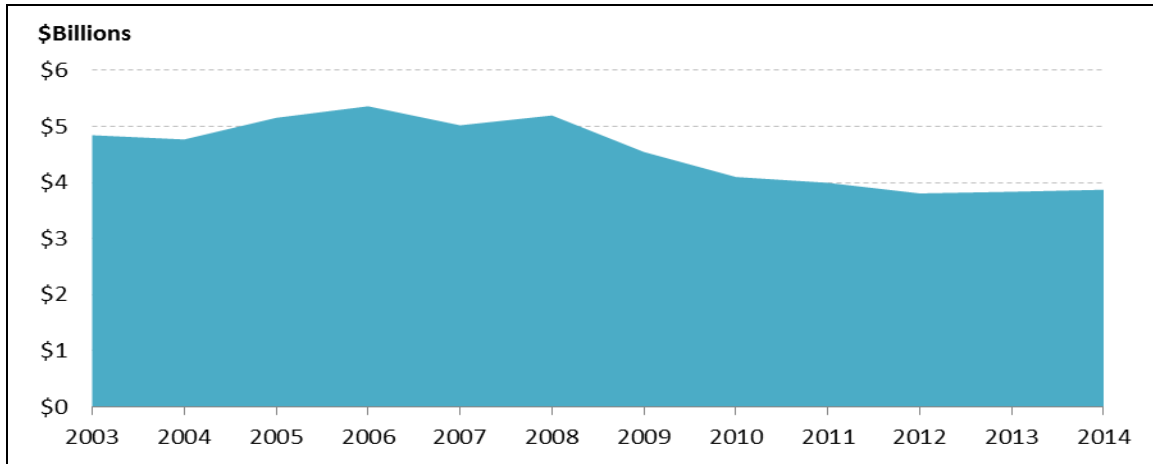
<sup>14</sup> Peter DiCola and David Touve, “Licensing in the Shadow of Copyright,” *Stanford Technology Law Review*, vol. 17, no. 397 (Winter 2014), p. 408.

<sup>15</sup> Harold L. Vogel, *Entertainment Industry Economics: A Guide for Financial Analysis*, 9<sup>th</sup> ed. (New York, NY: Cambridge University Press, 2015), pp. 275-277.

<sup>16</sup> James Crompton, “Music Publishing in the US—Getting a Remix: Digital Media Outlets Have Opened Up New Revenue Streams for Publishers,” IBISWorld Industry Report 51223, December 2014, pp. 4, 8 (2014 IBISWorld Music Publishing Report).



**Figure 1. U.S. Music Publishing Industry Revenue Trends**



**Source:** 2014 IBISWorld Music Publishing Report.

**Note:** Figures not adjusted for inflation.

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.<sup>17</sup>

## Recording Artists and Record Labels

Record labels are responsible for finding musical talent, recording their work, and promoting the artists and their work. Recording artists usually contract with record labels to administer their sound recording copyrights. For example, as a performer, Ms. Swift has a contract with a record label (Republic Nashville, a joint venture of Big Machine Records and Universal Music Group),<sup>18</sup> 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. 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.<sup>19</sup> 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.<sup>20</sup> Independent producers and independent labels often work with artists as subcontractors for major

<sup>17</sup> Ibid., p. 24.

<sup>18</sup> Nick Vivarelli, "A Big Year for Big Machine; Firm Adds Publishing Arm, Cuts Royalty Pact, Realizes Hollywood Ambitions," *Variety*, July 30, 2012, p. 8.

<sup>19</sup> Vogel, *Entertainment Industry Economics*, p. 280.

<sup>20</sup> 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," (continued...)

record companies under a variety of financial arrangements.<sup>21</sup> 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 56% of the industry’s revenues: (1) Sony Corporation (19.7%), (2) Universal Music Group (23.7%), and (3) Warner Music Group (12.9%).<sup>22</sup> These companies collectively earned about \$7.6 billion in revenues and \$450.2 million in profits from their recording businesses during 2014.<sup>23</sup> Few record labels are truly independent, because the initial financing, manufacturing (at least of CDs), and distribution of the sound recordings are more efficiently handled by large record companies that can diversify their risks over many different labels, artists, and styles of music while enjoying other economies of scale.<sup>24</sup>

## Music Licensees

A very large number of entities, from neighborhood bars to broadcast radio stations, transmit copyrighted music to 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 distributor 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.<sup>25</sup> 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.<sup>26</sup> With the 1909 Copyright Act, Congress added an exclusive right to make “mechanical” reproductions of songs in “phonorecords.”<sup>27</sup> At the time, this exclusive right of mechanical reproduction applied to music in player pianos.

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*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](http://www.nytimes.com/2015/03/06/arts/music/madonna-talks-about-rebel-heart-her-fall-and-more.html?_r=0).

<sup>21</sup> For detailed descriptions of financial arrangements, see Vogel, *Entertainment Industry Economics*, pp. 280-281.

<sup>22</sup> *Ibid.*, p. 8. In 2013 Sony acquired EMI Group’s publishing division in a partnership with private investors.

<sup>23</sup> James Crompton, “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 2014, p. 4 (2014 IBISWorld Major Label Music Production Report).

<sup>24</sup> Vogel, *Entertainment Industry Economics*, p. 281.

<sup>25</sup> Act of May 31, 1790, Ch. 15, Stat. 124.

<sup>26</sup> Act of Feb. 3, 1831, Ch. 16, 4 Stat. 436.

<sup>27</sup> U.S. Congress, House Committee on Patents, *To Amend and Consolidate the Acts Respecting Copyright*, committee print, 60<sup>th</sup> Cong., 2<sup>nd</sup> sess., February 22, 1909, Rep. 2222, pp. 6-8.

