



Music in the Digital Age: The Laws Governing Protection, Consumption and Exploitation

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Legal Bases of Copyright

- U.S. Constitution – Article I Section 8:
 - “The Congress shall have the power . . . To promote the progress of science and useful arts, by securing for limited times to authors and inventors the exclusive right to their respective writings and discoveries.”
- Federal Law – The U.S. Copyright Act, 17 U.S.C. § 101, *et seq.*
- State Law – Limited application
 - e.g., *Flo & Eddie, Inc. v Sirius XM Radio, Inc.*, 28 N.Y.3d 583 (2016)

Music Copyrights

Musical Composition (a.k.a. the Song)

- Protects words and music
- Exclusive Rights
 1. To reproduce the work in copies or phonorecords
 2. To distribute copies or phonorecords of the work to the public by sale or other transfer of ownership, or by rental, lease or lending.
 3. To prepare derivative works based upon the work
 4. To perform the work publicly
 5. To display the work publicly

Sound Recording (a.k.a. the Master)

- Protects the recorded performance
- Exclusive Rights
 1. To reproduce the sound recording in the form of phonorecords
 2. To prepare derivative works based on the copyrighted material
 3. To distribute phonorecords to the public by sale or other transfer
 4. To perform the work publicly by digital audio transmission

Music Copyright Ownership

Composition Owners

1. Songwriter
 - Composer of the music & writer of the lyrics
 - Copyright arises through fixation of composition in tangible medium
2. Music Publisher
 - By transfer or license from the songwriter

Sound Recording Owners

1. Artist
 - Copyright arises through fixation of performance in a tangible medium
2. Producer
 - Capture of performance and addition/editing of sounds creates a copyright interest.
3. Record Label
 - By transfer or license under a recording contract.

Breach of Contract or Copyright Infringement?

Copyright Act Preemption

- 17 U.S.C. § 301: The Copyright Act exclusively governs “all legal or equitable rights that are equivalent to any of the exclusive rights . . . in section 106”
- Elements of Preemption: (1) work is subject to Copyright Act protection; (2) legal claim seeks to vindicate rights equivalent to exclusive right under Copyright Act (i.e., reproduction, adaptation, performance, distribution, display)

Breach of Contract or Copyright Infringement? (cont.)

Federal Circuit Split

(1) No Contract Preemption: 7th Circuit, 11th Circuit, 5th Circuit

- *ProCD, Inc. v. Zeidenberg*, 86 F.3d 1447 (7th Cir. 1996)

(2) Preemption Absent “Extra Elements” of Claim: 6th Circuit, 2nd Circuit

(3) 2nd Circuit Split:

- (a) A Contractual Promise is an “Extra Element” – No preemption
- (b) Restrictive View of “Extra Element” – Depends on nature of the right asserted
- Example: *Shepard v. European Pressphoto Agency*, 291 F. Supp. 3d 465 (S.D.N.Y. 2017).

The Copyright Act: Infringement Claims

Registration of Copyright Prior to Commencement

- *Fourth Estate v. Wallstreet.com*, 139 S. Ct. 881 (Mar. 4, 2019) (Ginsberg, J.): Plaintiff must wait for registration to issue before commencing action
- Can collect damages for conduct before and after registration
- Average 7-month wait for registration, but expedited process exists

Benefits of Copyright Act Claims

- Exclusive Federal Court Jurisdiction (28 U.S.C. § 1338)
- Statutory Damages (17 U.S.C. § 504)
- Eligible to claim if (1) register before infringement starts; or (2) within 3 months of publication
- Elect Actual or Statutory Damages
- \$750 to \$30,000 *Per Work*
- Willful (max \$150,000) vs. Innocent (min \$200)
- Cut From “Same Cloth” as Actual Damages
- Attorneys Fees (17 U.S.C. § 505) – Awarded to “prevailing party” at discretion of the Court

Proving Copyright Infringement

Two Elements of Claim:

