

**Contrasting U.S. Performance Licenses:
Musical Works versus Sound Recordings**

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ABSTRACT

Two fundamental legal intellectual property rights in music must be clearly distinguished: 1) ownership of the basic *musical work*, with royalties for performances paid to song composers, lyricists, and publishers; and 2) ownership of any *sound recording* of that musical work, with royalties for performances paid to performing artists, musicians, and recording companies. The United States Congress has provided for, in some instances, statutory compulsory licenses for the use of copyrighted materials covered by either of these rights. The direct comparison of the treatment of these two performance rights and accompanying compulsory licenses, when put into practice under U.S. statutes, reveals very different outcomes. The sound recording digital performance statutory license, as the comparatively recent addition, is notably unsettled law and has resulted in relatively complicated regulations. Because the sound recording statutory license applies exclusively to digital performances, which utilize still rapidly evolving technology, the comparison of the two types of statutory licenses demonstrates how emerging technology can easily outrun the legal system's ability to acclimate.

Contrasting U.S. Performance Licenses: Musical Works versus Sound Recordings

The copyright law of the United States is intended to give the owners of intellectual works the exclusive right to authorize others to reproduce, distribute, or publicly perform their protected property. In the specific case of the performance of music, two discrete categories of protected works must be considered: “musical works” and “sound recordings” (17 U.S.C. § 102).

A “musical work” refers to the musical composition – the musical notes and arrangement – and any accompanying lyrics. A “sound recording” is the “fixation of a series of musical, spoken, or other sounds, ... regardless of the nature of the material objects, such as disks, tapes, or other phonorecords, in which they are embodied” (17 U.S.C. § 101). Also according to the statute, to “perform” a work means to “recite, render, play, dance, or act it, either directly or by means of any device or process or, in the case of a motion picture or other audiovisual work, to show its images in any sequence or to make the sounds accompanying it audible” (17 U.S.C. § 101).

These two separate legal rights in music must be clearly distinguished: 1) ownership of the basic *musical work*, with royalties for performances paid to song composers, lyricists, and publishers; and 2) ownership of any *sound recording* of that musical work, with royalties for performances paid to performing artists, musicians, and recording companies.

Performances of Musical Works

The copyright protection of the performance of musical works is the older of these two performance rights granted by the statute, and is therefore more likely to be familiar to potential “performers” of this type of intellectual property.

The language of the Copyright Act (1909) manifestly established two separate rights with relation to musical works. First is the explicit reference to protecting the right to *publicly perform* for profit the copyrighted musical composition, the subject of specific interest here. Second is the protection of the *written record* – the sheet music – of the public performance: “To make any arrangement or setting of it or of the melody of it in any system of notation or any form which it may be read or reproduced...” (*Copyright Act of 1909*, 17 U.S.C. § 1(e)). Significant is that the 1909 statute specifically limited protection of both the public performance and the notational record of such a performance to those made for profit.

Rights to perform musical works can be obtained directly from the composer or publisher of the work; however, in the case of a music user regularly performing multiple musical works, a blanket license obtained from a performance rights society is often the more expedient means to avoid infringement on the intellectual property right. A performance rights society is an entity that licenses the public performance of nondramatic musical works on behalf of the copyright owners of the works. Three such performance rights societies operate in the United States: the American Society of Composers, Authors and Publishers; Broadcast Music, Inc.; and SESAC, Inc. Each musical works author is typically represented by one of the three societies; because the memberships of the societies do not overlap, a music user wishing to perform a variety of works without infringement will normally secure licenses from all three performance rights societies. A “blanket license” is an annual license which permits the licensee to perform any work in the repertoire represented by the particular performance rights society (*ASCAP Licensing*, 2007). Through the use of such a license the music user avoids the burden of individually locating and securing licenses from each of the owners of the works. The Fairness in Music Licensing Act (1998) gave individual proprietors of fewer than seven non-publicly

traded establishments, except for broadcasters and certain other transmission services, a means of challenging performing rights society license fees for nondramatic performances alleged to be unreasonable (17 U.S.C. § 513).

The performance rights societies license only *nondramatic* performances of musical works. A “dramatic” performance of a musical work would include the performance of an entire musical comedy, opera or ballet; a concert version of such a work; a staged version of a portion of such a work; or other use of such a work as a part of a story or plot. Dramatic performances of musical works require “dramatic” or “grand” rights, which must be obtained directly from the composer or publisher of the work (*ASCAP Licensing*, 2007).

The Fairness in Music Licensing Act also codified exemptions applicable to certain small businesses for copyright liability from playing a radio or television program through a “single receiving apparatus of a kind commonly used in private homes” as long as no direct charge is made to see or hear the transmission (17 U.S.C. § 110). The exemption applies to food service or drinking establishments of less than 3,750 gross square feet of space; to most other types of establishments of less than 2,000 gross square feet of space; or to larger establishments as long as the performance is via not more than six loudspeakers, of which not more than four are located in any one room, and in the case of audiovisual works, the visual portion is shown on no more than four devices with no more than one in a room, each with a screen no greater than fifty-five inches diagonally measured.