By 1909, however, Congress was concerned about allegations that one piano manufacturer—the Aeolian Company—was seeking to create a monopoly by buying up exclusive rights from music publishers.<sup>28</sup> To address this concern, Congress established the first compulsory license in U.S. copyright law,<sup>29</sup> 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 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.<sup>30</sup>

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.<sup>31</sup> 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. §115 and raised the statutory rate from 2.0 cents per use to 2.75 cents per song embedded in each record, effective January 1, 1978. Congress subsequently adjusted this system twice, leading to the creation of the Copyright Royalty Board (CRB) in 2004.<sup>32</sup>

The CRB, which is composed of three administrative judges appointed by the Librarian of Congress, oversees the royalty rates that licensees pay publishers and songwriters for the mechanical rights to their works. The CRB sets rates every five years for Section 115 licenses, as required by the Copyright Act.<sup>33</sup> While copyright owners and users are free to negotiate voluntary licenses that depart from the statutory rates and terms, the CRB-set rate acts as a ceiling for what the owner may charge.<sup>34</sup> The CRB establishes rates for licenses based on policy objectives set

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<sup>28</sup> U.S. Congress, House Committee on Patents, *To Amend and Consolidate the Acts Respecting Copyright*, committee print, 59<sup>th</sup> Cong., 2<sup>nd</sup> sess., March 2, 1907, Rep. 7083, Part 2, Views of the Minority, p. 5.

<sup>29</sup> 2015 U.S. Copyright Office Report, p. 26.

<sup>30</sup> U.S. Congress, House Committee on the Judiciary, *Copyright Law Revision*, committee print, 83<sup>rd</sup> Cong., 2<sup>nd</sup> sess., March 8, 1967, H.Rept. 90-183, pp. 66-67.

<sup>31</sup> *Ibid.*, U.S. Congress, House Committee on the Judiciary, *Copyright Law Revision*, committee print, 94<sup>th</sup> Cong., 2<sup>nd</sup> 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/>.

<sup>32</sup> 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.

<sup>33</sup> 17 U.S.C. §§801(b)(1) and 801(b)(2).

<sup>34</sup> 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 (continued...)”

forth in Section 801(b)(1) of the 1976 Copyright Act.<sup>35</sup> The Songwriter Equity Act of 2015 (S. 662, H.R. 1283) would substitute the criteria the CRB uses to a “willing buyer, willing seller” standard. For more information, see “Bills Introduced in the 114th Congress.”

In 1995 Congress enacted the Digital Performance Rights in Sound Recordings Act (DPRSRA).<sup>36</sup> 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).<sup>37</sup> 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.”<sup>38</sup> 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 21<sup>st</sup> Century.”<sup>39</sup>

In November 2008, the Copyright Office, recognizing that streaming services make and store reproductions of musical works on computer servers in order to facilitate streaming, concluded that these services could utilize the Section 115 compulsory licensing process.<sup>40</sup> 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 non-interactive 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 adopted the statutory rates and terms for interactive streaming services based on an agreement negotiated among representatives of music publishers and songwriters, record labels, and the streaming services.

Interactive streaming services, including Spotify, obtain both mechanical and public performance licenses (described in more detail in “Musical Work Public Performance Royalties”) for the musical works they use. Non-interactive services such as Pandora, however, do not pay mechanical royalties to music publishers. In its SEC Form 10-K, Pandora states that

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(...continued)

all those who live below it.” 2009 Final Rule, p. 4513.

<sup>35</sup> 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).

<sup>36</sup> P.L. 104-39.

<sup>37</sup> U.S. Congress, Senate Committee on the Judiciary, *Digital Performance Right in Sound Recordings Act of 1995*, committee print, 104<sup>th</sup> Cong., 1<sup>st</sup> sess., August 4, 1995, S.Rept. 104-128 (Washington: GPO, 1995), p. 10.

<sup>38</sup> 17 U.S.C. §115(c)(3)(D).

<sup>39</sup> 2008 NPRM, p. 40806.

<sup>40</sup> 2008 Interim Rule, p. 66174.

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.<sup>41</sup>

According to the Copyright Office, interactive streaming services represent only a small percentage of mechanical royalties received by music publishers.<sup>42</sup>

**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.<sup>43</sup> 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 and CEO David Israelite, “If they get a better deal, we get a better deal.”<sup>44</sup>

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<sup>41</sup> Pandora 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>.

<sup>42</sup> 2015 Copyright Office Report, p. 162.

<sup>43</sup> 2015 Copyright Office Report, p. 171.

<sup>44</sup> 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 I. 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 units sold	\$0.091 per song	Songs > 5 minutes in length have a rate of \$0.0175 per minute or fraction thereof.
Permanent digital downloads (e.g., iTunes)	Payable royalty is linked to the number of units sold	\$0.091 per song	Songs > 5 minutes in length have a rate of \$0.0175 per minute or fraction thereof.
Ringtones	Payable royalty is linked to the number of copies sold	\$0.24 per ringtone	Before the CRB determined that ringtones were subject to compulsory license in 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.
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 per month	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).
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](https://www.harryfox.com/find_out/rate_charts.html); 2015 Copyright Office Report, p. 30.

In the United States, music publishers collect mechanical royalties directly from recorded music companies or, to minimize administrative burdens, via third-party administrators. The two major administrators are the Harry Fox Agency, a nonexclusive licensing agent affiliated with the National Music Publishers' Association, and Music Reports, Inc. (MRI). After charging an administrative fee, these agencies distribute the mechanical royalties to the publishers, who in turn split them with the songwriters.

## 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.<sup>45</sup> While this right represented a way for copyright owners to profit from their musical works, the sheer number and fleeting nature of public performances made it impossible for copyright owners to individually negotiate with each user for every use, or detect every case of infringement.<sup>46</sup>

Performance rights organizations (PROs) address the logistical issue of how to license and collect payment for the public performance of musical works in a wide range of settings.<sup>47</sup> The American Society of Composers, Authors and Publishers (ASCAP), was formed in 1914, the Society of European Stage Authors and Composers (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.

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 performance venues—may obtain a license from a songwriter or publisher through a PRO.<sup>48</sup> 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).<sup>49</sup> 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.<sup>50</sup> The settlements encompass the stations’ traditional

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<sup>45</sup> 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.

