

## Music Licensing

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The licensing of musical and audiovisual content under US law is complex and somewhat arcane,<sup>1</sup> but it arises in an increasingly broad spectrum of transactions. Industries in which music licensing crops up include software and video games, consumer electronics, television and film, advertising and of course traditional music publishing, distribution and performance. To understand how multimedia transactions are structured today, it is first useful to gain a basic understanding of the dual nature of copyright in music, and the complex statutory framework surrounding music licensing.

### 16.1 THE LEGAL STRUCTURE OF MUSIC COPYRIGHT IN THE UNITED STATES

COPYRIGHT AND THE MUSIC MARKETPLACE U.S. REGISTER OF COPYRIGHTS  
16–18 (2015)

#### 1. Brief History of Copyright Protection for Music

Congress passed the first federal copyright act in 1790. That act did not provide express protection for musical compositions (or “musical works” in the parlance of the current Copyright Act), though such works could be registered as “books.” Then, in 1831, Congress amended the law to provide expressly that musical works were subject to federal copyright protection. The 1831 amendment, however, provided owners of musical works with only the exclusive right to reproduce and distribute their compositions, i.e., to print and sell sheet music, because, “[a]t the time, performances were considered the vehicle by which to spur

<sup>1</sup> The goal of this chapter is not to provide an exhaustive treatment of licensing practices in the music industry, which are notoriously complex and worthy of an entire book in themselves. Rather, I hope to provide the reader with an overview of the issues to watch for when music-related transactions present themselves in a variety of contexts.

the sale of sheet music.”<sup>2</sup> In 1897, Congress expanded the rights of music owners to include the exclusive right to publicly perform their works. With the 1909 Copyright Act, federal copyright protection for musical works was further extended by adding an exclusive right to make “mechanical” reproductions of songs in “phonorecords”—in those days, piano rolls, but in the modern era, vinyl records and CDs.<sup>3</sup> At the same time, Congress limited the new phonorecord right by enacting a compulsory license for this use, a topic that is addressed in greater depth below. And in 1995, Congress confirmed that an owner’s exclusive right to reproduce and distribute phonorecords of musical works extends to digital phonorecord deliveries (“DPDs”)—that is, the transmission of digital files embodying musical works.

Over time, new technologies changed the way people consumed music, from buying and playing sheet music, to enjoying player pianos, to listening to sound recordings on a phonograph or stereo system. But it was not until 1971, several decades after the widespread introduction of phonorecords, that Congress recognized artists’ sound recordings as a distinct class of copyrighted works that were themselves deserving of federal copyright protection. This federal protection, however, was limited to sound recordings fixed on or after February 15, 1972, and, until more recently, protected only the exclusive rights of reproduction, distribution, and preparation of derivative works.

No exclusive right of public performance was granted. Then, in 1995, Congress granted sound recording owners a limited public performance right for digital audio transmissions—though, as discussed below, that right was made subject to compulsory licensing under sections 112 and 114 of the Copyright Act.

## 2. Musical Works versus Sound Recordings

As the above history indicates, a musical recording encompasses two distinct works of authorship: the musical work, which is the underlying composition created by the songwriter or composer along with any accompanying lyrics, and the sound recording, which is the particular performance of the musical work that has been fixed in a recording medium such as a CD or digital file. Because of this overlap, musical works and sound recordings are frequently confused. It is important to keep in mind, however, that these are separately copyrightable works.

A musical work can be in the form of sheet music, i.e., notes and lyrics written on a page, or embodied in a phonorecord, i.e., in a recording of the song. A sound recording comprises the fixed sounds that make up the recording. The musical work and sound recording are separately protected, and can be separately owned, under copyright law.

## Notes and Questions

1. *Influence of the dead hand?* As the above excerpt indicates, much of our current law relating to music copyright is based on technologies that developed over a century ago. How sensible is it for our laws relating to digital downloads and streaming to harken back to the days when

<sup>2</sup> Maria A. Pallante, *ASCAP at 100*, 61 J. Copyright Soc’y 545, 545–46 (2014).

<sup>3</sup> Today, of course, electronic copies, either stored on a computer or a smartphone, are probably more prevalent than either of these older storage media – Ed.



FIGURE 16.1 Prior to 1972, US copyright law did not protect sound recordings, leaving performances of public domain works (such as much of the classical repertoire) entirely without protection.

vinyl records and AM/FM broadcast, let alone player piano rolls, were the primary means for distributing music?