Noncommercial educational broadcast stations and other public broadcasting entities are provided with a compulsory statutory license for the performance of musical works (17 U.S.C. § 118). This license makes universally available to qualified music users a license negotiated under the provisions of the statute. In the absence of a voluntarily negotiated agreement, the law

provides an arbitration process to determine rates and terms of the music works performance license for noncommercial public broadcasting entities. Fortunately for all parties, negotiated agreements have in recent times been the norm for these Section 118 licenses.

As for digital transmissions of musical works, including through Webcasting, all three of the performance rights societies currently offer blanket licenses specifically tailored to the new media.

Performances of Sound Recordings

The technology of recorded music was in its early years at the time Congress enacted the Copyright Act (1909) and mechanical sound recordings did not then receive copyright protection. The 1909 act was amended by the Sound Recordings Act (1971) to, for the first time in the United States, extend copyright protection to sound recordings. The copyright protection for sound recordings was initially limited to protection of the right to duplicate the physical sound recording and right to control the making of authorized derivative works utilizing portions of the original recording. The then primary concern of Congress was to protect sound recording copyright owners against piracy of the physical product, thus a performance right was not at issue. This expansion of copyright protection for duplication and derivative works of sound recordings was continued in the general statutory rewrite that was the Copyright Revision Act (1976).

Until recent years sound recordings have not had any performance right under copyright law in the United States, although such rights have existed elsewhere in the world for several years. In response to the major revisions to copyright statute proposed in 1975 by H.R. 2223, Register of Copyrights Barbara Ringer testified in favor of a broad performance right for sound recordings (Ringer, *Second Supplementary Report*, 1975). However, the Register also testified

that the inclusion of a new sound recording performance right in legislation enacting comprehensive statutory reform would likely be cause for overwhelming opposition:

At the same time it must be said that, on the basis of experience, if this legislation were tied to the fact of the bill for general revision of the copyright law, there is a danger that it could turn into a "killer" provision that would again stall or defeat omnibus legislation. This danger exists even more clearly than when I testified to this same effect last July, and would be very severe if the potential compulsory licensees – notably the broadcasting and jukebox industries – exerted their considerable economic and political power to oppose the revision bill as a whole. Should this happen, there could be no question about priorities. The performance royalty for sound recordings would have to yield to the overwhelming need for omnibus reform of the 1909 law (Ringer, *Testimony on H.R. 2223*, 1975).

The Senate's version of the legislation specifically declined to create such a right, while the House version called for a Copyright Office study on the issue. The House language calling for a study ultimately prevailed in what would be the 1976 CRA.

In the resulting 1978 report the Copyright Office renewed its previous call for a broad performance right for sound recordings. However, no legislation was immediately passed in response to this recommendation, and the controversy remained dormant for a number of years.

Congress first recognized a *limited* performance right in sound recordings when it enacted the Digital Performance Right in Sound Recordings Act (1995). Rather than applying the new sound recording performance right broadly, Congress specifically limited the new protection to digital transmissions in order to avoid disruption to existing business relationships; legislators were concerned strictly with potential performances utilizing emerging technologies. This intent was specifically expressed in the House Report on the DPRA (1995):

Notwithstanding the views of the Copyright Office and the Patent and Trademark Office that it is appropriate to create a comprehensive performance right for sound recordings, H.R. 1506 addressed the concerns of record producers and performers regarding the effects that new digital technology and distribution systems might have on their core business without upsetting the longstanding business and contractual relationships among record producers and performers, music composers and publishers and broadcasters that have served all of these

Industries well for decades. Accordingly, H.R. 1506 creates a carefully crafted and narrow performance right, applicable only to certain digital transmissions of sound recordings.

Again, this new legal right applies only to the digital transmission of sound recordings, and thus had no impact on analog transmissions like existing over-the-air broadcasts or to performances at business establishments and other venues. As an aside, the DPRA also specifically exempted from sound recording performance royalty obligations anticipated terrestrial digital broadcast transmissions, now variously referred to as In-Band/On-Channel (“IBOC”), or the trademarked name “HD-Radio” (17 U.S.C. § 114(d)(1)(A)). Congress sought to preserve and “protect the livelihoods of the recording artists, songwriters, record companies, music publishers and others who depend upon revenues from traditional record sales, ... without hampering the arrival of new technologies, and without imposing new and unreasonable burdens on radio and television broadcasters, which often promote, and appear to pose no threat to, the distribution of sound recordings” (*Senate Report on the DPRA*, 1995). The comparative breadth of statutory protection for performances of musical works versus sound recordings demonstrates one key difference between the two: the musical works performances enjoy broad protection, while the statutory protection for sound recordings is limited.

The DPRA limited the application of the new performance right for sound recordings to just two specific types of digital services: subscription services and interactive services. As noted by identical language in the reports of the committees of each house of Congress, the music industry was primarily concerned that, “certain 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” (*House Report on the DPRA*, 1995; *Senate Report on the DPRA*, 1995).