- (1) Access to Plaintiff's Work
- (2) Substantial Similarity
- Court Compares Protected Elements of Works
- Expert Testimony – Musicologists
- Recent Music Infringement Cases: *Blurred Lines*, *Stairway to Heaven*, *Dark Horse*

Defenses:

- Not Subject to Copyright
 - Public Domain
 - Lack of Originality (*Gray v. Perry*, C.D. Cal. March 16, 2020; *Hall v. Swift*, 9th Cir., October 28, 2019)
 - Scene a Faire
- Fair use (17 U.S.C. § 107)
- Common Source
- License
- Statute of Limitations: 3 Years (17 U.S.C. § 507(b))
- *De Minimis* Use

User Generated Content: The Digital Millennium Copyright Act

“Safe Harbor”

- “Service Provider”: “provider of online services or network access, or the operator of facilities therefor.” (17 U.S.C. § 512(k)(1)(B))
- Types of Service Providers: (1) provide internet connection (e.g., Verizon); (2) “Information Location Tools” (e.g., Google); (3) provide storage “at the direction of users” (e.g., YouTube, SoundCloud)
- Safe harbor from “monetary relief” – injunctive relief still available (17 U.S.C. § 512(j))

User Generated Content Sites (17 U.S.C. § 512(c))

- No requirement to monitor users
- Safe Harbor requires:
 - (1) (a) lack of actual knowledge of infringement; (b) no circumstances from which infringement is “apparent”; OR (c) upon knowledge, expeditious removable or disabling of access
 - (2) No financial benefit directly attributable to infringement
 - (3) Designation of agent to receive infringement notices

The Digital Millennium Copyright Act (cont.)

- (4) Upon notification, removal of content
- (5) Adopt, reasonably implement and inform subscribers of policy for termination of “repeat infringers”
- (6) Do not interfere with “standard technical measures”

Statutory Requirements of Notice (17 U.S.C. § 512(c)(3))

- Identification of copyrighted work and infringing material
- Location of infringing material
- Notifying party's contact information
- Statement of good faith belief that use not authorized
- Under oath confirmation of authority
- Physical or electronic signature
- Upon proper notice (and no counter notice), service provider has no liability for takedown

The Digital Millennium Copyright Act (cont.)

Counter Notice (17 U.S.C. § 512(g)(2), (g)(3))

- Good faith belief that mistake or misidentification
- Contact information
- Consent to jurisdiction in federal district court and service waiver
- Physical or electronic signature
- If counter notice, service provider *must* replace material

