

Music Performance Licensing in the Digital Age
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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 musical performance rights granted by the statute, and is therefore more likely to be familiar to potential “performers” of these works. 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 of avoiding infringement.

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 (ASCAP), Broadcast Music, Inc. (BMI), and SESAC, Inc. Each music author is typically represented by one of the three societies; because the membership 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 repertory represented by the particular performance rights society. 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 of 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.

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 negotiated agreement, the law provides an arbitration process to determine rates and terms of the music works performance license for noncommercial broadcast entities. Fortunately for all parties, negotiated agreements have historically been the norm for the 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

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 many years. The U.S. Congress first recognized a limited performance right in sound recordings when it enacted the Digital Performance Right in Sound Recordings Act of 1995 (“DPRA”). This new legal right applies only to the digital transmission of sound recordings, and thus has 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”), Digital Audio Broadcasting (“DAB”), or the trademarked name “HD Radio” (17 U.S.C. § 114(d)(1)(A)).

The DPRA also established a compulsory statutory license for digital subscription transmission services, such as cable and satellite music channels. 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. Less clear under the DPRA was the standing of non-subscription, non-interactive services such as most Webcasts on the Internet.

Congress extended, through the Digital Millennium Copyright Act of 1998 (“DMCA”), the statutory sound recording digital performance license to non-subscription, non-interactive transmissions – which includes the majority of Webcasts – thereby eliminating most confusion.

The statute actually 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.

Arbitration of the Statutory Sound Recording Royalty

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(f)(2)(A)). For the want of such a negotiated license agreement, provision is made for the Librarian of Congress to initiate an arbitration process.

The arbitration procedure in place as of the effective date of the DMCA was presided over by a Copyright Arbitration Royalty Panel, or “CARP.” Congress stipulated that the CARP, comprised of three professional arbitrators paid by arbitration participants, must adopt rates and terms for the non-subscription, non-interactive digital performance license 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 initial panel determined that voluntarily negotiated agreements would provide the best benchmark of this standard (CARP Report, p. 43). Several such agreements were part of the CARP record, but the arbitrators ultimately rejected all but one for their use in determining the statutory royalty rates and terms. The CARP determination was based entirely on a single agreement reached between the Recording Industry Association of America (“RIAA”) and Yahoo!, Inc., at that time one of the nation’s largest commercial Webcasters (p. 74). 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 would determine statutory rates spanning the period from October 28, 1998 through December 31, 2002.

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 correct 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).

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 will phase out the CARP system and replace it with three permanent Copyright Royalty Judges (“CRJs”). The CRJs will be full-time employees of the Library of Congress, thus reducing somewhat the substantial financial burden on arbitration

participants. The Act additionally reforms several controversial aspects of the governing rules of the arbitration process and extends all pre-existing statutory sound recording royalty rates and terms through the end of 2005.

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

Present Statutory Sound Recording Royalty Rates

The statutory sound recording performance royalty agreement negotiated for the years 2003 through 2004, based substantially on the earlier CARP rates, stipulates a fee to be paid for each listener of each sound recording, which includes the Section 114 royalty as well as a percentage of the performance fee for the Section 112 ephemeral copy license, as listed in **Table A** (69 Fed. Reg. 5693). Instead of the per-performance fee, a music user can elect an “Aggregate Tuning Hour” option, which is based on the total number of listeners in the period multiplied by the number of sound recordings performed. A minimum annual statutory fee of \$500 applies to each channel, except that a music user transmitting multiple channels is liable for a total annual minimum fee not to exceed \$2,500. Again, these rates were automatically extended one year by the Copyright Royalty and Distribution Reform Act.

Table A	
Monthly Statutory Sound Recording Digital Performance Royalty Rates for Non-Subscription Services January 1, 2003 - December 31, 2005 (Select one option below)	
Per-Performance Option:	0.0762¢ per performance, except that 4% of performances shall bear no royalty.
Aggregate Tuning Hour Option:	Non-Music Programming: 0.0762¢ per aggregate tuning hour for programming reasonably classified as news, talk, sports or business programming.
	Broadcast Simulcasts: 0.88¢ per aggregate tuning hour for programming not reasonably classified as news, talk, sports or business programming.
	Other Programming: 1.17¢ per aggregate tuning hour for programming other than broadcast simulcast programming and programming not reasonably classified as news, talk, sports or business programming.
Minimum Annual Fee:	\$500 per channel, regardless of which royalty option is selected. For services transmitting multiple channels the total minimum fee shall be not more than \$2,500.

Alternatives to the Statutory Sound Recording Royalty Rates

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 (“SWSA”). A major proviso of the SWSA was the authorization for noncommercial Webcasters and SoundExchange – at the time an unincorporated licensing division of the RIAA, but which is now a separate legal entity – 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. As with the statutory rates established under arbitration, the SWSA agreements were automatically extended, by the Copyright Royalty and Distribution Reform Act, until the end of the calendar year 2005.

The small commercial Webcasters successfully sought from SoundExchange a royalty scheme based on percentage of revenue or percentage of expenses models (67 Fed. Reg. 78510). As of the year 2004, a small commercial Webcaster is defined in the agreement as an entity with gross annual revenues not to exceed \$1,250,000. The royalty fees for sound recording digital performances available to small commercial Webcasters are listed in **Table B**.