A compulsory statutory license for digital subscription transmission services, such as cable and satellite music channels, was also established by the DPRA. Again, with a statutory license a transmission service does not need to individually negotiate for permission from each copyright owner, but may perform any and all protected works by paying a royalty fee established under the law. This new statutory license was only to be available to non-interactive services; interactive services would continue to be required to acquire licenses directly from copyright owners. However, the revised statute still imposed limitations on the granting of exclusive licenses for interactive services, in order to not stifle the development of new services because of limited access by these services to copyrighted sound recordings (*House Report on the DPRA*, 1995).

The DPRA was a specific response to the technology of the day; however, advances in technology progressed rapidly subsequent to the passage of that act. Congress extended, through the Digital Millennium Copyright Act (1998), the statutory sound recording digital performance license to newly emerging non-subscription, non-interactive transmissions – which almost exclusively included at the time services commonly known as Webcasts. With this addition Congress recognized that even non-subscription services could present an economic threat to the recording industry.

The DMCA also differentiated between services operating prior to the passage of the 1998 amendments and those that came after the act. Three subscription services – Music Choice; DMX Music, Inc.; and Muzak, L.P. – and two satellite services – Sirius Satellite Radio, Inc. and XM Satellite Radio, Inc. – predated the 1998 amendments. These pre-existing services are evaluated under a different standard for determining royalty rates under statutory licenses than

are later services. The determination of royalty rates under statutory licenses will be discussed in further detail below.

The statute additionally distinguishes two separate uses of copyrighted sound recordings through digital transmissions. First is the basic public performance use protected under Section 114 of the amended Copyright Act, and second is the right to make “ephemeral” copies of digital recordings under Section 112. Ephemeral copies refer to temporary copies of sound recordings made to enable or facilitate the digital transmission of such recordings.

Comparing the Statutory Licenses

Congress has provided for, in some instances, statutory compulsory licenses for the use of copyrighted materials. In reaching such policy determinations Congress has acted to ensure the wide availability of the copyrighted materials while providing for proper compensation to the owners of such materials. Statutory licenses are “compulsory” in the sense that copyright owners have no right to deny licensing the protected intellectual property to a particular prospective licensee; any party meeting the requirements of the statutory license, including the payment of the applicable royalty, must be granted use of the copyrighted material. Procedures for determining the terms of the compulsory licenses are established under accompanying provisions of the statute. The obvious appeal of such a scheme for potential licensees is that the statutory license obviates the need to individually negotiate licenses with each copyright owner, and the entire repertoire of works subject to the statutory compulsory license is available for legal use. In the absence of a statutory compulsory license, an entity wishing to make use of a protected work must reach an agreement directly with each copyright owner. Even in those instances where a statutory compulsory license is available, however, a user may still directly license intellectual property from the copyright owner in order to obtain more favorable terms.

In the cases of performances of musical works and of sound recordings, Congress has created statutory licenses applying to just a few uses. For musical works, a statutory license has been created only for performances of published non-dramatic works made by a public broadcasting entity (17 U.S.C. § 118). A “public broadcasting entity” is defined as any noncommercial educational broadcast station as defined in Section 397 of Title 47 of the United States Code or any network solely serving such stations. The DPRA and DMCA, in combination, have created three basic categories of statutory performance licenses for sound recordings: pre-existing subscription services, as discussed in the previous section; new subscription services, which include those begun after July 31, 1998; and non-subscription services (17 U.S.C. § 114(d)(2)). In each of these three categories of sound recording performance statutory licensees the services must be non-interactive, meaning that a member of the public making use of the service cannot select a particular sound recording (17 U.S.C. § 114(d)(2)(A)(i); 17 U.S.C. § 114(j)(7)).

A cursory review of the statutory language providing for each the musical works and sound recording compulsory licenses reveals a fundamental distinction between the two: the volume of text describing the sound recording statutory license overwhelmingly eclipses the text of the musical works license.

Congress first established the statutory compulsory license for the performance of musical works by public broadcasting entities in the Copyright Revision Act of 1976. Prior to that act such services enjoyed a general not-for-profit exemption under the prior copyright law. In creating this statutory license Congress acceded to the contentions of proponents that:

[T]he creation of such a license is essential to assure public broadcasting broad access to copyrighted materials at reasonable royalties without protracted delays in obtaining permissions from copyright owners. Administrative costs for

individual clearances would be larger than the royalties paid, and beyond the resources of public broadcasting (*Senate Report on the CRA, 1975*).

The Senate report on the CRA stated that the compulsory license is not a subsidy of public broadcasting by copyright owners, because the statutory language “requires the payment of copyright royalties reflecting the fair value of the materials used.”