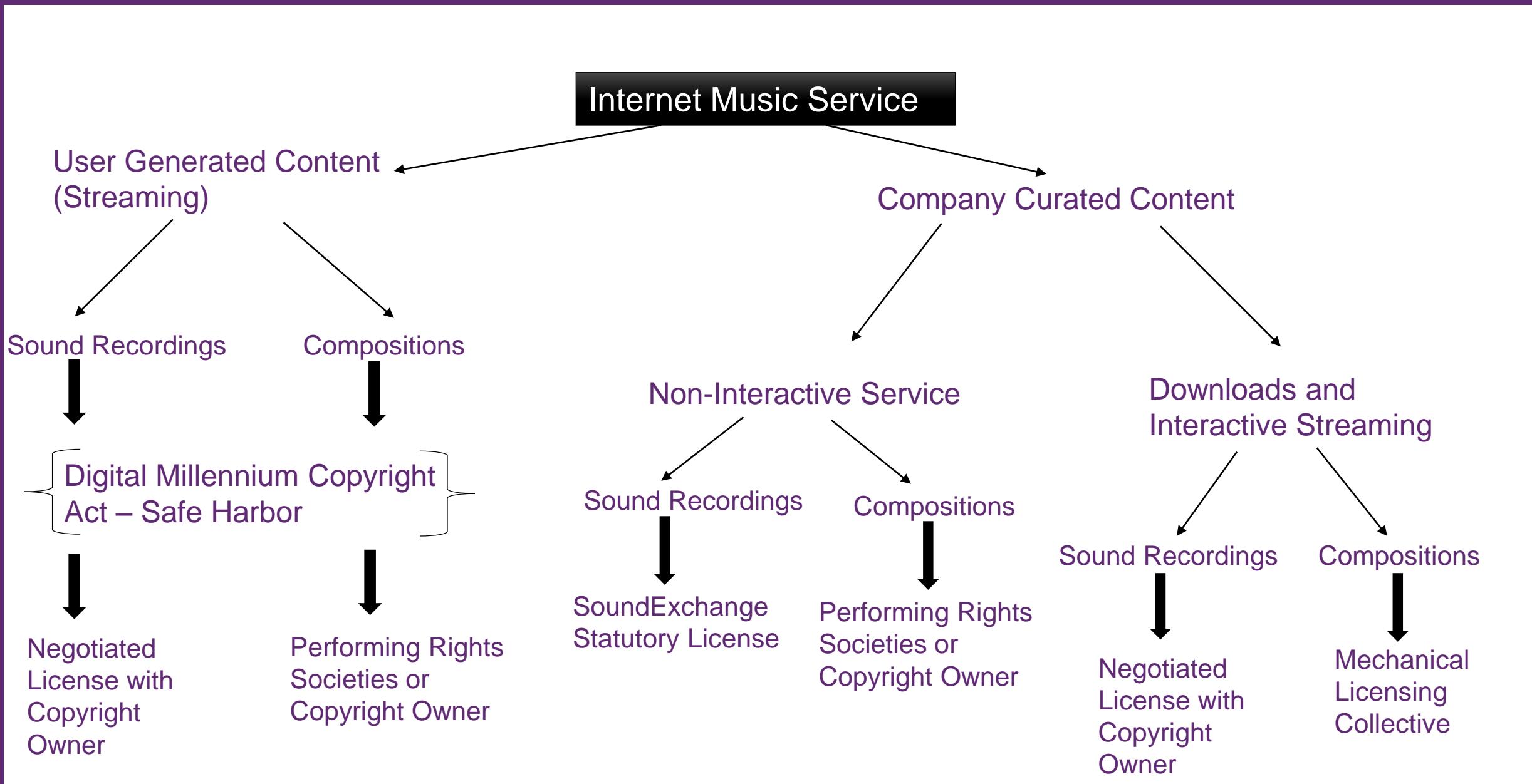
Online Exploitation: Statutory License Schemes

Digital “Radio” Licenses

- Sound Recording Digital Statutory License (17 U.S.C. § 114)
 - Non-interactive services only
 - Other statutory license requirements:
 - No foreknowledge given to listeners, audio only, restrictions on use as part of audio programs
 - SoundExchange administers licenses
- Performance Licenses for Compositions (ASCAP, BMI, SESAC)

Interactive Music Services (Music Modernization Act – July 2019)

- Downloads and interactive streams
- Applies to composition copyrights (still need license from copyright owner for recording)
- Replaces existing song-by-song compulsory licensing structure with blanket licensing system
- “Mechanical Licensing Collective” (“MLC”) will receive notices of license from users, administer blanket license, collect and distribute royalties and identify musical works and owners for payment
- MLC will establish and maintain a public database with the identity, relative shares and location of copyright owners, and the sound recordings in which the compositions are embodied



Pushing the Envelope – New Internet Music Services

Capitol Records, LLC v. ReDigi Inc., 910 F.3d 649 (2018)

- First Sale Doctrine
- Form vs. Substance – technical details of service are critical
- Not fair use

Current Development: Copyright Small Claims Court

Copyright Alternative in Small-Claims Enforcement Act (CASE)

- “Copyright Claims Officers” – part of Copyright Office
- Voluntary submission by agreement of parties (waiver of jury)
- Damages capped at \$30,000 total, \$15,000 for each infringed work
- No right of appeal
- Passed U.S. House of Representatives on October 22, 2019 (vote 410-6)
- Controversy in Senate – alternative legislation being proposed
 - Bill on hold in Senate
 - Potential for abuse by “copyright trolls”
 - Burden on First Amendment expression
 - Lack of appeal right



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