

**Music Performance Licensing in the Digital Age**  
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- I. U.S. copyright law delineates two categories of protected works applicable to music performances:
  - a. “Musical Works” – The underlying musical composition (the musical notes and arrangement) and any accompanying lyrics, and
  - b. “Sound Recordings” – The fixation or transmission of a musical work in or via a medium.
  
- II. Royalties for music performances are paid:
  - a. For “musical works,” to song composers, lyricists and publishers, or
  - b. For “sound recordings,” to performing artists, musicians, and recording companies.
  
- III. Performances of musical works (the older of these two types of intellectual property).
  - a. Rights might be obtained:
    - i. Directly from the composer or publisher, or
    - ii. Through a performance rights society.
      1. The three U.S. performance rights societies are:
        - a. American Society of Composers, Authors and Publishers (ASCAP),
        - b. Broadcast Music, Inc. (BMI), and
        - c. SESAC, Inc.
      2. Each author is typically represented by one of the performance rights societies; a music user wishing to perform a variety of works will normally secure licenses from all three performance rights societies.
      3. 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.
      4. Performance rights societies license only *nondramatic* performances of musical works. Dramatic performances of musical works require “dramatic” or “grand” rights, obtained directly from the composer or publisher.
    - b. Statutory exemptions apply to performances by some, typically small, businesses.
    - c. Noncommercial educational broadcast stations are provided with a compulsory statutory license for the performance of musical works (Section 118).
  
  - IV. Performances of Musical Works.
    - a. Performance rights for sound recordings are relatively recent in the U.S.
      - i. A limited sound recording performance right was first established by the Performance Right in Sound Recordings Act of 1995 (“DPRA”).
        1. DPRA only applies to the digital transmission of sound recordings.
        2. DPRA specifically exempts from liability performances by anticipated digital broadcasts for licensed terrestrial stations.
        3. DPRA established a compulsory statutory license for digital subscription services, such as cable and satellite music channels.
        4. The statutory license is only available to non-interactive services.

- a. Interactive services must still obtain licenses directly from the copyright owners.
- 5. DPRA was ambiguous about non-subscription, non-interactive services, such as Webcasts.
- ii. Digital Millennium Copyright Act of 1998 (“DMCA”) extended the statutory sound recording digital performance license to non-subscription, non-interactive transmissions.
- iii. Two uses are protected:
  - 1. The public performance (Section 114), and
  - 2. “Ephemeral Copies” (Section 112) – temporary copies used to facilitate transmission.
- b. Statute allows for voluntary negotiations between copyright owners and users to establish the statutory rate.
- c. If no voluntary agreement is reached, the statute allows for an arbitrations process.
  - i. Copyright Arbitration Royalty Panel (CARP) was in place when DMCA went into effect.
    - 1. Controversy surrounded both the process and the results of the first arbitration to set the digital performance rates.
  - ii. Distribution Reform Act of 2004 replaces the CARP with Copyright Royalty Judges (CRJs).
- d. Present statutory rates are based primarily on a per-performance basis, where a fee is paid each time a person listens to an individual musical recording, with an option for a rate based on “Aggregate Tuning Hours.”
- e. Negotiation of alternative royalties was allowed for certain services and SoundExchange under the Small Webcasters Settlement Act of 2002 (SWSA).
  - i. Small commercial services secured royalties based on the greater of a percentage of revenue or a percentage of expenses.
  - ii. Noncommercial services secured royalties based on flat annual fees, with and additional fee in exchange for an exemption to recordkeeping requirements.
- f. Statute requires establishment of recordkeeping regulations:
  - i. Content of recordkeeping reports was initially controversial, but interim regulations have been established after a lengthy debate.
  - ii. Frequency of reporting is contentious: census reporting vs. sampling.
  - iii. Format of reports has yet to be established in the regulations.
  - iv. Services under SWSA have different reporting obligations than statutory licensees.
- g. Statute includes content restrictions applicable to all, some examples include:
  - i. Service cannot be interactive.
  - ii. Cannot exceed “sound recording performance complement.” In a three hour period, no more than:
    - 1. 3 songs from one album or compact disc, if no more than 2 in a row,
    - 2. 4 songs form one artist of box set, if no more than 3 in a row.
  - iii. Advance announcement of specific sound recording, album title, or artist is prohibited.
  - iv. Must provide simultaneous text display of recording title, album title, and artist.
  - v. Limitations on archived and looped programming.