In sum, the statutory license for musical works allows a compliant public broadcasting entity to publicly perform covered works; to produce and make copies of “transmission programs” for the purpose of distributing programs to public broadcasting entities (e.g., making physical copies of a complete program to be distributed to a network’s affiliates – as was in times of old referred to as “bicycle networking”); and to make temporary copies for the purpose of a later broadcast (e.g., a local station time shifting a network program) (17 U.S.C. § 118(c)).

While the statutory license applicable to musical works is relatively simple and straightforward, the statutory license applicable to sound recordings contains much more complex conditions.

In the case of the statutory license for the performance of musical works, all proceeds flow directly to the copyright owner. On the other hand, the statutory license for the digital performance of sound recording divides royalty receipts between the copyright owner, the featured artist or artists performing on the recording, non-featured vocalists, and non-featured musicians. Congress expressed its rationale for this royalty revenue sharing:

In the absence of the applications of the work made for hire doctrine of the copyright law, record companies, as authors of the sound engineering, and performers, as authors of their recorded interpretations, are joint authors of a sound recording. However, the work made for hire doctrine often applies to recorded performances. Under this doctrine, upon creation of the sound recording, record companies are authors of both the performance and the sound engineering portions of the sound recordings, and thus the sole rightsholders. Performers, in these cases, receive their compensation for the performance from the rightsholder on a contractual basis. The Committee intends the language of

section 114(g) to ensure that a fair share of the digital sound recording performance royalties goes to performers according to the terms of their contracts. Subsection (g) then, refers to all royalties generated by the new digital performance right (*House Report on the DPRA, 1995*).

The statute provides that copyright owners are to receive 50 percent of the royalty proceeds under the sound recording digital performance statutory license, while featured artists are to receive 45 percent of the proceeds and non-featured vocalists and non-featured musicians each receive a 2½ percent share (17 U.S.C. § 114(g)(2)). The non-featured vocalist portion is managed by an administrator jointly appointed by copyright owners and the American Federation of Television and Radio Artists, regardless of membership; the non-featured musician portion is managed by an administrator appointed by copyright owners and the American Federation of Musicians, regardless of membership.

Noteworthy is that this royalty revenue sharing applies only to sound recording statutory licenses; voluntary direct licenses for the digital performance of sound recordings are not required to allocate royalty revenue, unless so provided for in any contractual agreement between the copyright owner – typically the recording label – and the artist or artists.

As was discussed previously, services under the statutory sound recording digital performance license cannot be interactive. Accepting a listener request, as is typical of many radio stations, does not necessarily make a service interactive. The statute only prohibits programming consisting substantially of sound recordings performed within one hour of the request – such as some all-request programs – or playing a request at a time designated by either the listener or broadcaster (17 U.S.C. § 114(j)(7)).

Programming under the statutory sound recording performance license must not exceed the “sound recording performance complement,” which means that in a three-hour period a digital service can transmit no more than three songs from one album or compact disc, if no more

than two of these are played in a row; or four songs by the same featured artist or from the same box set, if no more than three of these are played in a row (17 U.S.C. § 114(j)(13)).

Advance announcements or program schedules listing the titles of specific sound recordings, album titles, or names of featured recording artists are prohibited, with limited exceptions; however, a general announcement that a featured artist will be played at an unspecified future time is permitted (U.S.C. § 114(d)(2)(B)(ii); 17 U.S.C. § 114(d)(2)(C)(ii)).

With the advent of the DMCA several additional restrictions apply to new subscription services and non-subscription services, but do not apply to pre-existing subscription services. Among these is the condition that the transmitting entity makes use of available efforts to prevent recipients from creating digital copies of the transmission (17 U.S.C. § 114(d)(2)(C)(vi)). Such services must also make efforts to prevent recipients from automatically scanning the transmission in order to select a specific recording (17 U.S.C. § 114(d)(2)(C)(v)). Copy protection measures encoded in the original sound recording also cannot be defeated (17 U.S.C. § 114(d)(2)(C)(viii)).

Further, archived programming of less than five hours in length is not permitted on new subscription services and non-subscription services, and archived programming cannot be made available for a period exceeding two weeks. Looped programming cannot be less than three hours in duration. An identifiable program that plays songs in a predetermined order cannot be repeated more than three times in any two-week period if the program is less than one hour in duration, or cannot be repeated more than four times in a two week period if the program is one hour or more in duration (17 U.S.C. § 114(d)(2)(C)(iii)).

The above content restrictions were designed to limit unauthorized copying of the sound recordings by the recipient of the performance. In stark contrast to the performance of sound

recordings, compulsory licenses for performances of the underlying musical works have no similar statutory limitations on content.

New subscription services and non-subscription services additionally must provide a text display for the receiving device, at the time the sound recording is performed, of the title of the sound recording, the album title, and the name of the featured recording artist (17 U.S.C. § 114(d)(2)(C)(ix)).

Establishing Rates and Terms for the Musical Works Statutory License

The process for determining the rates and terms for any statutory license is presently overseen by the Copyright Royalty Judges, a body of the Library of Congress. This group was established by the Copyright Royalty and Distribution Reform Act (2004) to serve the functions previously performed by the Copyright Royalty Arbitration Panel, or “CARP,” along with the Librarian of Congress, and even earlier by the CARP’s predecessor, the Copyright Royalty Tribunal.