<sup>46</sup> *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).

<sup>47</sup> *Ibid.* and 2015 Copyright Office Report, p. 20.

<sup>48</sup> 2015 Copyright Office Report, p. 33.

<sup>49</sup> Radio Music License Committee, *Our Mission*, <http://www.radiomlc.org/Homepage/4779186>.

<sup>50</sup> 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/>.

radio broadcast service as well as their non-interactive streaming services that compete with Pandora and Apple’s iTunes Radio.

The U.S. District Court for the Southern District of New York, acting as the rate court, approved of these settlements. After Pandora 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 should pay ASCAP 1.85% of its revenues.<sup>51</sup> This is less than the 3% of revenues ASCAP originally demanded from Pandora, but more than the 1.7% paid by radio broadcast groups and by online streaming services operated by broadcast radio groups. There are now several such services (see **Table 2**). Pandora has filed an application with the Federal Communications Commission to purchase broadcast radio station KSMZ-FM in Rapid City, SD, so it, too, could be covered by the terms of the RMLC settlements.<sup>52</sup>

**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.
Cumulus Media Inc.	416	Rdio (partial ownership stake)	Free for up to six months. Thereafter \$4.99 or \$9.99 per month, depending on whether mobile included.
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.

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

Current law, 17 U.S.C. §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

<sup>51</sup> 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](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 (2<sup>nd</sup> Cir. May 6, 2015).

<sup>52</sup> Pandora is involved in a similar suit with BMI.

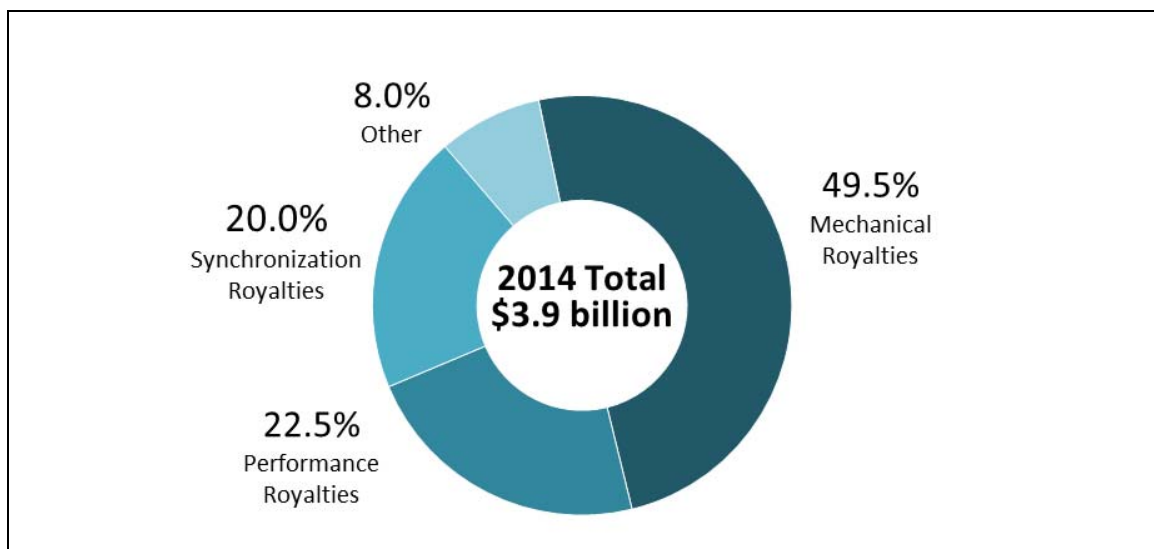


1995 enactment of the DPRSRA. This provision creates a disparity between the rates interactive services pay music publishers for performance rights, which *cannot* be tied to the prices they pay record labels, and the rates they pay music publishers for mechanical rights, which *are* tied to the rates they pay record labels.

The Songwriter Equity Act of 2015 (S. 662, H.R. 1283) would repeal this provision. Songwriters, publishers, and the Copyright Office support such a change; streaming music services oppose repeal. Parties on both sides predict that the legislation would increase performance rates for musical works to make them more commensurate with rates paid for sound recordings.

**Figure 2** represents how the different sources of royalties contribute to music publishers' revenues.<sup>53</sup>

**Figure 2. Breakout of Music Publishers' U.S. Revenues, by Type of Royalty**



**Source:** IBISWORLD.com, 2014 IBISWorld Music Publishing Report.

**Note:** Synchronization (often referred to as “synch”) refers to the use of music incorporated in audiovisual works, such as movies, television programs, and video games.

## Record Labels and Recording Artists

### Reproduction and Distribution Licenses

Congress did not recognize artists' sound recordings as a distinct class of copyrighted works until 1971, when it adopted the 1971 Sound Recording Amendment.<sup>54</sup> This law granted sound

<sup>53</sup> The National Music Publishers Association (NMPA) reported that in 2013 its member organizations received \$2.2 billion in U.S. revenues. It estimated the following contributions from each type of royalty: performance represented 52%, mechanical licenses represented 23%, synchronization royalties from audiovisual works represented 20%, and all other uses collectively represented 5% of annual revenues. National Music Publishers Association, “U.S. Music Publishing Industry Valued at \$2.2 Billion,” press release, June 11, 2014, <https://www.nmpa.org/media/showrelease.asp?id=233>.

<sup>54</sup> P.L. 92-140. See also Maria A. Pallante, Register of Copyrights, *Federal Copyright Protection for Pre-1972 Sound* (continued...)

recordings a reproduction right analogous to that provided for other works of authorship.<sup>55</sup> 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. The Fair Play Fair Pay Act of 2015, H.R. 1733, would include pre-1972 sound recordings within the jurisdiction of federal copyright law.

