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ENTERTAINMENT LAW FORMS AND ANALYSIS

By

Corey Field

*Member of the California, New York
and Pennsylvania Bars*

and

Barry I. Slotnick

Member of the New York Bar

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Corey Field

About the Authors

COREY FIELD (Principal author). Corey Field represents clients in transactional and litigation matters involving all facets of the entertainment industry including film, television, music publishing, music recording, live concerts, book and magazine publishing, social media, internet and high technology, celebrity rights, agents, managers, and software. His clients range from some of the largest entities in the entertainment industry, to new and emerging companies, celebrities and athletes, the estates of novelists and public figures, high technology and software enterprises, non profit arts and cultural organizations, composers, writers, performing and dance groups, and entrepreneurs.

Prior to practicing law, Mr. Field was an executive in the international music publishing industry, and is a trained musician with a doctorate in music. He is active nationwide as a speaker, author, television commentator, and board member. From 2010 to 2012, he served as the President of The Copyright Society of the U.S.A. (New York); and currently serves as a Trustee of the Marlboro Music School and Festival (Vermont); a Trustee of the BMI Foundation; and is on the Grammy Foundation's Entertainment Law Initiative Advisory Committee. He formerly served as Treasurer of the American Music Center (New York), as a Governor of the Philadelphia Chapter of the Recording Academy, and as a board member of the Music Publisher's Association of the United States.

His writings on entertainment and copyright law have been published in scholarly journals including the Journal of The Copyright Society of the U.S.A.; the UCLA Entertainment Law Review; The Delaware Journal of Corporate Law; the Journal of Intellectual Property Law; Entertainment and Sports Lawyer; and the Entertainment, Publishing, and the Arts Handbook. Mr. Field teaches a course in the Entertainment Studies Department of UCLA Extension titled "Copyright Law in the Entertainment Industry."

Corey's work as an attorney on behalf of his clients has been recognized by inclusion in The Best Lawyers in America in the field of entertainment and copyright law; and by Chambers USA in the field of intellectual property law. He is a member of the California, New York, and Pennsylvania bars and holds a B.A. in Music from the

University of California at Santa Barbara; a Ph.D (D.Phil.) in Music Composition from the University of York, England, and a J.D. *cum laude* from Widener University School of Law. He is the author of several published and recorded musical compositions and articles on music, and is the editor of *The Musician's Guide to Symphonic Music*. Corey is Of Counsel in the Los Angeles office of Ballard Spahr LLP.

BARRY SLOTNICK. Mr. Slotnick is an internationally recognized litigator who has represented clients in the entertainment, advertising, licensing and merchandising industries in courts throughout the United States, in practice areas including copyright, trademark, and the right of publicity.

His clients include several of the largest international entertainment media companies in the film, television, and music industries, as well as artists and creators.

Mr. Slotnick is the Chair of the Intellectual Property and Entertainment Litigation Practice Group at Loeb and Loeb, LLP, in the firm's New York office. He has served as a former President of the Copyright Society of the U.S.A., and a board member of the Association of Independent Music Publishers.

As a frequent speaker, Mr. Slotnick regularly contributes on copyright and entertainment issues for leading entertainment industry and legal organizations.

[3]—Distribution

The Act also gives copyright owners the exclusive right to distribute copies of their works.⁹ The distribution right is tied to the concept of publication, as

“the distribution of copies or phonorecords of a work to the public by sale or other transfer of ownership, or by rental, lease, or lending. The offering to distribute copies or phonorecords to a group of persons for purposes of further distribution, public performance, or public display, constitutes publication. A public performance or display of a work does not of itself constitute publication.”¹⁰

Under copyright law, a business that seeks to reproduce and distribute copies of a work must be certain to obtain *both* reproduction and distribution rights. The mechanical license paid by a record company to a music publisher for the right to include a musical composition on a phonorecord encompasses all three of the rights considered so far: the right to reproduce copies of the phonorecord; the right to create a derivative work (a sound recording) based on the musical composition; and the right to distribute the phonorecord.

[4]—Public Performance

The public performance of a musical composition (for profit) is the right most closely allied with the musical experience itself, because it is based on the performance of a musical composition for an audience. It is different from rights such as reproduction and distribution that depend on tangible physical or digital “manifestations.”

The Copyright Act defines a public performance as follows:

To perform or display a work “publicly” means—

- (1) to perform or display it at a place open to the public or at any place where a substantial number of persons outside of a normal circle of a family and its social acquaintances is gathered; or

⁹ See e.g., A&M Records v. Napster, 239 F.3d 1004, 1014 (1991) (stating the distinction between reproduction and distribution rights as follows: “plaintiffs have shown that Napster users infringe at least two of the copyright holders’ exclusive rights: the rights of reproduction, § 106(1); and distribution, § 106(3). Napster users who upload file names to the search index for others to copy violate plaintiffs’ distribution rights. Napster users who download files containing copyrighted music violate plaintiffs’ reproduction rights.”).

¹⁰ 17 U.S.C. § 101.

(2) to transmit or otherwise communicate a performance or display of the work to a place specified by clause (1) or to the public, by means of any device or process, whether the members of the public capable of receiving the performance or display receive it in the same place or in separate places and at the same time or at different times.¹¹

The public performances and transmissions referred to cover a very broad range of means by which that music can be heard, including radio and television broadcasts, live performances in concert halls and clubs, “on hold” music for phone systems, background music in shopping malls and music on the Internet.¹²

[a]—Performing Rights Societies

The genesis of the nondramatic performance right was recognized in the courts in the case involving Victor Herbert, the American composer and one of the founders of the American Society of Composers, Authors and Publishers (“ASCAP”). In the early years of the twentieth century, Herbert enjoyed the exclusive “grand right” to present staged productions of his works. However, the right to publicly perform nondramatic excerpts, such as individual songs, was not clearly protected.¹³ While Herbert was out to dinner one evening, he heard one of his compositions being performed for the clientele. Realizing that the restaurant was profiting from music that attracted customers, and that he, the composer of the work, was not being compensated, Herbert and his publisher brought suit against the restaurant.

The lower courts held that although Herbert had exclusive dramatic performance rights with respect to the staged “grand rights,” there was no exclusive right of public performance with respect to song excerpts sold as sheet music and performed in a nondramatic setting, without any admission charge. Supreme Court Justice Oliver Wendell Holmes reversed, and memorably explained how the public performance of nondramatic works had value, and contributed to profits, in a commercial setting such as a restaurant, where music provided “a luxurious pleasure not to be had from eating a silent meal.”¹⁴

¹¹ 17 U.S.C. § 101.