2. *Nondramatic works.* Several important provisions of the Copyright Act, including the compulsory license under Section 115, apply only to “nondramatic” musical works. These provisions thus do not apply to musical works that are part of a dramatic production, such as an opera, ballet or musical. Why do you think this distinction exists? Does it make sense today? In practice, the distinction between dramatic and nondramatic musical works does not play a large role today. If a song from a popular musical such as *Hamilton* or *The Phantom of the Opera* is released separately from the show (e.g., on CD, streaming or download), then it is understood to be subject to Section 115. In general, it is only the performance/recording of the song in a dramatic setting itself (e.g., an unauthorized performance of *Hamilton*) that triggers this distinction. But the question still remains: Why should this distinction exist at all? Why should we treat audio works such as “The Collected Speeches of Martin Luther King, Jr.” or an audio recording of *The Sound and the Fury* differently than an Andrew Lloyd Webber show tune or Lady Gaga’s “Poker Face”?

## 16.2 LICENSING MUSICAL WORKS AND COMPOSITIONS

The divide under US copyright law between musical compositions and sound recordings has led to a bifurcated licensing system with both voluntary and statutory components. In this section we will discuss the licensing of musical compositions (works). Section 16.3 will discuss the licensing of sound recordings. With respect to each type of right licensed (composition/work and sound recording) there are two general categories of rights granted: the “mechanical” reproduction right and the performance right.

## 16.2.1 The “Mechanical” Reproduction Right

The “mechanical” right to reproduce a musical work was first recognized over a century ago:

Until the early twentieth century, owners of musical works were compensated primarily through the reproduction and distribution of sheet music ... And prices for sheet music were, as they are today, set in the free market. By the early 1900s, however, technological advances made music available for the first time via “mechanical” renderings of songs captured in player piano rolls and phonograph records. Although music publishers insisted that physical embodiments of their works were copies, the Supreme Court held otherwise in the 1908 case *White-Smith Music Publishing v. Apollo*, 209 U.S. 1, 8–9, 17–18 (1908), reasoning that such reproductions were not in a form that human beings could “see and read.” With the enactment of the 1909 Copyright Act, however, Congress overrode the Court’s decision and recognized copyright owners’ exclusive right to make and distribute, and authorize the making and distribution, of phonorecords—i.e., mechanical reproductions—of musical works.<sup>4</sup>

Today, the “mechanical” reproduction right covers the reproduction of a musical work in all physical forms, including not only sheet music and player piano rolls, but vinyl records, magnetic tape, CDs, DVDs, ringtones and electronic downloads and copies of all kinds. Even some works that are electronically streamed require mechanical reproduction rights (see Note 5, below). For anachronistic reasons, all of these types of recordings are still called “phonorecords.”

## 16.2.2 The Compulsory License for Mechanical Reproductions under Section 115

When the mechanical reproduction right was first incorporated into the 1909 Copyright Act, Congress was concerned that the Aeolian Company, the dominant US manufacturer of player pianos, could acquire enough exclusive rights from music publishers that it would develop a



FIGURE 16.2 Paper rolls used in player pianos were the first “mechanical” reproductions of music.

<sup>4</sup> Registrar of Copyrights, Copyright and the Music Marketplace 26 (2015).

monopoly in player piano rolls. To avoid that result, Congress simultaneously enacted the first compulsory license under US copyright law. This compulsory license is currently codified at Section 115 of the Copyright Act.

17 U.S. CODE § 115: SCOPE OF EXCLUSIVE RIGHTS IN NONDRAMATIC MUSICAL WORKS: COMPULSORY LICENSE FOR MAKING AND DISTRIBUTING PHONORECORDS

In the case of nondramatic musical works, the exclusive rights provided by clauses (1) and (3) of section 106, to make and to distribute phonorecords of such works, are subject to compulsory licensing under the conditions specified by this section.

**(a) Availability and Scope of Compulsory License**

- (1) When phonorecords of a nondramatic musical work have been distributed to the public in the United States under the authority of the copyright owner, any other person . . . may, by complying with the provisions of this section, obtain a compulsory license to make and distribute phonorecords of the work. A person may obtain a compulsory license only if his or her primary purpose in making phonorecords is to distribute them to the public for private use, including by means of a digital phonorecord delivery.
- (2) A compulsory license includes the privilege of making a musical arrangement of the work to the extent necessary to conform it to the style or manner of interpretation of the performance involved, but the arrangement shall not change the basic melody or fundamental character of the work, and shall not be subject to protection as a derivative work under this title, except with the express consent of the copyright owner.