Recognizing that non-interactive digital services (including Sirius XM 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 distribution of musical works described in Section 115(c)(3)(C)(i).<sup>56</sup> The rates and terms of the Section 112 license are established by the CRB. Through SoundExchange, described below in “Sound Recording Public Performance Royalties,” sound recording owners receive Section 112 fees. Recording artists, however, do not.<sup>57</sup>

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

### *Non-interactive 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 earned income from the 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.<sup>58</sup> Beginning with the passage of DPRSRA in 1995, Congress has moved gradually in the direction of granting record labels and artists public performance rights and allowing them to sell such rights at market rates.<sup>59</sup>

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(...continued)

*Recordings*, U.S. Copyright Office, 2011, <http://copyright.gov/docs/sound/> (2011 Copyright Office Report).

<sup>55</sup> 2011 Copyright Office Report.

<sup>56</sup> 17 U.S.C. §112(e)(1); U.S. Congress, House Committee on the Judiciary, *Digital Millennium Copyright Act*, committee print, 106<sup>th</sup> Cong., 2<sup>nd</sup> sess., October 8, 1998, H.Rept. 105-796, pp. 89-90.

<sup>57</sup> Copyright Office, Library of Congress, “Review of Copyright Royalty Judges Determination, Notice,” 73 *Federal Register* 9143, 9146, February 19, 2008.

<sup>58</sup> *Arista Records, LLC v. Launch Media, Inc.*, 578 F.3d 148, 153 (2d Cir. 2009), cert. denied, 559 U.S. 929 (2010). (“Launch Media”).

<sup>59</sup> Jeffrey A. Eisenach, “The Sound Recording Performance Right at a Crossroads: Will Market Rates Prevail?,” *CommLaw Conspectus*, vol. 22, no. 1 (2014), pp. 1-2.

With 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 non-interactive subscription services, specifically satellite radio and subscription music, eligible for compulsory licensing under Section 114.<sup>60</sup> 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.

With the enactment of the Digital Millennium Copyright Act (DMCA) in 1998, Congress expanded the statutory licensing provisions in Section 114 to include non-interactive online radio services.<sup>61</sup> It then set up a bifurcated system of rate-setting standards for the CRB:<sup>62</sup>

- Services that *existed as of July 31, 1998*, prior to the enactment of the DMCA (i.e., Sirius-XM satellite service as well as the Music Choice and Muzak subscription services), remained subject to the Section 801(b)(1) standard.
- Internet radio and other digital music services (including 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.”<sup>63</sup>

SoundExchange also administers the Section 114 fees that non-interactive 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 non-interactive digital music services via SoundExchange.

### *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 to an individual.<sup>64</sup>

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

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<sup>60</sup> 17 U.S.C. §114(d)(2). 2015 Copyright Office Report, p. 49.

<sup>61</sup> P.L. 105-304.

<sup>62</sup> Eisenach states that “the 801(b) standard arguably grants licensees a *de facto* right to perpetual profitability, allowing licensees to argue that they and their business models have a right to be protected from ‘disruption.’” Eisenach, p. 4.

<sup>63</sup> 17 U.S.C. §114(f)(2)(B).

<sup>64</sup> U.S. Congress, Senate Committee on the Judiciary, *Digital Performance Right in Sound Recordings Act of 1995*, committee print, 104<sup>th</sup> Cong., 1<sup>st</sup> sess., August 4, 1995, S.Rept. 104-128, p. 18.

greatest threat to the livelihoods of those whose income depends on revenues derived from traditional record sales.<sup>65</sup>

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 negotiate with non-interactive services such as Pandora.

### ***Broadcast Radio Exception***

Congress does not require broadcast radio stations to obtain public performance rights 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 following:

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.<sup>66</sup>

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.”<sup>67</sup>

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.<sup>68</sup> 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.<sup>69</sup> A 2010 report published by the Government Accountability Office “found the relationship between radio airplay and music sales to be unclear.”<sup>70</sup> Pandora 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.<sup>71</sup>

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

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<sup>65</sup> Ibid., pp. 14-16.

<sup>66</sup> U.S. Congress, Senate Committee on the Judiciary, *Digital Performance Right in Sound Recordings Act of 1995*, committee print, 104<sup>th</sup> Cong., 1<sup>st</sup> sess., August 4, 1995, S.Rept. 104-128, pp. 14-15.

<sup>67</sup> Ibid., p. 15.

<sup>68</sup> National Association of Broadcasters, *A Performance Tax Puts Local Jobs at Risk*, <http://nab.org/advocacy/issue.asp?id=1889&issueid=1002>.

<sup>69</sup> Music First, *The Truth About Performance Rights*, <http://musicfirstcoalition.org/performance-rights>.

<sup>70</sup> 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>.

<sup>71</sup> Tim Westergren, founder, Pandora, *Pandora and Royalties* (blog), June 26, 2013, <http://blog.pandora.com/2013/06/26/pandora-and-royalties/>.

royalties.<sup>72</sup> The Copyright Office supports such a requirement, arguing that adding this 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 counters that an expansion of performance rights will be insufficient to invoke copyright reciprocity from other nations.<sup>73</sup>

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.<sup>74</sup> 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. SoundExchange is the only organization authorized by the CRB to fulfill this role for the 2011-2015 license period.<sup>75</sup>

The Copyright Act does not include record producers in the statutorily defined split of royalties for public performances of sound recordings by digital non-interactive 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. The Allocation for Music Producers Act (AMP Act), H.R. 1457, would grant producers the statutory right to seek payment of their royalties via SoundExchange when they have a letter of direction from a featured artist.

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.<sup>76</sup> That per-stream approach has proven controversial.<sup>77</sup> After the CRB’s “Webcasting II” decision in 2007, a number of online streaming services and radio broadcasters complained that the per-performance rates were unsustainable. These concerns led Congress to pass legislation giving SoundExchange the

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<sup>72</sup> 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/>.

<sup>73</sup> 2015 Copyright Office Report, pp. 89-90.

<sup>74</sup> 17 U.S.C. §112(e)(2), 114(e)(1), 115(c)(3)(B).