¹² See generally, www.ascap.com; www.bmi.com; www.sesac.com (last visited May 16, 2011). The Web sites for each PRS detail the many difference types of licenses available for different public performance scenarios.

¹³ *Herbert v. Shanley Co.*, 229 F. 340 (2d Cir. 1916), *rev'd* *Herbert v. Shanley Co.*, 242 U.S. 591, 593, 37 S.Ct. 232, 61 L.Ed. 511 (1917). Among the rationales was that there was no admission charge for the music, it was presented “for free” for the enjoyment of diners. The lower courts held that the hotel did not infringe Herbert’s public performance rights.

¹⁴ *Herbert v. Shanley Co.*, 242 U.S. 591, 37 S.Ct. 232, 61 L.Ed. 511 (1917).

At this point, music publishers and songwriters recognized that no single composer or music publisher had the resources to monitor music performances in every venue and in every available medium. Herbert helped to create a “performing rights society” (“PRS”) that could represent all music publishers and songwriters, and through strength in numbers, have the business, accounting, and administrative resources to monitor public performances, issue licenses, collect license fees, and distribute those license fees to its publisher and songwriter members.¹⁵ While the Copyright Act uses the name “Performing Rights Society,” the name “Performing Rights Organization” and the corresponding acronym “PRO” are also commonly used.

ASCAP is an unincorporated membership association, formed in 1914 by and for the benefit of its composer, lyricist, and music publisher members, who also comprise the board of directors. ASCAP licenses public performing rights to users wherever and via the myriad technological methods by which music is publicly performed.¹⁶

In 1939, a second performing rights society, Broadcast Music, Inc. (“BMI”), was founded. BMI is a New York corporation formed by

“If the rights under the copyright are infringed only by a performance where money is taken at the door, they are very imperfectly protected. Performances not different in kind from those of the defendants could be given that might compete with and even destroy the success of the monopoly that the law intends the plaintiffs to have. It is enough to say that there is no need to construe the statute so narrowly. The defendants’ performances are not eleemosynary. They are part of a total for which the public pays, and the fact that the price of the whole is attributed to a particular item which those present are expected to order is not important. It is true that the music is not the sole object, but neither is the food, which probably could be got cheaper elsewhere. The object is a repast in surroundings that to people having limited powers of conversation, or disliking the rival noise, give a luxurious pleasure not to be had from eating a silent meal. If music did not pay, it would be given up. If it pays, it pays out of the public’s pocket. Whether it pays or not, the purpose of employing it is profit, and that is enough.”

Id. at 593.

¹⁵ The Copyright Act defines a performing rights society “an association, corporation, or other entity that licenses the public performance of nondramatic musical works on behalf of copyright owners of such works, such as the American Society of Composers, Authors and Publishers (ASCAP), Broadcast Music, Inc. (BMI), and SESAC, Inc.” 17 U.S.C. § 101. The PRS’s retain a small percentage of the gross licensing revenue to cover their administrative costs.

¹⁶ Venues include local television and radio stations, broadcast and cable/satellite television networks, Internet service providers, cable systems operators and direct broadcast satellite services, restaurants, night clubs, universities and colleges, hotels, concert promoters, sports arenas, roller skating rinks and other businesses. See *United States v. ASCAP*, 562 F. Supp.2d 413, 423-425 (S.D.N.Y. 2008), determining license fees for performances of music online, and also describing the activities of ASCAP.

broadcasters, whose shareholders and board of directors are comprised of current or former broadcasters.¹⁷

ASCAP and BMI initially held an exclusive monopoly over the licensing of performing rights, which was challenged in the courts. As a result of antitrust litigation brought by the government against both ASCAP and BMI, ASCAP now operates under a consent decree.¹⁸ Anyone requesting a blanket license for public performances will be granted the license subject to payment of a fee. Should the user object to the license fee, they have the right to petition the district court for a ruling. The court issues a determination of fees after a bench trial.¹⁹ Moreover, ASCAP's rights are non-exclusive; ASCAP members retain the right to license performing rights directly to users.²⁰ BMI is also subject to consent decrees, and licenses non-exclusively.²¹

While ASCAP and BMI are the leading performing rights societies with respect to the number of songwriters, songs, and publishers they represent, a third, smaller performing rights society exists. SESAC, which was originally the "Society of European State Authors and Composers," is now a purely United States-based entity. While SESAC is not subject to a Department of Justice consent decree, it has been the subject of antitrust challenges.^{21.1}

Composers and songwriters can belong to only one performing rights society at a time, but their music publishers typically join each society to which their composers belong. Publishers must use different business names for each society to avoid confusion, but need not actually form separate corporations for their membership in each PRS.

Performing rights societies operate on a non-exclusive basis, meaning that publisher members can choose to license performing rights

¹⁷ See www.bmi.com. See also, *United States v. ASCAP*, N. 16 *supra*, at 425 (describing BMI and noting the differences between BMI and ASCAP).

¹⁸ See: *United States v. ASCAP*, 1940-43 Trade Cas. (CCH) ¶ 56,104 (S.D.N.Y. 1941); *United States v. BMI*, 1940-43 Trade Cas. (CCH) ¶ 56,098 (S.D.N.Y. 1941). In 1941, the United States brought a civil actions against ASCAP and BMI for alleged violations of the Sherman Antitrust Act. The actions were settled by the entry of a consent decree. The 1941 ASCAP consent decree was amended on March 14, 1950 to form the Amended Final Judgment, and again on January 7, 1960. The terms of those orders regulated the manner in which ASCAP could operate within the music industry and gave the Southern District of New York exclusive oversight jurisdiction. The Amended Final Judgment was again amended on June 11, 2001. See *United States v. ASCAP*, 2001 U.S. Dist. LEXIS 23707, 2001 WL158999 (S.D.N.Y. June 11, 2001).

¹⁹ Thus, there is continual "rate court" litigation in the Southern District of New York. See *United States v. ASCAP*, N. 18 *supra*.

²⁰ *Id.* at 14.

²¹ See *United States v. BMI*, 1940-43 Trade Cas. (CCH) ¶ 56,098 (S.D.N.Y. 1941).