Table B	
Monthly SWSA Sound Recording Digital Performance Royalty Rates for Small Commercial Webcasters January 1, 2004 - December 31, 2005	
The greater of:	10% of the first of the first \$250,000 of annual gross revenues, plus 12% of any annual gross revenues in excess of \$250,000. 7% of annual expenses.
Minimum Annual Fee:	\$2,000 for small Webcaster with annual gross revenue of not more than \$50,000 for the prior year and projected revenue of not more than \$50,000 for the applicable year, or \$5,000 for small Webcaster with annual gross revenue of more than \$50,000 for the prior year or projected revenue of more than \$50,000 for the applicable year.

The negotiated noncommercial agreement largely replaces the per-performance statutory payments with annual blanket fees for sound recording digital performances, listed in **Table C** (68 Fed. Reg. 35008). This settlement further subdivides noncommercial services into three categories: 1) a Noncommercial Educational Entity (“NEE”) transmitting a single channel, 2) any other noncommercial service transmitting a single channel, and 3) a noncommercial service transmitting multiple channels. An additional Usage Fee, listed in **Table D**, applies 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.

Table C				
Annual SWSA Sound Recording Digital Performance Royalty Rates for Noncommercial Webcasters ¹ January 1, 2004 - December 31, 2005				
Noncommercial Educational Entity ² (Single Channel)	Other Noncommercial Webcaster (Single Channel)		Noncommercial Webcaster (Multiple Channels) ³	Recordkeeping Fee (All Noncommercial Webcasters)
	All news, talk, sports or business	Music/Mixed		
\$250/\$500 ⁴	\$250	\$500	\$500	\$25

¹ An additional Usage Fee is due any month the Webcaster’s average audience exceeds 200 simultaneous listeners (146,000 Aggregate Tuning Hours).

² A Noncommercial Educational Entity is defined as “a Noncommercial Webcaster that is directly operated by, or is affiliated with and officially sanctioned by, and the digital audio transmission operations of which are, during the course of the year, staffed substantially by students enrolled at, a domestically accredited primary or secondary school, college, university or other post-secondary degree-granting educational institution, but that is not a ‘public broadcasting entity’ (as defined in 17 U.S.C. § 118(g)) qualified to receive funding from the Corporation for Public Broadcasting pursuant to the criteria set forth in 47 U.S.C. § 396.”

³ Archived programming that complies with statutory content restrictions (referenced later in this paper) is not considered a separate channel. If substantially all programming on all channels is news, talk, sports, or business, the fee for each year is \$250. See the Federal Register for additional conditions and limitations.

⁴ An NEE affiliated with an educational institution with fewer than 10,000 enrolled students will pay \$250; for an NEE at an institution with 10,000 students or more the fee is \$500.

Table D		
SWSA Usage Fees for Monthly Listening in Excess of 146,000 ATH for Noncommercial Webcasters January 1, 2004 - December 31, 2005 (Select one option below)		
Per Performance:		0.02176¢
Per Aggregate Tuning Hour:	All news, talk, sports or business	0.02¢
	Music/Mixed	0.251¢

In lieu of recordkeeping requirements discussed later in this paper, those entities electing the SWSA noncommercial terms must pay an additional fee, listed in **Table C** above, 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.

Recordkeeping for Sound Recording Digital Performances

The statute requires the Copyright Office to establish rules for services to report to copyright owners digital performances of sound recordings. This rulemaking proceeding is distinct in 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 requirements for nonsubscription services 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. The specific reporting requirements are published in 37 C.F.R. § 270.3(c)(2). 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.

Beyond the *contents* of these reports of use, the *format* of reports is also an issue yet to be fully addressed – including whether reports will be required to be made in an electronic format, as opposed to written hard-copy recordkeeping. Comments on this additional issue were filed with the Copyright Office in September of 2002, with a status conference following on October 8, 2002. The Office has yet to issue any regulations addressing the format of reports of use under the statutory sound recording digital performance license.

Digital services electing one of the aforementioned negotiated settlements under the Small Webcaster Settlement Act are subject to recordkeeping requirements established under each respective agreement. Services electing the agreement for small commercial Webcasters under the SWSA must submit to SoundExchange detailed reports of use detailing nine pieces of information for every sound recording performed, on a census basis, but the agreement leaves the specification of the reporting format up to the yet-to-be-determined Copyright Office requirements. As discussed previously, noncommercial services electing the negotiated SWSA agreement pay to SoundExchange a recordkeeping fee instead of providing any sound recording data.

Content Restrictions for Sound Recording Digital Performances

The DMCA enacted several limitations on programming transmitted under the terms of the statutory license, and an antitrust exemption provided by the SWSA to SoundExchange for the negotiation of alternative agreements did not allow for the relaxation of these requirements; therefore, digital services must abide by the statutory content restrictions regardless of whether they operate under the statutory license or the alternative SWSA license.

Services under these sound recording digital performance licenses 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 must not exceed the “sound recording performance complement,” which means that in a three-hour period a digital service can transmit no more than: 1) three songs from one album or compact disc, if no more than two of these are played in a row; or 2) 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 (17 U.S.C. § 114(d)(2)(C)(ii)).

The digital service 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)).

Archived programming of less than five hours in length is not permitted, 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)).

Additional restrictions less likely to appreciably impact digital services should be reviewed in Title 17 of the U.S. Code, Section 114(d)(2)(C).

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 formulated, reviewed and refined. The complex issue of copyright licensing has the very real potential to significantly color the emergence of technologies that are presently far from being fully developed or understood.

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