<sup>75</sup> 37 C.F.R. §380.11.

<sup>76</sup> “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.’” Library of Congress, Copyright Office, “Determination of Reasonable Rates, Final Rule and Order,” 67 *Federal Register* 45240, 45249, July 8, 2002.

<sup>77</sup> 2015 Copyright Office Report, pp. 51-52.

authority to negotiate and agree to alternative royalty schemes that could be binding on all copyright owners and others in lieu of the CRB-set rates.<sup>78</sup> Its authority to do this, however, expires at the end of 2015, pursuant to 17 U.S.C. §114(f)(5)(A). In April 2015 the CRB began the hearing phase of its proceeding to set the royalty rates paid by non-interactive digital music services to SoundExchange for the years 2016-2020.<sup>79</sup> It is to rule by the end of 2015.<sup>80</sup>

In the wake of Congress's actions, SoundExchange reached agreements with several digital music services. For example, in 2009, SoundExchange negotiated rates with Pandora. Under that agreement, Pandora agreed to pay the greater of 25% of gross revenues, or \$0.00140 per stream per month. Had Pandora not reached such an agreement, it would have paid the CRB default rate fee of \$0.00023 per stream per month.

**Table 3** describes how public performance rates vary, depending on the type of music service, when it began operating, and whether it opted to reach agreements pursuant to the Webcaster Settlement Act of 2008, P.L. 110-435, and the Webcaster Settlement Act of 2009, P.L. 111-36, (WSAs) in lieu of rates set by the CRB.<sup>81</sup> The rates in the agreements negotiated pursuant to the WSAs include rights to ephemeral recordings, as described in Section 112, as well as public performance rights for digital services described in Section 117 of the Copyright Act. In 2014, the CRB, determined, after the U.S. Court of Appeals ordered it to reconsider its initial decision, that rights to ephemeral recordings should be bundled with the Section 114 royalties and deemed to 5% of the bundled payments.<sup>82</sup> Pursuant to several agreements, SoundExchange takes the payments, allocates them to songs according to how often each song is played, and then pays the featured artists and copyright holders of the recordings. The Copyright Office has no responsibility for administering the rates and terms of these agreements.

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<sup>78</sup> Webcaster Settlement Act of 2008, 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, 2015 Copyright Office Report, pp. 47, 52, and *Copyhype*, November 12, 2012, <http://www.copyhype.com/2012/11/a-brief-history-of-webcaster-royalties/>.

<sup>79</sup> 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-2016-2020-when-will-we-see-a-decision/>.

<sup>80</sup> U.S. Copyright Office, "Digital Performance Right in Sound Recordings and Ephemeral Recordings," 79 *Federal Register* 214, November 5, 2014. David Oxenford, "Webcasting Rate Proposals for 2016-2020 Now Public—What Will the Copyright Royalty Board Be Considering in Setting Royalty Rates for Internet Radio," *Broadcast Law Blog*, October 13, 2014, <http://www.broadcastlawblog.com/2014/10/articles/webcasting-rate-proposals-for-2016-2020-now-public-what-will-the-copyright-royalty-board-be-considering-in-setting-royalty-rates-for-internet-radio/>.

<sup>81</sup> The Webcaster Settlement Act of 2008 provided limited statutory authority for SoundExchange to negotiate and enter into alternative royalty fee agreements within an allotted time frame. The Webcaster Settlement Act of 2009 allowed webcasters who had not reached an agreement with SoundExchange another opportunity to do so. U.S. Congress, House Committee on the Judiciary, *Webcaster Settlement Act of 2009*, committee print, 111<sup>th</sup> Cong., 1<sup>st</sup> sess., June 8, 2009, H.Prt. 111-139 (Washington: GPO, 2009), p. 3.

<sup>82</sup> 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.

**Table 3. Royalty Rates Payable to Record Labels for Public Performance Rights**  
 Applies to Selected Digital Non-Interactive Audio Services

Media	Description	Amount	Notes
Preexisting subscription service as of July 31, 1998 (Music Choice, Muzak)	Annual minimum fee: \$500 per station or channel; maximum of \$50,000 per year.	\$0.0023 per stream per month	Default rate set by CRB based on 17 U.S.C. §801(b)(1) factors. Codified in 37 C.F.R. §380 Subpart A.
Preexisting satellite digital audio radio service as of July 31, 1998 (Sirius-XM)	Annual minimum fee: \$500 per station or channel; maximum of \$50,000 per year.	\$0.0024 per stream per month	Pursuant to WSA agreement. Sirius XM has opted out of the CRB's §801(b)(1) rate standard and reached a separate agreement with SoundExchange, which is effective through 2015. <sup>a</sup> Not codified in C.F.R.
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.	\$0.0025 per stream per month	Pursuant to WSA agreement, NAB has opted out of the CRB's willing buyer, willing seller rate standard and reached a separate agreement with SoundExchange, which is effective through 2015. <sup>b</sup> Codified in 37 C.F.R. §380 Subpart B.
Non-subscription services whose revenues are earned primarily through webcasting businesses (IHeart Radio <sup>c</sup> )	Annual minimum fee: \$500 per station or channel; maximum of \$50,000 per year.	\$0.0023 per stream per month	Default rate for non-interactive radio services subject to rates set by CRB, based on willing buyer/willing seller standard. Codified in 37 C.F.R. 380 Subpart A.
Non-subscription pureplay webcasters whose revenues are earned primarily through their webcasting business (Pandora)	Nonsubscription services: a greater of 25% of gross revenues, or \$0.00140 per stream.		Pursuant to WSA agreement, Pandora has opted out of the CRB's willing buyer/willing seller rate standard and reached a separate agreement with SoundExchange, which is effective through 2015. <sup>d</sup> Not codified in C.F.R.