^{21.1} See *Meredith Corp. v. SESAC LLC*, 2014 U.S. Dist. LEXIS 26992, 2014 WL 812795 (S.D.N.Y. March 3, 2014).

directly to a user for a specific usage, which is known as “source” or “program” licensing.²²

[b]—Types of Licenses

[i]—Blanket Licensing

Most of the licenses issued by PRS’s are “blanket” licenses, because payment of the fee results in a license to all the copyrighted works in the repertoire of that PRS.²³ In order to be completely licensed for all copyrighted nondramatic songs, and be free to perform any music it chooses, a radio station, for example, will enter into blanket licenses with all three PRS’s. By virtue of agreements with similar performing rights societies in other countries, licenses with the three American PRS’s ultimately cover most of the copyrighted music in the world today.

While blanket licensing is the most comprehensive for the licensee, it may also be the most expensive. Therefore, radio and television broadcasters may seek a less expensive alternative by licensing public performance rights directly from copyright owners of the music (a “source license”) or from producers of television programs who, in effect, pass through the music licensing to their program because they have obtained the right to do so from the owner of the music copyright (a “direct license”).

[ii]—Direct Licenses

A direct license is a license for performance rights granted directly to the licensee, without anyone acting as an intermediary, by the copyright owner of the music. Under their consent decrees, ASCAP and BMI are required to permit stations to obtain direct licenses from the music publishers that own the copyrights. The music publisher and songwriter members of ASCAP and BMI, in turn, only grant

²² See *Buffalo Broadcasting Co., Inc. v. ASCAP*, 744 F.2d 917 (2d Cir. 1984) (blanket licensing of local television stations was not an unreasonable restraint of trade where, because ASCAP’s rights to license music are non-exclusive, stations also had opportunity to acquire the necessary broadcast performance rights directly from copyright owners via “program” license, “direct” license, or “source” license was realistically available to the local stations). See also, *Broadcast Music, Inc. v. DMX, Inc.*, 683 F.3d 32 (2d Cir. 2012) (blanket license fees are subject to adjustable carve-outs to account for direct licensing).

²³ See *Buffalo Broadcasting Co., Inc. v. ASCAP*, N. 22 *supra*, 744 F.2d at 920-923 (discussing performance licensing including blanket licensing, source licensing, and direct licensing in the context of local television broadcasts, also noting that usage of music on television programming is categorized as “theme,” “background,” or “feature.”).

nonexclusive license rights to ASCAP and BMI, and thus have the right to grant direct licenses at their discretion.

[iii]—Source Licenses

A source license in effect uses a producer of a television program as a licensing middleman between the music copyright owner and the television station. For example, the producer of a television program that includes music can obtain from the music copyright owner the right to publicly perform the music in the program and to license that right to others whenever the producer licenses the entire production. In that case, a television station that pays the producer to broadcast the program will also have a license to publicly perform the music, i.e., the television station will have obtained the music license from the source of the program, the producer, instead of from the PRO.

[iv]—Per-Program Licenses

Where a television station has engaged in either direct licensing or source licensing, the station will have obtained some of the public performance rights it needs without going through a PRO. But that may leave a lot of music being broadcast that is not included in the direct or source licenses. The television station can then go to the PRO to license any remaining programs, on a “per-program license” (“PPL”) basis.

[c]—Direct Royalty Payments: Author Share and Publisher Share

Performing rights societies distribute the royalties in two halves, or “shares.” One half goes to the music publishers and copyright owners of the compositions (the “publisher share”), and the other half goes directly to the composers and songwriters (the “author share”).^{23.1} This is an important distinction to bear in mind. All categories of music publishing income, other than performing rights royalties, are “filtered” through the publisher, who then remits to the author the contractual share of the revenue in the form of author’s royalties.

^{23.1} Writer members may assign their “writer share” of royalties to third parties in exchange for a cash advance or other consideration and, if they do so, must comply with notice and other requirements of their membership agreement with their PRO. See, e.g., *Stewart v. First California Bank*, 2013 Cal. App. Unpub. LEXIS 3829 (Cal. App. 2 Dist. May 30, 2013) (detailing various dealings of performer and songwriter Sly Stone, including his assignment of the writer share of his performing rights royalties).

[d]—Exceptions for Grand Rights

Performing rights societies license only “small rights” non-dramatic works such as typical popular songs. Dramatic and staged works, such as operas, musical theatre, and ballet are licensed directly by the music publisher, not by ASCAP, BMI, or SESAC. This holds true with respect to, for example, radio broadcasts of operas, which would not be licensed by any of the PRS’s. Instead, a radio station wishing to broadcast the copyrighted opera would have to obtain a grand rights performance license directly from the music publisher.²⁴

[e]—Registration of Works with Performing Rights Societies

The PRS can pay royalties only if the work is registered with its database.²⁵ In order to participate in the PRS’s licensing efforts and receive income from performances, the music publisher must first apply to the PRS to become a publisher member or affiliate. After establishing membership or affiliation, the publisher must then register with the PRS every work the publisher represents, and every new work the publisher acquires.

The registration of the “title” must indicate the names of all authors of the work, and their percentage of the “writer’s” share. For example, if there are two songwriters, the title registration will indicate both as authors and will indicate they each receive 50% of the author’s share of royalties. As for the other half of royalties, the “publisher share,” that also can be divided between more than one publisher.

Total royalty	\$200
Composer (entire author share)	\$100
Publisher share	\$100

Two authors, a composer and lyricist, split the author share:

Total royalty	\$200
Composer (half of author share)	\$50
Lyricist (half of author share)	\$50

²⁴ Music publishers may sometimes differ with presenting organizations as to whether a “revue” or “cabaret” with a story line is a dramatic or non-dramatic use of the musical compositions, and thus whether it would be covered by a license from a PRS.

²⁵ Registration can be accomplished via written forms or online.

Publisher	\$100
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Two authors, each with a different publisher, split royalties:

Total royalty	\$200
Composer (half of author share)	\$50
Lyricist (half of author share)	\$50
Composer's publisher (half of publisher share)	\$50
Lyricist's publisher (half of publisher share)	\$50

[f]—Limitations to the Public Performance Right

The exclusive rights of a copyright owner under Section 106 of the Copyright Act are subject to limitations set forth in Sections 107 through 122, which contain the Act's fair use guidelines, the first sale doctrine, and various exemptions and compulsory licensing schemes in which Congress sets license rates.²⁶

The limitations on the right of public performance are concentrated in Section 110, which contains an extensive list of situations where no performance licenses are required.²⁷ The exemptions must be reviewed closely, however, to confirm if a given performance meets exemption requirements.