The compulsory license under Section 115 is sometimes referred to as the “cover” license because it allows anyone to release a “cover” recording of a musical work after an initial recording of the work has been released with the authorization of the copyright owner. Recall that this license applies only to a musical composition (i.e., a song), and not to a *recording* of a song. For example, in 1984 Leonard Cohen released the song “Hallelujah,” which he wrote, on his album *Various Positions*. Following its initial release, more than 300 other artists, including k.d. lang, Rufus Wainwright, John Cale and Jeff Buckley, have released their own versions of “Hallelujah.”<sup>5</sup> So long as the cover version does not alter “the basic melody or fundamental character” of the original work, it may be released under Section 115 without the permission of the copyright owner.

Though a compulsory license permits a performer to release a version of a musical work without the permission of the copyright owner, it does not grant this right for free. Under the 1909 Copyright Act, Congress established a statutory royalty rate of two cents per copy. That rate has since been increased and is today established by the Copyright Royalty Board (“CRB”), which is composed of three administrative judges appointed by the Librarian of Congress. The following excerpt from a recent case explains the CRB’s process for determining royalties for particular mechanical rights, in this case ringtones.

<sup>5</sup> The song “Hallelujah” was also used to great effect in the motion picture *Shrek* (2001), but, as discussed in [Section 16.4](#), the use of music in film requires a special set of “synchronization” licenses and is not authorized under Section 115.

*Recording Industry Assn. of Am. v. Librarian of Congress*

608 F.3d 861 (DC Cir. 2010)

## KAVANAUGH, CIRCUIT JUDGE

By law, the Copyright Royalty Board sets the terms and rates for copyright royalties when copyright owners and licensees fail to negotiate terms and rates themselves. As part of its statutory mandate, the Board sets royalty terms and rates for what is known as the § 115 statutory license. That license allows individuals to make their own recordings of copyrighted musical works for distribution to the public without the consent of the copyright owner.

In carrying out its statutory responsibilities under 17 U.S.C. § 115, the Board instituted a ... penny-rate royalty structure for cell phone ringtones, under which copyright owners receive 24 cents for every ringtone sold using their copyrighted work.

The Recording Industry Association of America challenges ... the Board's decision, arguing that [it was] arbitrary and capricious for purposes of the Administrative Procedure Act.<sup>6</sup> We conclude that the Board's decision was reasonable and reasonably explained. We therefore affirm the Board's determination.

## I A

Most songs played on the radio, sold on CDs in music stores, or digitally available on the Internet through services like iTunes embody two distinct copyrights—a copyright in the “musical work” and a copyright in the “sound recording.” See 17 U.S.C. § 102. The musical work is the musical composition—the notes and lyrics of the song as they appear on sheet music. The sound recording is the recorded musical work performed by a specific artist.

Although almost always intermingled in a single song, those two copyrights are legally distinct and may be owned and licensed separately. One party might own the copyright in the words and musical arrangement of a song, and another party might own the copyright in a particular artist's recording of those words and musical notes.

This case involves licenses in a limited category of copyrighted musical works—as opposed to sound recordings. Section 115 of the Copyright Act allows an individual to make and distribute phonorecords (that is, sound recordings) of a copyrighted musical work without reaching any kind of agreement with the copyright owner. That right does not include authorization to make exact copies of an existing sound recording and distribute it; if a musical work has been recorded and copyrighted by another artist, a licensee “may exercise his rights under the [§ 115] license only by assembling his own musicians, singers, recording engineers and equipment, etc. for the purpose of recording anew the musical work that is the subject of the [§ 115] license.” 2 Melville B. Nimmer & David Nimmer, *Nimmer On Copyright* § 8.04[A], at 8–58.5 (2009). For example, a § 115 licensee could pull together a group of musicians to record and sell a cover version of Bruce Springsteen's 1975 hit “Born to Run”, but that licensee could not make copies of Springsteen's recording of that song and sell them.