**Source:** 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, "NAB/SoundExchange Agreement: Annual Webcaster Wake-Up Call! SoundExchange Reports and Payments Due Soon," *CommLawBlog*, Fletcher Heald & Hildreth, January 22, 2015; John Vilasenor, *Digital Music Broadcast Royalties: the Case for a Level Playing Field*, Center for Technology at Brookings, Paper Series, August 2012, [http://www.brookings.edu/~media/research/files/papers/2012/8/07%20music%20royalties%20technology%20villasenor/cti\\_19\\_villasenor.pdf](http://www.brookings.edu/~media/research/files/papers/2012/8/07%20music%20royalties%20technology%20villasenor/cti_19_villasenor.pdf); John Timmer, "Pandora Lives! SoundExchange Cuts Deal on Webcasting Rates," *Ars Technica*, July 7, 2009, <http://arstechnica.com/tech-policy/2009/07/07/soundexchange-cuts-deal-on-music-webcasting-rates/>.

- a. 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).
- b. Library of Congress, Copyright Office, "Notification of Agreements Under the Webcaster Settlement Act of 2008," 74 *Federal Register* 9293, Appendix B, March 3, 2009.
- c. IHeartMedia, Inc., SEC Form 10-K, for the fiscal year ended December 31, 2014, p. 14.
- d. Pandora Media, Inc., SEC Form 10-K, for the fiscal year ended December 31, 2014, pp. 6-7. Library of Congress, Copyright Office, "Notification of Agreements Under the Webcaster Settlement Act of 2009," 74 *Federal Register* 34796, Appendix A, July 9, 2009.

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 non-featured vocalists who perform on sound recordings.<sup>83</sup> Prior to distributing royalty payments, SoundExchange deducts costs incurred in carrying out its responsibilities.<sup>84</sup> In 2014, SoundExchange collected a total of \$773 million in royalties, compared with \$20 million in royalties in 2005 and \$462 million in 2012.<sup>85</sup>

## Industry Developments and Issues

### “Interactive” Versus “Non-Interactive” Music Services

The distinction between interactive and non-interactive services has been a matter of debate.<sup>86</sup> For the purposes of defining the process by which owners of sound recordings can set rates for public performance rights, 17 U.S.C. Section 114 provides that an interactive service is one that enables a member of the public to receive either “a transmission of a program specially created for the recipient,” or, “on request, a transmission of a particular sound recording, whether or not as part of a program, which is selected by or on behalf of the recipient.”<sup>87</sup> As discussed in “Reproduction and Distribution Licenses (Mechanical Licenses),” 17 U.S.C. Section 115 does not distinguish between interactive and non-interactive 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.<sup>88</sup>

In order to qualify as a “non-interactive” digital music service eligible for compulsory licenses of sound recording licenses at rates set by the CRB, the services must limit the features they offer consumers, pursuant to the Copyright Act. For example, these services are prohibited from announcing in advance when they will play a specific song, album, or artist.<sup>89</sup> 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.<sup>90</sup>

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<sup>83</sup> 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/>.

<sup>84</sup> 17 U.S.C. §114(g)(3).

<sup>85</sup> 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](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/>.

<sup>86</sup> 2015 Copyright Office Report, pp. 48-49.

<sup>87</sup> 17 U.S.C. §114(j)(7).

<sup>88</sup> 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.

<sup>89</sup> 17 U.S.C. §114(d)(2)(B)-(C).

<sup>90</sup> 17 U.S.C. §114(d)(2)(B)(i), (d)(2)(C)(i), (j)(13).



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.<sup>91</sup> 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.<sup>92</sup>

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.<sup>93</sup> Nevertheless, the court reasoned that uniquely created playlists do not ensure predictability. Therefore, the court determined, LAUNCHcast was a non-interactive service.<sup>94</sup>

## Free Versus Subscription Services and Sales of Music Downloads

Following the *Launch Media* decision, personalized music streaming services including Pandora and iHeartRadio, obtained statutory licenses as non-interactive services for their public performances of sound recordings.<sup>95</sup> The CRB-established rates do not currently distinguish between such customized services and other services that simply transmit undifferentiated, radio-style programming over the Internet.

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

Artists and record labels are debating whether interactive, on-demand advertising-supported services such as Spotify will help the music industry by stemming online music piracy<sup>96</sup> or hurt the industry by reducing paid downloads of songs and albums.<sup>97</sup> Spotify asserts that users of its

<sup>91</sup> *Arista Records, LLC v. Launch Media, Inc.*, 578 F.3d 148, 153 (2d Cir. 2009), cert. denied, 559 U.S. 929 (2010).

<sup>92</sup> *Ibid.*, p. 164.

<sup>93</sup> LAUNCHcast subsequently ceased operations.

<sup>94</sup> *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.’”

<sup>95</sup> 2015 Copyright Office Report, p. 164. Apple’s iTunes Radio service, a non-interactive digital streaming service that is similar to Pandora, has opted to negotiate directly with record labels for public performance rights in lieu of obtaining the statutory license. Glenn Peoples, “SoundExchange Financials Show Fewer Unclaimed Royalities, Persistent Data Problems,” *Billboard*, December 23, 2014, <https://www.billboard.com/articles/business/6415147/soundexchange-fewer-unclaimed-royalties-data-problems>.

<sup>96</sup> Seabrook, “Revenue Streams.”

<sup>97</sup> Matthew Garrahan, Murad Ahmed, and Robert Cookson, “Universal Takes on Spotify Freemium Model,” *Financial* (continued...)

free service tier subsequently become paying subscribers, thereby doubling the amount they pay for music from about \$5 per month (the average amount they spend on downloads) to \$9.99 per month.<sup>98</sup> Reports indicate that the record labels are pressuring Spotify to reduce the number of offerings on its free service.<sup>99</sup>

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.<sup>100</sup> 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. 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.<sup>101</sup>

## 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.<sup>102</sup> The record labels have also reportedly bought minority stakes in the new music streaming service Tidal.<sup>103</sup>

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.<sup>104</sup>

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(...continued)

*Times*, March 20, 2015, <http://www.ft.com/cms/s/0/5645cf6c-ce73-11e4-900c-00144feab7de.html#axzz3WkcKStxq>.