Places of worship are exempt from obtaining performance licenses for music performed in the course of religious services, provided that the music is either non-dramatic, or a dramatic work of a religious nature.²⁸ That exemption does not apply to commercial performances held in a place of worship.²⁹

Section 110 also exempts performances of non-dramatic works in the course of face-to-face teaching at nonprofit educational institutions,

²⁶ 17 U.S.C. §§ 107-122. One example of licensing schemes is the compulsory mechanical royalty for sound recordings.

²⁷ 17 U.S.C. § 110(5). The exemptions that affect the largest portions of society include performance of non-dramatic music and literary works (including song lyrics) in schools, in places of worship in the course of religious services, and radio and television transmissions in restaurants of limited size. The exemptions for smaller eating establishments were enacted as part of the hotly contested "Fairness in Music Licensing Act of 1998" sought by the restaurant lobby. Pub. L. No. 106-44, 113 Stat. 221.

²⁸ 17 U.S.C. § 110(3).

²⁹ If a concert promoter presents a concert that is not part of a church service and charges admission, then the usual performance licenses would be required in the event the concert included nondramatic copyrighted works.

including some related television transmissions.³⁰ There are also exemptions for nonprofit and fundraising performances at any location, provided that none of the presenters or participants receive compensation, and provided that any proceeds, after deduction of reasonable production costs, are used exclusively for educational, religious, or charitable purposes.³¹

Other notable exemptions include performance of music at retail music establishments where the performances are meant to promote the sale of the recordings,³² and performances of non-dramatic musical works by a governmental body or nonprofit agricultural or horticultural organization in connection with an agricultural or horticultural fair. This latter exemption does not extend to for-profit performances by concessionaires or businesses at the event.³³

[g]—Movie Theatres

In the United States, movie theatres are not licensed by the performing rights societies.³⁴ Movie producers obtain the performing rights for movies when they obtain synchronization licenses from the copyright owners.³⁵

[h]—Foreign Performances

Performing rights societies exist in most countries, and have cooperative agreements to remit royalties from their respective territory to their fellow societies. ASCAP, BMI, and SESAC will receive and forward to their members foreign accountings. Many publishers have “sub-publishers” in foreign territories whose job is to collect monies from all sources in that territory. The sub-publisher will belong to the local PRS in its territory. It collects and forwards to the U.S. publisher any publisher-share royalties earned in the foreign territories. The author’s share, however, will usually be transferred from the foreign

³⁰ 17 U.S.C. § 110(1-2).

³¹ 17 U.S.C. § 110(4).

³² 17 U.S.C. § 110(7).

³³ 17 U.S.C. § 110(6). Exemptions also are included for transmissions intended for the blind and other handicapped persons, see 17 U.S.C. § 110(8), and for social events organized by veterans’ groups to which the general public is not invited. 17 U.S.C. § 110(10).

³⁴ See Alden-Rochelle, Inc. v. ASCAP, 80 F. Supp. 900 (S.D.N.Y. 1948). However, outside the United States, performing rights societies do license movie theatres.

³⁵ See § 4.06 *infra*, for a discussion of synchronization licenses.

PRS to the PRS in the United States, and then to the authors, without going through the publishing company.³⁶

(Text continued on p. 4-21)

³⁶ Because other countries do not have the same antitrust laws as the United States, in other countries there is usually only one performing rights society for that territory, and the PRS's in other countries may also handle mechanical licensing as well as performing rights. Some of the leading foreign performing rights societies, all of whom have reciprocal agreements with the United States based PRS's, include the following, listed by their commonly used acronyms. For more information, see the Web site of the International Confederation of Societies of Authors and Composers ("CISAC"), at www.cisac.org (last visited July 10, 2014):

Argentina: SADAIC; Australia: APRA; Austria: AKM; Belgium: SABAM; Brazil: UBC, ECAD; Canada: SOCAN; China: MCSC; Denmark: KODA; Finland: TEOSTO; Greece: AE; France: SACEM; Germany: GEMA; Hong Kong: CASH; Hungary: Artisjus; Iceland: STEF; India: IPRS; Ireland: IMRO; Israel: ACUM; Italy: SIAE; Japan: JASRAC; Lithuania: LATGA-A; Malaysia: MACP; Mexico: SACM; Netherlands: BUMA; New Zealand: APRA; Norway: TONO; Poland: ZAIKS; Portugal: SPA; Russia: RAO; Singapore: COMPASS; South Africa: SAMRO; Spain: SGAE; Sweden: STIM; Switzerland: SUISA; Turkey: MESAM; United Kingdom: PRS.

§ 5.05 Music Licensing in the Terrestrial and Digital Radio Industries

[1]—Governmental and Court Regulation of Mass Media

Radio is a mass medium, with thousands of “over the air” terrestrial radio (“TR”) stations as well as Internet, satellite, and mobile based digital radio services (“DR services”) making countless songs available to many millions of people every hour of every day, resulting in billions of performances of music each year. Copyright law says music copyright owners of musical compositions (songwriters and their music publishers) must be paid when their songs are performed on traditional terrestrial radio, and in the case of DR services, both the music publishers/songwriters and the recording artists/record labels must be paid.¹ However, there are 15,196 AM/FM terrestrial radio stations in the United States and many more DR services.² No copyright owner has the resources or time to conclude licensing agreements with thousands of individual radio services for each song performed.

The solution has been governmental regulation of music licensing on the radio by Congress and the courts, streamlining the process with licensing collectives (Performing Rights Organizations or “PRO”) such as ASCAP, BMI, SESAC, and SoundExchange on the “music” side, and the Radio Music Licensing Committee (RMLC) and the National Association of Broadcasters (NAB) on the radio side. Licensing rates for these broad collectives are either on a “blanket” license arrangement, with a negotiated fee covering every copyright whether it is played or not, or a per-performance “micro-penny” rate based on reportable digital data on users and performances. Other licensing techniques are used to simplify the process, including annual minimum payments without the requirement of detailed reporting for small and non-profit educational radio services. PROs only license “non-dramatic” performances of songs as typically found on radio, as background music in film and television, and in concerts and many other uses, with “dramatic” uses such as stage musicals licensed directly by the copyright owner.