The present statute specifies four alternatives for establishing the rates and terms applicable to the compulsory performance license for musical works: 1) any copyright owner or public broadcasting entity may submit proposed license terms to the CRJs, who may then, after a public notice-and-comment process, establish the compulsory license rates and terms applicable to all parties; 2) license agreements voluntarily entered into by copyright owner(s) and public broadcasting entity(ies), to be applied to those parties in lieu of any separate determination, provided such agreements are filed with the CRJs; 3) voluntarily license agreements entered into during a statutory negotiation period, to be applied to the parties to any such agreement; or 4) in the absence of a negotiated agreement, and in response to a petition by an interested party, the CRJs must conduct an arbitration proceeding to determine the compulsory license rates and

terms (17 U.S.C. § 118(b)). Any group of copyright owners or public broadcasting entities can designate a common agent for the purposes of these negotiations. The rates and terms for this compulsory license are presently subject to adjustment at five-year intervals.

Universal to both the musical works and the sound recording statutory licenses are four basic objectives for the CRJs to strive to achieve during the arbitration process:

- (A) To maximize the availability of creative works to the public.
- (B) To afford the copyright owner a fair return for his or her creative work and the copyright user a fair income under existing economic conditions.
- (C) To reflect the relative roles of the copyright owner and the copyright user in the product made available to the public with respect to relative creative contribution, technological contribution, capital investment, cost, risk, and contribution to the opening of new markets for creative expression and media for their communication.
- (D) To minimize any disruptive impact on the structure of the industries involved and on generally prevailing industry practices (17 U.S.C. § 801(b)(1)).

The most recent proceeding to consider the terms and rates for the musical works statutory license occurred in 2002, for the period 2003 through 2007 (67 Fed. Reg. 77170). Entities in that proceeding representing users of this compulsory license were National Public Radio, the Public Broadcasting System, the Corporation for Public Broadcasting, the American Council on Education, the National Religious Broadcasters Music License Committee, the National Federation of Community Broadcasters, and WCPE-FM. Copyright owners were represented by the American Society of Composers, Authors and Publishers; Broadcast Music, Inc.; SESAC, Inc.; the National Music Publishers Association; and the Harry Fox Agency, Inc. (67 Fed. Reg. 66090). The parties to the proceeding were successful in negotiating rates and terms to be jointly proposed to the Librarian of Congress – at that time, the Librarian was charged with receiving such proposals, though that responsibility has now been passed to the CRJs. The joint proposals received no objection upon publication for comment, and were therefore adopted by the Librarian (67 Fed. Reg. 77170).

Regulations to promulgate the most recent rates and terms for the musical works statutory license are contained in Part 253 of Title 37 of the Code of Federal Regulations. Those regulations divide licensees into three categories: the Public Broadcasting Service, National Public Radio, and their member stations; broadcasting entities licensed to colleges and universities and which are not affiliated with National Public Radio; and other public broadcasting entities. In the case of PBS, NPR, and their stations, the statutory license calls for a per-work royalty for any performances not covered by a voluntary agreement. Other public broadcasting entities, including those licensed to colleges and universities, are subject to annual flat-fee blanket royalties payable to ASCAP, BMI, and SESAC and to a per-performance royalty payable to any copyright owner not represented by one of the performance rights societies. A “blanket license” allows a music user to perform any work from a rights society’s repertoire after paying an annual fee.

Establishing Rates and Terms for the Sound Recording Statutory License

The statute allows for the voluntarily negotiation, between copyright owners and services performing works, of rates and terms for royalty payments applicable to non-subscription, non-interactive digital performances of sound recordings (17 U.S.C. § 114(e)). For the want of such a negotiated license agreement, provision is made for the CRJs to initiate an arbitration process (17 U.S.C. § 114(f)). Until the passage of the Copyright Royalty and Distribution Reform Act of 2004, the interval for the sound recording statutory license was two years; the Reform Act extended the statutory license period to five years.

Sound recording copyright owners can designate common agents “to act on their behalf to grant licenses and receive and remit royalty payments;” entities performing sound recordings

can designate common agents “to act on their behalf to obtain licenses and collect and pay royalty fees” (17 U.S.C. § 114(e)(2)).

Again, the statute provides four basic objectives for the CRJs to achieve during the arbitration process, whether the arbitration is to address statutory licensing for musical works or for sound recordings. For sound recording statutory license arbitration, the judges also “may consider the rates and terms for comparable types of subscription digital audio transmission services and comparable circumstances under voluntary license agreements” (17 U.S.C. § 114(f)(1)(B), 17 U.S.C. § 114(f)(2)(B)).