<sup>98</sup> Spotify, *Spotify Explained: How is Spotify Contributing to the Music Business?*, <http://www.spotifyartists.com/spotify-explained/#how-is-spotify-contributing-to-the-music-business>.

<sup>99</sup> Tim Ingham, “Lily Allen: Spotify is Not the Enemy—Tidal May Boost Pirate Sites,” *Music Business Worldwide*, April 6, 2015, <http://www.musicbusinessworldwide.com/lily-allen-spotify-is-not-the-enemy-tidal-may-boost-pirate-sites/>.

<sup>100</sup> 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>.

<sup>101</sup> 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>.

<sup>102</sup> 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>.

<sup>103</sup> 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>.

<sup>104</sup> 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>.

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.<sup>105</sup>

David McCandless and his staff at the firm Information is Beautiful provide an infographic comparing how much artists earn online from various digital download services, free online music services, and subscription music services.<sup>106</sup> They note that

Unsigned “DIY” artists hold on to the majority of income when they sell their stuff online, but signed artists get more marketing, which is a prerequisite to getting more plays on streaming services. Spotify might pay less than Tidal each time your track is played, but Spotify has many more users—making it more likely that someone will play your music in the first place.

## 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.<sup>107</sup> 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 select group of songwriters. When ASCAP and BMI originally formed (in 1914 and 1939, respectively), they acquired the exclusive right to negotiate on behalf of the members (music publishers and songwriters), and forbade members from entering into direct licensing agreements.<sup>108</sup> Both offered only blanket licenses covering all of the 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 DOJ has periodically reviewed their operation and effectiveness. The ASCAP consent decree was last amended in 2001, and the BMI consent decree was last amended in 1994.

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<sup>105</sup> 2015 Copyright Office Report, pp. 128-130.

<sup>106</sup> Information is Beautiful, *Selling Out: How Much Do Artists Earn Online?*, <http://www.informationisbeautiful.net/visualizations/how-much-do-music-artists-earn-online-2015-remix/>.

<sup>107</sup> 2015 Copyright Office Report, p. 33.

<sup>108</sup> The following is a summary of the 2015 Copyright Office Report, pp. 35-42.

Although the ASCAP and BMI consent decrees are not identical, they share many of the same features. Among those features are requirements that the Performance Rights Organization 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.<sup>109</sup> For example, Pandora reported that in 2014, it paid 44% of its \$921 million total revenues, or \$405 million, to SoundExchange,<sup>110</sup> while in 2013 ASCAP collected \$33 million from new media services.<sup>111</sup> 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.<sup>112</sup>

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 non-interactive 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—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 UMPG at rates that brought the publishers higher fees than they were receiving under the PRO system.<sup>113</sup> Pandora, 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.<sup>114</sup>

The DOJ's Antitrust Division announced in June 2014 that it would evaluate the consent decrees, and has solicited and received extensive public comments on whether and how to modify the consent decrees.<sup>115</sup> 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

<sup>109</sup> In contrast to record labels, however, publishers receive performance royalties from radio broadcasts.

<sup>110</sup> Pandora 2014 SEC Form 10-K, pp. 12, 39.

<sup>111</sup> ASCAP Annual Report, p. 19.

<sup>112</sup> Ed Christman, “Pandora vs. BMI's Court Battle Reveals Long-Term Strategies, Licensing Arms,” *Billboard*, February 17, 2015, <http://www.billboard.com/articles/business/6473027/pandora-vs-bmg-strategies-licensing-aims>.

<sup>113</sup> Not long afterward, Sony/ATV bought EMI's music catalog.

<sup>114</sup> *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).

<sup>115</sup> 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>.

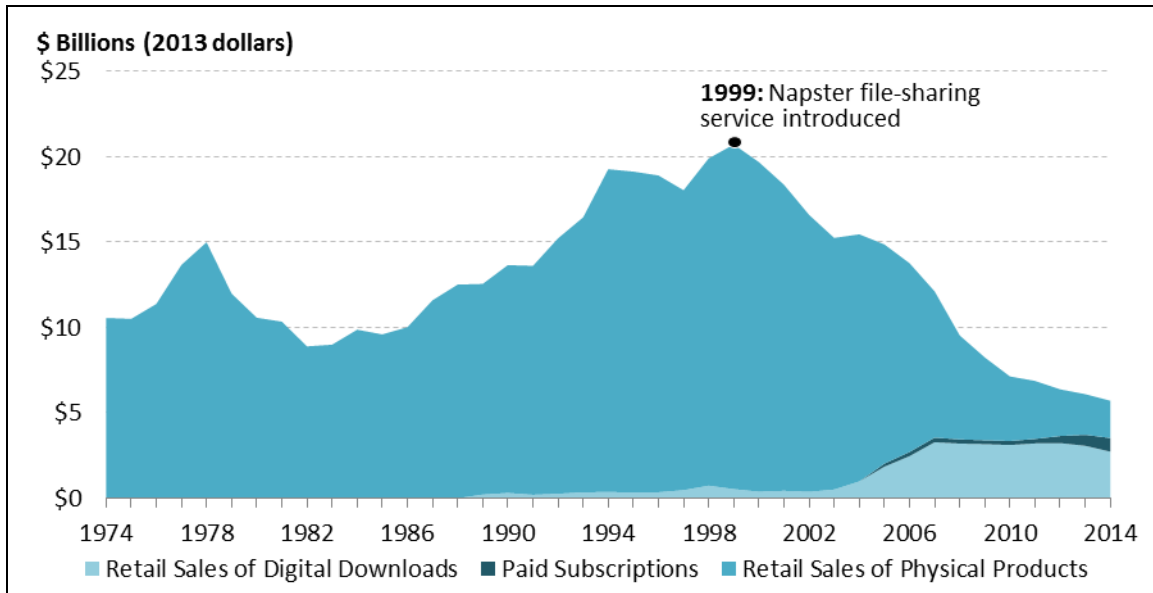
intent to “examine the operation and effectiveness of the Consent Decrees,” particularly in light of the changes in the way music has been delivered and consumed.