¹ 17 U.S.C. §§ 106, 114. The provisions in the Copyright Act that regulate digital performance of sound recordings were originally part of two legislative acts passed in 1995 and 1998: The Digital Performance Rights in Sound Recordings Act of 1995, Pub. L. 104-39, 109 Stat. 336; and the Digital Millennium Copyright Act, Pub. L. 105-304, 112 Stat. 2860 (1998).

² See FCC News, “Broadcast Station Totals as of December 31, 2012,” available at http://transition.fcc.gov/Daily_Releases/Daily_Business/2013/db0111/DOC-318352A1.pdf.

The PROs only license the public performance right, with other types of music licensing based on making or distributing copies such as mechanical royalties and synchronization licenses handled either by the copyright owner or other types of collectives outside the realm of the non-dramatic public performance right under copyright law.

After its founding in 1914 as the only licensing collective for music publishing performance rights, ASCAP was subject to court challenges on antitrust principles. As a result, there are now three songwriting collectives for public performance licensing, ASCAP, BMI, and SESAC. ASCAP and BMI operate subject to consent decrees supervised by federal courts in the Southern District of New York (the “Rate Court”), designed to prevent licensing monopolies and to ultimately approve license fee rates where the parties are unable to negotiate rates among themselves.³

Music publishers and songwriters grant representation rights to the collectives on a non-exclusive basis, and can choose to directly license performances.⁴ In the case of digital performances on DR, music publishers have attempted to withdraw their entire catalogs from their PRO limited to digital performances, in order to directly license DR at a freely negotiated rate that is not constrained by the court oversight over ASCAP and BMI’s licensing rates. However, the “rate court” that governs ASCAP in the Southern District of New York has held that publishers may not withdraw only a subset of digital rights from the ASCAP repertoire.⁵ Where publishers have successfully engaged in direct licensing, courts have held that the PROs must adjust their blanket license rates to compensate for the fact that portions of the PRO’s repertoire are licensed directly from some PRO member publishers by the DR service.⁶

[2]—Two Separate Copyrights in Every Song

Every song is comprised of two entirely separate copyrights: the songwriters are represented by music publishers who own the copyright in the musical compositions; and the musical performing artists are represented by the record companies that own the copyright in the sound recording. When the music is played on the radio, it is “performed.” Copyright law involves other rights such as making copies,

³ See, e.g., *United States v. ASCAP*, 2001 WL 158999 (S.D.N.Y. June 11, 2001).

⁴ See *Buffalo Broadcasting Co., Inc. v. ASCAP*, 744 F.2d 917 (2d Cir. 1984).

⁵ See *Pandora Media, Inc. v. ASCAP*, 2013 U.S. Dist. LEXIS 133133 (S.D.N.Y. Sept. 17, 2013).

⁶ See, e.g. *Broadcast Music Inc. v. DMX, Inc.*, 683 F.3d 32 (2d Cir. 2012).

publishing, etc., but for radio the copyright category is almost always “public performance.”⁷

Congress has decided that, regarding terrestrial radio, the songwriters and publishers have a performance right and must be paid, but performing artists and record labels have no performance rights.⁸ In other countries, record labels do have a performance right that covers radio broadcasts of their sound recordings. This is not the case in the United States. Historically the record labels accepted this status quo in exchange for the promotion value of airplay that drove record sales.

In the digital world of DR services, the “digital audio transmission” right for sound recordings applies, meaning that a DR service must pay a license fee to both the music publisher/songwriter, and the record label/performing artist.⁹

[3]—Terrestrial Radio: Industry-Wide Negotiation of License Fee Rates

The RMLC and ASCAP/BMI negotiate the industry wide rates for songwriters and publishers that every terrestrial radio station must pay. ASCAP and BMI are heavily regulated by federal courts in New York that ultimately can determine license fees when free negotiations fail. Thus, in exchange for having their powerful licensing collectives, music publishers must accept limits on their licensing power imposed by the courts. In effect, through their oversight, the courts “cap” what music publishers can charge for performance rights. The much smaller SESAC is not subject to the same consent decrees and court oversight but licenses on behalf of its members at reportedly similar rates as those charged by ASCAP and BMI. ASCAP, BMI, and SESAC distribute half the license fee royalties they collect to the music publishers, and the other half directly to the songwriters (after deducting a small administrative fee).

Radio licensing by ASCAP and BMI to the commercial radio industry is traditionally based on the mature and profitable terrestrial radio industry business model, which generated \$17.4 billion dollars in advertising revenue in 2011.¹⁰ Digital online advertising revenue, generated by webcasters affiliated with terrestrial radio stations, generated about \$709 million in advertising revenue, which is about four percent of the terrestrial radio industry total ad revenue.

⁷ See 17 U.S.C. § 106. The public performance right in § 106(4) specifically applies to works other than sound recordings. The limited digital audio transmission right for sound recordings is listed separately in § 106(6).

⁸ *Id.*

⁹ See 17 U.S.C. §§ 106, 114.

¹⁰ See “Radio Industry Grows Annual Advertising Revenue”, available at <http://www.hollywoodreporter.com/news/radio-industry-grows-annual-advertising-revenue-292439> (last visited Jan. 13, 2014).

Currently, the commercial radio industry (other rates apply to public radio and educational radio) pays 1.7% or less of that overall revenue for music rights, in a complex formula with lots of exceptions and adjustments that still generates about \$175 million per year in terrestrial radio licensing fees. The PROs then have the task of dividing up that revenue among their many songwriter and music publisher members. The fees charged by ASCAP and BMI also include “webcasting,” which is where a terrestrial radio station simultaneously streams its signals over the Internet. So if a radio station paid the ASCAP/BMI performance royalty, that blanket license fee also includes the affiliated webcaster Internet stream of the station’s programs.

[4]—The Digital Performance Right for Sound Recordings

DR services are treated differently under copyright law. As the world saw the Internet growing in the 1990s, the record industry successfully lobbied Congress for what it had always lacked on terrestrial radio, a performance right. But the sound recording performance right *only* applies to DR. Congress decided that some DR business models would pay the new sound recording performance royalty based on a percentage of revenue, and other DR business models would pay based on a “micro penny” per-performance rate. Gone were the days of terrestrial radio mass media performances where one “spin” could be heard by millions of unidentified people. With DR, it was possible to accurately track exactly which songs were streamed to exactly which listeners. In the brave new world of DR performance licensing for sound recordings, Congress set various rates, with the “standard” rate at about \$0.0022 per performance. It means that for every 1,000 performances of a sound recording, the license fee paid is \$2.22. For every one million performances, the license fee paid to SoundExchange is \$2,200.