The statute further specifies several criteria that apply to new subscription services and non-subscription services performing sound recordings, but that apply neither to pre-existing subscription services performing sound recordings nor to public broadcasting entities performing musical works. Most notable of these additional requirements is that “the Copyright Royalty Judges shall 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 a willing seller” (17 U.S.C. § 114(f)(2)(B)). The judges are also charged to make their determination of rates and terms, for new subscription services and non-subscription services, based on economic, competitive and programming information presented by the arbitration participants, including:

- (i) whether use of the service may substitute for or may promote the sales of phonorecords or otherwise may interfere with or may enhance the sound recording copyright owner's other streams of revenue from its sound recordings; and
- (ii) the relative roles of the copyright owner and the transmitting entity in the copyrighted work and the service made available to the public with respect to relative creative contribution, technological contribution, capital investment, cost, and risk (17 U.S.C. § 114(f)(2)(B)).

Previous determinations for the three categories of services operating under the sound recording statutory license have demonstrated mixed outcomes.

The most recent proceeding to consider the terms and rates for the digital performance license for sound recordings by pre-existing subscription services occurred in 2003, for the period 2002 through 2007 (68 Fed. Reg. 39837). On January 17, 2003, the Recording Industry Association of America (on behalf of copyright owners), AFTRA, AFM, Music Choice, DMX Music, Inc. and Muzak, LLC filed a joint petition containing a proposal for the adjustment of rates and terms for statutory licenses applicable to the preexisting subscription services (68 Fed. Reg. 4744). On March 3, 2003, Royalty Logic, Inc. filed an objection to the proposed settlement, which objection was rejected by the Librarian of Congress upon determining that RLI did not have a specific interest in the proposed rates and terms (68 Fed. Reg. 39837). The Librarian subsequently adopted the petitioner's proposal, which featured royalty rates based on a service's monthly gross revenue.

The first determination of rates and terms for the use of sound recordings in transmissions made by new subscription services came in 2004, for the period from 1998 through 2004 (69 Fed. Reg. 5693). On April 14, 2003, a petition requesting that the Librarian adopt proposed rates and terms applicable to new subscription services was jointly filed by SoundExchange (at the time an unincorporated licensing division of the RIAA, but which is now a separate legal entity), AFTRA, AFM, and the Digital Media Association (68 Fed. Reg. 23241). That proposal allowed new subscription services, at their election, to pay royalty rates based on any of per-performance, aggregate tuning hour, or percentage of subscription options. "Aggregate tuning hours" means the total hours of programming transmitted to all listeners (e.g., if a service transmits one hour of programming to ten simultaneous listeners, the service's aggregate tuning hours would be equal to ten).

The determination of rates and terms for the non-subscription sound recording statutory license has been much more contentious. In practice, the non-subscription license thus far has been synonymous with “Webcasting.” The first statutory rates and terms for non-subscription licenses came on July 8, 2002, in a determination by the Librarian of Congress, subsequent to a recommendation of the Register of Copyrights and based largely on a report by the CARP (67 Fed. Reg. 45239). The Librarian’s determination established separate per-performance royalty rates for each simultaneous Internet retransmissions of over-the-air radio broadcasts by commercial services, simultaneous Internet retransmissions of over-the-air radio broadcasts by noncommercial services, and all other Internet transmissions. In the case of the first two two-year licensing periods under the DMCA the Librarian consolidated the trial-like arbitration into a single proceeding (65 Fed. Reg. 77394). Therefore, the initial arbitration and the ensuing Librarian’s ruling would determine statutory rates spanning the period from October 28, 1998 through December 31, 2002.

The CARP had concluded that voluntarily negotiated agreements would provide the best benchmark of the statutory willing buyer/willing seller standard (*CARP Report*, 2002). Several such agreements were part of the CARP record, but the arbitrators ultimately rejected all but one for their use in determining the compulsory royalty rates and terms. The CARP determination was based entirely on a single agreement reached between the RIAA and Yahoo!, Inc., at that time one of the nation’s largest commercial Webcasters.

Copyright owners and users alike were displeased with the results of the inaugural arbitration determination. Multiple legal challenges to the statutory rates ensued, accompanied by attempts to politically alter through Congress an arbitration process nearly universally recognized as severely flawed. While these actions were sorted out, copyright owners and users

negotiated a compromise agreement for the next two-year term for 2003 through 2004, without the need to convene a new CARP (69 Fed. Reg. 5693). The statutory sound recording performance royalty agreement negotiated for the years 2003 through 2004, based substantially on the earlier CARP rates, stipulated a fee to be paid for each listener of each sound recording. As an option to the per-performance fee, a music user could elect an aggregate tuning hour option, which was to be based on the total number of listeners in the period multiplied by the number of sound recordings performed.

Noncommercial and small commercial Webcasters who were financially precluded from participating in the first CARP process successfully lobbied Congress for relief from the statutory royalty rates established by the CARP and the Librarian, in the form of the Small Webcasters Settlement Act of 2002. A major proviso of the SWSA was the authorization for noncommercial Webcasters, small commercial Webcasters, and SoundExchange to enter into negotiated agreements that would be binding on all copyright owners of sound recordings (17 U.S.C. § 114(f)(5)(A)). Any negotiated agreement could be optionally used by a service instead of statutory sound recording digital performance royalty rates previously determined by the CARP and the Librarian. Two separate negotiated agreements were established under the SWSA, one for small commercial Webcasters and a separate agreement for noncommercial Webcasters.