The § 115 licensing regime operates in a fairly straightforward manner. When a copyright owner distributes work “to the public,” § 115's provisions are triggered. Once that

<sup>6</sup> The RIAA also contested the Board's determination of a 1.5 percent monthly late fee for interest on unpaid royalties.

occurs, anyone may “obtain a compulsory license to make and distribute phonorecords of the work” under § 115 so long as the “primary purpose in making [the] phonorecords is to distribute them to the public for private use.” *Id.* Assuming the copyright has been registered with the Copyright Office, the licensee owes the copyright owner a royalty for every phonorecord “made and distributed in accordance with the [§ 115] license.” *Id.*

Because the § 115 license issues without any agreement between the copyright owner and the licensee, the system needs a mechanism to figure out how much the licensee owes the copyright owner and what the terms for paying that rate should be. Although that mechanism has changed over time, the Copyright Royalty Board currently serves as the rulemaking body for this system. The Board is a three-person panel appointed by the Librarian of Congress and removable only for cause by the Librarian. The Board sets the terms and rates for copyright royalties when copyright owners and licensees fail to negotiate terms and rates themselves.

As relevant here, the Copyright Act requires the Board to set “reasonable terms and rates” for royalty payments made under the § 115 license when the parties to the license fail to do so. When establishing terms and rates under that license, the Copyright Act requires the Board to balance four general and sometimes conflicting policy objectives: (1) maximizing the availability of creative works to the public; (2) providing copyright owners a fair return for their creative works and copyright users a fair income; (3) recognizing the relative roles of the copyright owners and users; and (4) minimizing any disruptive impact on the industries involved. *Id.* § 801(b)(1)(A)–(D).

At specified intervals, the Board holds ratemaking proceedings for licenses issued under the Copyright Act. Section 115 rate-making proceedings can occur every five years “or at such other times as the parties have agreed.” *Id.* § 804(b)(4).

## B

In 1996, the parties with an interest in the § 115 license (such as the Recording Industry Association of America, the Songwriter’s Guild of America, and the National Music Publishers’ Association) agreed on various terms and rates for the compulsory license. They also agreed that the settlement with respect to those terms and rates would expire 10 years later. In 2006, after the parties found they could not reach a new compromise, the Board instituted proceedings to set certain terms and rates governing the operation of the § 115 license. The process was long and complicated, involving 28 days of live testimony, more than 140 exhibits, and more than 340 pleadings, motions, and orders.

When the Board published its final determination from those proceedings in 2009, it ... established a royalty rate for cellular phone ringtones—a sound cell phones can make when they ring that often samples a popular song. It set the rate at 24 cents per ringtone sold.

The Recording Industry Association of America, known as RIAA, is a trade association representing companies that create, manufacture, and distribute sound recordings. It participated as a party in the § 115 licensing proceedings. After the Board issued its determination, RIAA filed a motion for rehearing. The Board denied the motion. RIAA now appeals ... the imposition of a penny-rate royalty structure for ringtones at 24 cents per ringtone sold.

The Board’s rulings are subject to review in this Court under the arbitrary and capricious standard of the Administrative Procedure Act. 17 U.S.C. § 803(d)(3). As a general matter,



FIGURE 16.3 In 2010, the Copyright Royalty Board determined compulsory licensing rates for ringtones.

our review under that standard is deferential. And we give “substantial deference” to the ratemaking decisions of the Board because Congress expressly tasked it with balancing the conflicting statutory objectives enumerated in the Copyright Act. “To the extent that the statutory objectives determine a range of reasonable royalty rates that would serve all [the] objectives adequately but to differing degrees, the [Board] is free to choose among those rates, and courts are without authority to set aside the particular rate chosen by the [Board] if it lies within a zone of reasonableness.”<sup>7</sup>

### III

As part of the § 115 licensing proceedings, the Board established what is known as a penny-rate royalty structure for ring-tones. Under that rate, copyright owners receive 24 cents for every ringtone sold using their copyrighted work.

In the proceeding before the Board, RIAA argued for a percentage-of-revenue royalty structure under which copyright owners would receive 15 percent of the wholesale revenue derived from the sale of a ringtone. As a less preferred alternative, RIAA sought a penny-rate royalty structure in which copyright owners would receive 18 cents per ringtone sold.

<sup>7</sup> *Recording Indus. Ass’n of America v. Copyright Royalty Tribunal*, 662 F.2d 1, 9 (D.C.Cir.1981).