Unlike the terrestrial radio license fees for songwriters, which were based on a percentage of revenues and allowed for *unlimited number* of performances constrained only by the number of hours in a day, the DR royalties were based on *how many* copyrighted works the DR actually performed. More music equals higher license fees. The licensing collective originally set up by the record industry’s trade organization, the RIAA, is called SoundExchange. SoundExchange issues licenses, collects, revenues, and pays out royalties from DR. SoundExchange, distributes 50% of the license amounts to the record label, 45% to the featured artists, and 5% to “sidemen” on the recording (after taking a small administrative fee).

[5]—Types of DR Services: Non-Interactive or Interactive

SoundExchange, the licensing collective for digital performance rights in sound recordings, lists sixteen different categories of services that it licenses.¹¹ Those categories range from the “pre-existing” services, to commercial webcasters affiliated with terrestrial radio stations, to educational and non-profit small webcasters, and other categories. All of these services essentially act as digital radio, meaning they stream music to listeners based on the service’s formulas as to what would be satisfy listeners, often in conjunction with user-determined categories such as “channels” devoted to specific artists. In addition, these services must comply with regulations that limit the user’s ability to select a particular song, or to hear multiple songs from the same album in a short time frame.¹²

The rationale is that allowing users to request any song any time on a streaming “Internet radio” service would harm sales of recorded music. Such services are deemed “non-interactive” and thus qualify for the statutory licensing rates for digital performance of sound recordings in Section 114 of the Copyright Act, and in notices published in the Code of Federal Regulations (CFR).¹³

Interactive DR services that allow a high degree of user control over which sound recordings are streamed do not qualify for the guaranteed or “compulsory” statutory rates for sound recording digital performance and must negotiate licenses directly with the record label copyright owner. Spotify™ is a leading example of a DR service deemed interactive because of the high level of user control over what music is streamed. Thus Spotify’s license agreements with the record industry are freely negotiated, confidential and not matters of public record, but reportedly are marginally higher than the non-interactive statutory rates paid by Pandora™ and other non-interactive DRs.

In 2009, the boundaries between what constitutes a non-interactive service entitled to compulsory licensing of sound recordings at the statutory rate, and an interactive service that must negotiate voluntary licenses with sound recording copyright owners, was examined in *Artista Records, LLC v. Launch Media, Inc.*¹⁴ In that case, the court determined that a DR service that allowed users to select channels based on artists and musical genres, and that used a complex formula to determine what music would be streamed as a result, was not “interactive” because it was in concept similar to the choices consumers

¹¹ See generally, www.soundexchange.com.

¹² See 17 USC § 114(j)(13) “Sound Recording Performance Complement.” See also, 17 USC § 114(D)(2)(C) limiting advance schedule publication of streamed recordings.

¹³ See, e.g. 17 U.S.C. § 114; 37 CFR §§ 360-380.

¹⁴ See *Arista Records, LLC v. Launch Media, Inc.*, 578 F.3d 148 (2d Cir. 2009).

make when choosing a terrestrial radio station. Where a listener selects a “jazz” station instead of a “classic rock” or “oldies” station on terrestrial radio, and the station determines what songs will actually be played, the experience remains fundamentally non-interactive.

Currently popular DR services such as Pandora follow the model set forth in the *Launch Media* case, and are able to let users rate songs and choose channels while remaining non-interactive and thus able to take advantage of statutory license rates.

[6]—The “Pureplay Settlement”

The DR industry and the music industry participate in the digital sound recording royalty rate determination process, with the final decision made by the Copyright Office’s Copyright Royalty Judges, most recently setting rates for the period 2011-2015.¹⁵

Beginning in 2002, and again in 2008, some “pureplay”¹⁶ DR services and smaller webcasters, concerned with the royalty rates set by the Copyright Royalty Judges, lobbied Congress for relief in the form of the Small Webcaster Settlement Act of 2008, passed in 2009, which allowed Pureplay DRs to negotiate lower rates with SoundExchange as compared to the rates set by the Copyright Royalty Judges.

Under the resulting “Pureplay Settlement” between Pureplay DR services and SoundExchange, the per-performance royalties were cut in half, currently at \$0.0011 per performance. But very importantly, the Pureplay Settlement recognized the very different business model of Pureplay DR: not built on impressive ad revenue, but often geared towards realizing profits on stock shares via an IPO, perhaps losing money along the way to obtaining more users and thus more value in the world of the internet IPO. Accordingly, the Pureplay Settlement license rate for sound recordings is the greater of the \$0.0011 per-performance rate, or 25% of the Pureplay DR’s revenue. This “blended” rate recognized that sound recording copyright owners should be paid the micro-penny rate at a minimum, but also share in any revenue success generated by their copyrighted music.

[7]—DR Services and Songwriters

On the songwriting and music publishing side for DR, for those commercial for-profit “Pureplay” services that had no affiliation with a terrestrial station, ASCAP and BMI set up experimental license rates for webcasters, operating within the constraints of court oversight.

¹⁵ See 37 CFR § 380.3.

¹⁶ Certain digital radio services are designated as “pureplay” because they are entirely online and not affiliated with any terrestrial station and do not currently receive much advertising revenue.

The DR rates tended to be higher than the 1.7% paid by terrestrial radio, for good reason: the DR industry was not a mature business model with high revenues. While 1.7% might be an acceptable rate for a \$17.4 billion dollar industry, it was too low for the business model of a Pureplay DR service, which might forego traditional revenue in the quest for more users, receiving funding via venture capital or the stock market instead of advertising sales.

[8]—The Fee Rate Status Quo

The status quo is currently:

Terrestrial Radio and its Affiliated Webcasters

- (1) Sound Recordings: Terrestrial radio paid nothing to perform sound recordings.
- (2) Musical Compositions: Terrestrial radio paid about 1.7% of revenues to ASCAP/BMI for performances of musical compositions by songwriters.
- (3) Musical Compositions - Webcasting: The 1.7% of revenue paid to songwriters and music publishers also included any internet webcasting services offered by the terrestrial radio station.
- (4) Sound Recordings Performed by Affiliated Webcasters: Webcasters affiliated with terrestrial radio stations pay SoundExchange \$0.0022 per performance for streaming sound recordings. Small and university webcasters pay SoundExchange an annual fee of \$500 provided they do not exceed specified numbers of performances.