The small commercial Webcasters successfully sought from SoundExchange a royalty scheme based on percentage of revenue or percentage of expenses model (67 Fed. Reg. 78510). As of the year 2004, a small commercial Webcaster was defined in the agreement as an entity with gross annual revenues not to exceed \$1,250,000.

The negotiated noncommercial agreement largely replaced the per-performance statutory payments with a pseudo flat-fee annual blanket royalty for sound recording digital performances (68 Fed. Reg. 35008). This settlement further subdivided noncommercial services into three categories: 1) a Noncommercial Educational Entity transmitting a single channel, 2) any other noncommercial service transmitting a single channel, and 3) a noncommercial service transmitting multiple channels. The amount of the base noncommercial royalty varied depending on the categorization. An additional usage fee, applied to any noncommercial service for any month with more than 146,000 aggregate tuning hours, which equates to an audience exceeding an average of 200 simultaneous listeners. In lieu of recordkeeping requirements discussed later in this paper, those entities electing the SWSA noncommercial terms were required to pay an additional fee intended to facilitate SoundExchange's ability to collect or otherwise acquire substitute data on which to base distributions of royalties to copyright owners and performers.

As the statutory negotiation period for the term 2005 through 2006 was beginning, Congress passed copyright reform to replace the reviled CARP. The Copyright Royalty and Distribution Reform Act of 2004 phased out the CARP system and replaced it with three permanent Copyright Royalty Judges. The CRJs are full-time employees of the Library of Congress, thus reducing somewhat the substantial financial burden on arbitration participants; participants in a CARP proceeding previously had been responsible for paying the costs and salaries of the arbitrators. The act additionally reformed several controversial aspects of the governing rules of the arbitration process and extended all pre-existing statutory sound recording royalty rates and terms to coincide with new licensing intervals established by the amendment.

The CARP and the CRJs have each determined that SoundExchange should be the single collective to receive royalty payments made by services operating under the sound recording statutory license, thus reducing the transactional costs for implementing these statutory licenses through the designation of a single administrative body (*CARP Report, 2002; CRJ Report, 2007*).

Several proceedings to determine the reasonable rates and terms for new sound recording performance statutory licenses are presently underway.

On February 16, 2005, the Interim Chief Copyright Royalty Judge announced the commencement of the next proceeding to determine the rates and terms for the non-subscription statutory sound recording digital performance licenses for what is now to be a five-year period beginning January 1, 2006, and ending on December 31, 2010 (70 Fed. Reg. 7970).

The commencement of the proceeding to determine the reasonable rates and terms for pre-existing subscription and satellite digital audio radio services was announced on January 9, 2006. The to-be-determined rates applicable to the activities of pre-existing subscription services will be effective during the period beginning on January 1, 2008, and ending on December 31, 2012. For pre-existing satellite digital audio radio services, the new rates will be effective during the period beginning on January 1, 2007, and ending on December 31, 2012 (71 Fed. Reg. 1455).

The proceeding to establish new rates for business establishment services, the only existing “new subscription service,” was announced on January 5, 2007, for the five-year period commencing on January 1, 2009 (72 Fed. Reg. 584).

The CRJs released their determination in the ongoing non-subscription proceeding on March 2, 2007 (*CRJ Report, 2007*). According to an interview appearing at Salon.com, the record of the proceeding included “48 days of testimony, 13,288 pages of transcripts, 192

exhibits and 475 entries of pleadings, motions and orders, on top of written direct statements and rebuttals from the parties involved” (Roberts, 2007). The resulting hard-hitting increase in royalty rates proposed in the determination immediately prompted petitions for rehearing by eight of the involved parties (*CRJ Order*, March 20, 2007). The ultimate conclusion of this proceeding could extend well beyond the April 2, 2007, date set by the CRJs to hear the positions of each party on the issues raised in the motions for rehearing. The principle difficulty dogging this proceeding appears to be the same challenge that dominated the previous CARP proceeding: determining the rates and terms that would have been negotiated in the marketplace between a willing buyer and a willing seller, when such a marketplace exists only in economic theory.

Recordkeeping for Sound Recording Digital Performances

The statute requires the Copyright Office – and, more recently, the CRJs – to establish rules for services to report to copyright owners information pertaining to digital performances of sound recordings. This rulemaking proceeding is distinct from the negotiation and arbitration process used to set royalty rates. On February 7, 2002, the Office issued a notice of proposed rulemaking specifying recordkeeping requirements (67 Fed. Reg. 5761). The proposed regulations would require that digital services report dozens of items of information for every recording performed. More than 39 sets of initial comments were filed as a result of this notice, followed by 23 sets of reply comments, an all-day public roundtable to discuss the matter was conducted on May 10, 2002, and a recordkeeping status conference was held on July 15, 2002.