## Consumption Trends

Much has happened in the music industry between 1985, when the band Dire Straits released the song “Money for Nothing,” about a blue-collar worker’s lament of the high pay of popular music performers he saw on television,<sup>116</sup> and 2015, when a new version of the song was available for download in iTunes after premiering on the FOX television program *Empire*.<sup>117</sup>

After sales of physical media, including cassette tapes and vinyl records, dipped slightly to \$9.6 billion (in 2013 dollars) in 1985 from \$9.9 billion in 1984, the introduction of the compact disc led to an increase in music sales to consumers, peaking at \$20.2 billion (in 2013 dollars) in 1999.<sup>118</sup> That same year, Napster, the pioneering file-sharing service, facilitated online piracy. Since then, consumer spending on music has plummeted (see **Figure 3**).<sup>119</sup>

**Figure 3. 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.

<sup>116</sup> Richard Buskin, “Classic Tracks: Dire Straits ‘Money for Nothing,’” *Sound on Sound*, May 2006, [http://www.soundonsound.com/sos/may06/articles/classictracks\\_0506.htm?print=yes](http://www.soundonsound.com/sos/may06/articles/classictracks_0506.htm?print=yes).

<sup>117</sup> Billboard Staff, “‘Empire’ Cast, ‘Money for Nothing,’ Feat. Jussie Smollett & Yazz: Exclusive Song Premier,” *Billboard*, February 16, 2015, <http://www.billboard.com/articles/news/6472989/empire-cast-money-for-nothing-feat-jussie-smollett-yazz-exclusive-song>.

<sup>118</sup> For more information on the evolution of online music piracy, see Stephen Witt, “The Man Who Broke the Music Business,” *The New Yorker*, April 26, 2015, [http://www.newyorker.com/magazine/2015/04/27/the-man-who-broke-the-music-business?mod=e2this+nightly&utm\\_term=0\\_4b29b52ce6-1f9f580384-248161753](http://www.newyorker.com/magazine/2015/04/27/the-man-who-broke-the-music-business?mod=e2this+nightly&utm_term=0_4b29b52ce6-1f9f580384-248161753).

<sup>119</sup> Seabrook, “Revenue Streams.”

In the past 15 years, however, online radio listening has become increasingly prevalent. Research firms Edison Research and Triton Digital estimate that about 119 million people, representing 44% of adults aged 12 or older, stream audio weekly, as of 2015, compared with just 2% in 2000.<sup>120</sup> In addition, as of 2015, nearly two-thirds of all Internet users have used YouTube to watch music videos or listen to music.<sup>121</sup>

## U.S. Copyright Office Recommendations

In March 2013 Maria A. Pallante, the Register of Copyrights, delivered a lecture at Columbia Law School and published an article in the *Columbia Journal of Law & the Arts* advocating that Congress comprehensively review and revise U.S. copyright law.<sup>122</sup> In April 2013 House Judiciary Committee Chairman Bob Goodlatte announced that the Judiciary Committee would conduct such a review.<sup>123</sup>

In February 2015 the Copyright Office published a report, *Copyright and the Music Marketplace*, offering Congress a series of recommendations for changing copyright law in light of music industry developments.<sup>124</sup> Among its recommendations are the following:

- regulate musical works and sound recordings consistently
- extend the public performance right in sound recordings to broadcast radio
- include sound recordings made prior to February 15, 1972, in the federal copyright regime, rather than a patchwork of state statutory and common law
- adopt a uniform market-based rate-setting standard for all government rates (i.e., eliminate the Section 801(b)(1) four factors test)
- migrate all rate-setting to the CRB (including rates payable to the ASCAP and BMI PROs, which are currently set by the New York federal district court)
- permit music publishers to opt out of PROs when negotiating with interactive music services for public performance rights, just as record labels are able to do
- encourage greater transparency in the reporting and payment of songwriters' and artists' share of royalties paid to music publishers and record labels, especially in the context of any direct deals negotiated by publishers and record labels with licensees

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<sup>120</sup> Edison Research, *The Infinite Dial (Blog—Latest News)*, March 4, 2015, <http://www.edisonresearch.com/the-infinite-dial-2015/>.

<sup>121</sup> YouTube has a licensing agreement with the website Vevo to stream music videos.

<sup>122</sup> Maria A. Pallante, "The Next Great Copyright Act," *Columbia Journal of Law & the Arts*, vol. 36, no. 3 (Winter 2013), p. 315, <http://lawandarts.org/articles/the-next-great-copyright-act/>.

<sup>123</sup> House Judiciary Committee, "Chairman Goodlatte Announces Comprehensive Review of Copyright Law," press release, April 23, 2013, <http://judiciary.house.gov/index.cfm/2013/4/chairmangoodlatteannouncescomprehensivereviewofcopyrightlaw>.

<sup>124</sup> 2015 Copyright Office Report.

- allow music publishers to bundle the licensing of mechanical and public performance rights
- consider permitting SoundExchange to collect royalty payments on behalf of record producers (the office stated that it would like to hear more from recording artists about this proposal)<sup>125</sup>

## **Bills Introduced in the 114<sup>th</sup> 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 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 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.

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 described in "U.S. Copyright Office Recommendations." 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

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<sup>125</sup> 2015 Copyright Office Report, pp. 1-11.

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.<sup>126</sup> The bill would also ban the Federal Communications Commission from requiring smartphones to include FM tuners.<sup>127</sup>

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<sup>126</sup> For more information about retransmission consent, see CRS Report R43490, *Reauthorization of the Satellite Television Extension and Localism Act (STELA)*, by Dana A. Scherer.

<sup>127</sup> On the inclusion of FM tuners in smartphones, see CRS Report R43828, *Radio Broadcasting Chips for Smartphones: A Status Report*, by Linda K. Moore.