Pureplay DR Services

- (1) Sound recordings: Under the Pureplay Settlement, Pureplay DR services pay SoundExchange \$0.0011 per performance for streaming sound recordings, or 25% of revenue, whichever is greater. Pandora pays that rate for users of its free, advertising supported service. Where Pandora has subscribers who pay a monthly subscription fee, Pandora pays a higher rate of \$0.0022 per stream.
- (2) Musical Compositions via PROs: Pureplay services pay the ASCAP/BMI “experimental” digital blanket license fee rate which is approximately \$0.00008 per stream (a thousand streams would generate 8 cents). This rate is “capped” by the courts that oversee ASCAP and BMI. ASCAP’s rate court has set a royalty for Pandora of 1.85% of revenue.^{16.1}

^{16.1} See *In re Petition of Pandora Media*, 2014 U.S. Dist. LEXIS 36914, 2014 WL 1088101 (S.D.N.Y. March 18, 2014).

All of the current rates are the result of industry-wide lobbying of Congress or litigation in the “rate courts” in New York, where both sides have the opportunity to make their case and then must abide by the final decisions of either the Copyright Royalty Judges at the Copyright Office or the judges in the “rate court” that regulates ASCAP and BMI in New York.

[9]—Legislative Initiatives Regarding Radio and Music Licensing

License fees that govern the use of music on radio are set by the Congress and the courts, subject to hearings and lobbying that put forward the view of all sides, taking into account business models, revenues, comparable licensing, and historical usage.

In 2009, the recording industry introduced copyright legislation that would have created a performance right for sound recordings on terrestrial radio, the “Performance Rights Act.”¹⁷ Strongly opposed by the broadcasting industry, the bill has not passed.¹⁸

Digital Radio has also been the subject of proposed legislation. Pandora Media, Inc. is the leading Pureplay DR service, with over 200 million users who account for approximately 1.5 billion listening hours per month, using DR technology that allows for millions of simultaneous performances.¹⁹ Pandora offers a free advertising-supported service, and a monthly subscription fee service without advertising interruptions. Pandora’s business model emphasizes acquisition of users resulting in maximum music performances and maximum value of its publicly traded shares, but has not yet found a way to have advertising or subscription revenues create a profit. In fact Pandora’s business model has resulted in Pandora spending about half its revenues on music license payments because the more music Pandora performs, the more licensing fees it must pay in the per-performance model that applies.

In 2012, Pandora lobbied Congress to change copyright law via the proposed Internet Radio Fairness Act of 2012. The proposed Act would change the manner in which the Copyright Royalty Judges (CRJ) are appointed, and more importantly would direct those judges to apply a percentage of revenue model to DR instead of the “per-performance” model.²⁰

¹⁷ H.R. 848.

¹⁸ In 2013, a similar bill, H.R. 3219, the “Free Market Royalty Act,” was introduced.

¹⁹ See Pandora Media Annual Report, <http://investor.pandora.com>.

²⁰ The Internet Radio Fairness Act of 2012 focuses on the relatively low 8% of revenue royalty paid by “pre-existing” subscription services such as SiriusXM and seeks to apply those rates to Pureplay DR, which at the moment must pay per-performance (more performances equals higher royalties as compared to a percentage of revenue model where there can be unlimited performances at no additional cost).

The Fairness Act has not passed and appears to be stalled. Pandora still pays sound recording digital performance royalties under the “Pureplay Settlement” act it negotiated with SoundExchange in 2009 as follows:

Year	CRJ Industry Rate	Pureplay Non-Subscription	Pureplay Subscription
2012	\$0.00210	\$0.00110	\$0.00200
2013	\$0.00210	\$0.00120	\$0.00220
2014	\$0.00230	\$0.00130	\$0.00230
2015	\$0.00230	\$0.00140	\$0.00250

[10]—Digital Licensing Maneuvers by the Music and Radio Industries

The advent of new digital music industry business models, such as digital radio streaming via Pandora and limited downloads via other types of services, led to several important new digital licensing models with overlapping interests: music publishers license digital mechanicals and digital performing rights simultaneously but through different mechanisms, while coexisting with sound recording digital performance licensing by record companies to the same digital services.

From the perspective of music publishers, their share of the new digital royalties, as compared to the record companies, was tightly constrained by the Copyright Act setting mechanical royalty rates and by the court-governed Consent Decrees that regulate public performance royalties charged by ASCAP and BMI. In an attempt to negotiate “market” rates not subject to regulatory and court restrictions, some large music publishers sought to withdraw from the PROs and privately negotiate with Pandora for only a subset of their overall rights, the so-called “Digital Media” performance rights.

The withdrawal of partial Digital Media rights from ASCAP and BMI, and its potential effect upon Pandora Media, has been the subject of recent litigation in the Southern District of New York, the so-called “rate courts” established under Consent Decrees separately entered into between ASCAP and BMI and the Justice Department.

The overall result of the rate court litigation, which is subject to appeals and not entirely tested in practice, is that, in the case of both ASCAP member publishers and BMI affiliated publishers, songs and catalogs are either “all in” or “all out” of the respective PROs for purposes of nondramatic public performance licensing in all media. Publishers may not withdraw just a subset of Digital Media rights for their songs and entire catalogs. But the two rate court decisions had

subtle differences that the music community is still trying to understand in practice.

In the case of ASCAP, before any publishers acted to withdraw only their Digital Media rights, Pandora Media had applied in writing for a blanket license for the period 2011 to 2015, the procedure specified by the ASCAP Consent Decree. In addition to holding that publishers may not withdraw just their Digital Rights, the ASCAP rate court held that, having previously applied for the 2011-2015 blanket license, Pandora will be able to rely on a license for all works/all rights in the ASCAP repertory during that 2011-2015 license term. Subsequently, the ASCAP rate court (which is subject to appeals to the Second Circuit) issued a decision on the ASCAP royalty rate for Pandora, arriving at 1.85% of revenues.