The Office eventually announced interim recordkeeping content requirements for sound recording performance statutory licensees on March 11, 2004 (69 Fed. Reg. 11515). Under these interim rules, a service utilizing the statutory license may report as few as six items of data per

sound recording or as many as eight, depending on the amount of data available to the service. Instead of the full-time census reporting sought by SoundExchange, the interim rules require reporting for two periods of seven consecutive days within each calendar quarter.

The CRJs released, on October 6, 2006, an “Interim Final Rule” for the *delivery and format* of reports of use of sound recordings under the statutory license, as these concepts are distinct from the *content* of reports addressed in the previous interim rules (71 Fed. Reg. 59010).

The length of the more than four-year span of this recordkeeping rulemaking proceeding, only to arrive at “interim” regulations, gives some indication as to the controversy and complexity of the issues involved.

Interestingly, the statute uses virtually identical language to specify the requirements for reports of use for sound recordings and for musical works. Compare:

[For musical works]

The Copyright Royalty Judges shall also establish requirements by which copyright owners may receive reasonable notice of the use of their works under this section, and under which records of such use shall be kept by public broadcasting entities (17 U.S.C. § 118(b)(4)).

[For sound recordings]

The Copyright Royalty Judges shall also establish requirements by which copyright owners may receive reasonable notice of the use of their sound recordings under this section, and under which records of such use shall be kept and made available by entities performing sound recordings (17 U.S.C. § 114(f)(4)(A)).

Yet the differences in the outcomes could hardly be more dramatic. The interim recordkeeping rules for notice of use of sound recordings, as published in the Federal Register, span 146.5 column inches in length in columns 2½ inches in width (37 C.F.R. § 370). The *entirety* of the corresponding regulations for each category of noncommercial public broadcasting entities operating under the musical works statutory licenses is as follows:

[PBS, NPR, and their member stations]

Records of use. PBS and NPR shall, upon the request of a copyright owner of a published musical work who believes a musical composition of such owner has been performed under the terms of this schedule, permit such copyright owner a reasonable opportunity to examine their standard cue sheets listing the nondramatic performances of musical compositions on PBS and NPR programs. Any local PBS and NPR station that shall be required by the provisions of any voluntary license agreement with ASCAP or BMI covering the license period January 1, 2003, to December 31, 2007, to prepare a music use report shall, upon request of a copyright owner who believes a musical composition of such owner has been performed under the terms of this schedule, permit such copyright owner to examine the report (37 C.F.R. § 253.4(c)).

[Public broadcasting entities licensed to colleges and universities]

Records of use. A public broadcasting entity subject to this section shall furnish to ASCAP, BMI and SESAC, upon request, a music-use report during one week of each calendar year. ASCAP, BMI and SESAC shall not in any one calendar year request more than 10 stations to furnish such reports (37 C.F.R. § 253.5(e)).

[Other public broadcasting entities]

Records of use. A public broadcasting entity subject to this section shall furnish to ASCAP, BMI and SESAC, upon request, a music-use report during one week of each calendar year. ASCAP, BMI and SESAC each shall not in any one calendar year request more than 5 stations to furnish such reports (37 C.F.R. § 253.6(e)).

Voluntary Licenses

Although the in-depth analysis of voluntary performance licenses negotiated directly with copyright owners is beyond the scope of this paper, a brief mention of two specific initiatives serves to enlighten. Because the musical works statutory compulsory license provides for only noncommercial public broadcasting entities, a significant void exists for commercial broadcasters performing musical works.

The Radio Music License Committee is comprised of volunteers who negotiate voluntary licenses with ASCAP and BMI on behalf of the commercial radio industry (*Radio Music License Committee*, n.d.). The RMLC has recently succeeded in transitioning fees under its negotiated agreements from a percentage of revenue standard to a form of a flat fee model.

Full-powered commercial television stations are represented in voluntary license negotiations with ASCAP, BMI, and SESAC by the Television Music License Committee, a non-profit association (*Television Music Licensing*, n.d.). Present licenses negotiated by the TMLC offer options of per-program license or a blanket license with royalty amounts based on the individual market population size.

Conclusion

Much as digital technologies are now evolving, intellectual property law regarding the use of music in the new media is also extremely transient. The more established province of copyright protection of the performance of musical works continues to be adapted to new contexts, while laws and regulations addressing the digital performances of sound recordings are simultaneously formulated, reviewed and refined. Contrasting the relatively recent development of intellectual property law applicable to the digital performance of sound recordings with the more established legal framework of performances of musical works highlights the legal system's struggle to adequately cope with emerging technology. The complex issues of copyright licensing have the very real potential to significantly color the emergence of technologies that are presently far from being fully developed or understood. The concern then raised is not whether law and policy can keep pace with the development of technology, but whether the lagging acclimatization of intellectual property law in the United States might actually contribute to the holding back of technological advancement.

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