In the case of BMI, the licensing arrangements with Pandora Media had progressed past the initial written application for a license to the next phase under the Consent Decree: an “interim license” that expressly acknowledged that BMI’s licensing of Pandora was subject to adjustment in the event of any publisher withdrawals of Digital Media rights. Having agreed with the ASCAP rate court that withdrawals cannot be limited to Digital Media rights, the BMI rate court further held that the Digital Media rights withdrawals at issue would be given effect but would be further interpreted as not limited to Digital Media: although the publishers never asked for complete withdrawal of rights from BMI when they sought withdrawal of Digital Media rights, the BMI rate court viewed the withdrawals as *de facto* withdrawals of all rights, thus preventing BMI from licensing those works to any users, not just digital media services.

The ruling caught the music industry by surprise. Faced with the BMI rate court’s seeming conversion of a Digital Media rights withdrawal into a complete withdrawal of all rights, for the moment most publishers are indeed remaining with BMI, but Pandora’s interim BMI license with its adjustment provision led Pandora to obtain some direct licenses with the publishers who had previously announced their withdrawal, in the immediate aftermath of the court’s ruling. All of the above analysis of the ASCAP and BMI consent decrees is subject to further appeals and business understandings between the parties.

The relevant rate court decisions are:

ASCAP:

In re Petition of Pandora Media, Inc. v. American Society of Composers, Authors and Publishers, 2013 U.S. Dist. LEXIS 133133, 2013 WL 5211927 (S.D.N.Y. Sept. 17, 2013) (holding that publisher members of ASCAP cannot withdraw partial Digital Media rights to their works in the ASCAP repertory, they can only withdraw entire works; thus, Pandora’s written application for a license in the period 2011-2015 acts

as an interim license including all works in the ASCAP repertory, subject to rate court determination of what that license rate shall be).

In re Petition of Pandora Media, Inc. v. American Society of Composers, Authors and Publishers, 2013 U.S. Dist. LEXIS 175800, Dec. 13, 2013 (granting two large music publishers right to intervene).

In re Petition of Pandora Media, Inc. v. American Society of Composers, Authors and Publishers, 2014 U.S. Dist. LEXIS 36914, 2014 WL 1088101 (S.D.N.Y. March 18, 2014) (the rate court decision setting Pandora's license rate under their 2011-2015 ASCAP license at 1.85% of revenue) (on appeal).

BMI:

Broadcast Music, Inc. v. Pandora Media, Inc., 2013 U.S. Dist. LEXIS 178414, 2013 WL 6697788 (S.D.N.Y. Dec. 19, 2013) (publisher withdrawals from BMI of Digital Media Rights acted, in view of court, as effective withdrawal of all rights).

Id., Docket Entries 77 (Dec. 20, 2013, Letter from Pandora Media); 78 (Dec. 20, 2013, Order in Response); 79 (Dec. 20, 2013, Letter from BMI); 80 (Dec. 20, 2013, Letter from Intervenor Publishers with Memo Endorsement from Court); 81 (Dec. 20, 2013, Letter from Pandora Media); 86 (Dec. 23, 2013, Memo Endorsement with regard to Docket #79 Letter from BMI); 87 (Dec. 23, 2013, Memo Endorsement with regard to Docket #81 Letter from Pandora Media) (Summary of Docket Entries above: Pandora Media's Interim License with BMI does not include any works withdrawn by publishers).

[11]—Artist Response

As the Pandora legislative and licensing maneuvers played out, various artists published blogs and articles bemoaning their low royalty fees generated by DR.²¹ Some commentary was not helpful because it failed to distinguish between songwriting royalties and sound recording royalties, and other commentary was unhelpful because it failed to acknowledge that ASCAP, BMI, and SoundExchange all remit 50% directly to the publisher or record label, then split the remaining 50% between the creators. So if a song has four songwriters, they would each receive 25% of the songwriter share. Thus a songwriter who receives \$100 may have received their correct share from an original license fee payment of \$800 (distributed \$400 to the publisher, and \$100 to each of the four songwriters).

²¹ See "My Song Got Played on Pandora 1 Million Times and All I Got Was \$16.89," available at <http://thetricordist.com/2013/06/24/my-song-got-played-on-pandora-1-million-times-and-all-i-got-was-16-89-less-than-what-i-make-from-a-single-t-shirt-sale/> (last visited Jan. 13, 2014). But compare "Pandora Paid Over \$1,300 for 1 Million Plays, Not \$16.89," available at <http://theunderstatement.com/post/53867665082/pandora-pays-far-more-than-16-dollars> (last visited Jan. 13, 2014).

Because DR tracks the actual number of performances of a song, in recent years artists are seeing something new on their royalty statements that include DR: precise numbers of performances of their works, and sometimes the numbers seem impressive because they total a million or more. However, one million DR performances or more, while impressive sounding, is not a huge number in United States mass media overall context, and at the moment, under the statutory licensing regulations, does not result in large royalty payments.

[12]—Other Royalty Consequences for Songwriters and Artists

Collective licensing organizations such as ASCAP/BMI/SESAC for songwriters, and SoundExchange for performing artists, deduct a small administration fee for their services, and then make direct payments without any further deductions: half to the publisher/record label, and half to the songwriter/artist. In some cases there is a further 5% deduction from the artist's share paid to "sidemen" on the recordings. But when the collectives handle the licensing, they do not take into account any other contractual agreements that may exist between the songwriter and their publisher, or between the musical artist and their record label.

As noted, there may be situations where licensing is not done through the collectives. Where a DR service is interactive, it does not qualify for the statutory compulsory license rates, and it must license interactive sound recording streaming rights directly from each copyright-owning record label. And where a music publisher withdraws its digital performance licensing rights from its PRO, it makes a direct license agreement with the DR service.

In such direct licensing or "voluntary licensing" scenarios, the revenues are all paid directly from the DR service to the copyright owner (music publisher or record label), and are not paid to the PRO or SoundExchange. This means that the songwriter or artist's share of such revenues must first go through their publisher or label, and are now subject to any deductions, recoupment, lower percentage fees or other provisions in the contractual agreement between the songwriter/artist and their music publisher/record label, as well as any accounting or processing delays.

Some publishers and labels may have contracts that simply split such "direct licensing" revenues in the same way as a PRO or SoundExchange would do, while others may have agreements that subject the revenues to recoupment, deductions, lower percentages, etc. In negotiating music publishing and recording agreements, both sides should agree on how such "direct licensing" revenues should be handled.