Applying the § 801(b)(1) criteria, the Board settled on a penny-rate royalty structure of 24 cents per ringtone sold. With respect to the first statutory criterion it had to consider—maximizing the availability of creative work—the Board concluded that a “nominal rate[] for ring-tones” supports that objective. As to the second criterion—affording the copyright owner a fair return—the Board found that the new rates did not deprive copyright owners of a fair return on their creative works. The Board also found that the penny rate met the third statutory criterion—respecting the relative roles of the copyright owner and user. And under the fourth criterion—minimizing disruptive impact on the industry—the Board found that the rate structure it chose was reasonable and already in place in many parts of the market, minimizing any disruptive impact.

On two separate grounds, RIAA now challenges the structure of the ringtone royalty rate imposed by the Board—specifically, the fact that it is a penny rate rather than a percentage-of-revenue rate. First ... RIAA alleges that the penny-rate royalty structure inappropriately departs from market analogies for voluntary licenses. Second, RIAA contends that a penny rate is unreasonable in light of falling ringtone prices.

A

As previously discussed, although existing market rates for voluntary licenses do not bind the Board when making its determinations, the Board considered those rates when selecting the penny-rate royalty structure.

The Board expressly recognized that marketplace ringtone contracts typically provide for royalty payments at the greater of (1) a penny rate ranging from 10 to 25 cents; (2) a percentage of retail revenue ranging from 10 to 15 percent; and (3) a percentage of gross revenue ranging from 9 to 20 percent.

After weighing the costs and benefits of the parties’ proposals and taking into account relevant market practices, the Board concluded that a penny rate was superior to a percentage-of-revenue rate for several reasons.

First, the Board determined that a penny rate was more in line with reimbursing copyright owners for the use of their works. Under the Board’s determination, every copyright owner will receive 24 cents every time a ringtone using their work is sold. By contrast, under a percentage-of-revenue system, the royalty paid to copyright owners would vary based on factors in addition to the number of ringtones sold, such as the price charged to the end consumer. This Court has validated the Board’s preference for a royalty system based on the number of copyrighted works sold—like the penny rate—as being more directly tied to the nature of the right being licensed than a percentage-of-revenue rate.

Second, when looking to market analogies, the Board determined that many of the concerns driving the adoption of a percentage-of-revenue royalty structure in other instances were absent here. For example, the Board had previously concluded that a percentage-of-revenue royalty structure made sense in the satellite digital radio context because it would be difficult to measure how much a given work was actually used. In the case of ring-tones, “measuring the quantity of reproductions presents no such problems.” 74 Fed. Reg. at 4516. In a market based on the sale of individual copyrighted works (like the ringtone market) as opposed to a market where copyrighted works are bundled and sold as a service to consumers (like satellite radio) figuring out how many times a copyrighted work is used (i.e., sold) is much easier.

Third, the Board found that the simplicity of using a penny-rate royalty structure supported its adoption: “No proxies need be formulated to establish the number of such reproductions,” which are “readily calculable as the number of units in transactions between the parties.” 74 Fed.Reg. at 4516. That simplicity contrasts sharply with the “salient difficulties” presented by RIAA’s proposed percentage-of-revenue royalty structure. As the Board recognized, not least among these difficulties were definitional problems such as disagreements about what constituted “revenues.”

Tying all of those strands together, the Board ultimately concluded “that a single penny-rate structure is best applied to ringtones as well as physical phonorecords and digital permanent downloads” because of “the efficiency of administration gained from a single structure when spread over the much larger number of musical works reproduced” under the § 115 licensing regime. 74 Fed.Reg. at 4517 n. 21. In the Board’s view, the penny rate provided “the most efficient mechanism for capturing the value of the reproduction and distribution rights at issue.” 74 Fed.Reg. at 4515.

We find nothing unreasonable about the Board’s preference for a penny-rate royalty structure.

## B

RIAA also argues that plummeting ring-tone prices render the penny rate inherently unreasonable. The Board considered and rejected this argument, stating: “RIAA’s shrill contention that a penny-rate structure ‘would be disruptive as consumer prices continue to decline’ and should, therefore, be replaced by a percentage rate system in order to satisfy 801(b) policy considerations is not supported by the record of evidence in this proceeding. RIAA [does not] offer any persuasive evidence that would in any way quantify any claimed adverse impact on projected future revenues stemming from the continued application of a penny-rate structure” 74 Fed.Reg. at 4516.

Although the Board concluded that falling ringtone prices were not relevant to the choice of a penny-rate royalty as opposed to a percentage-of-revenue royalty, it did find information about declining prices useful in structuring the terms of the penny rate it chose. For example, the Board referenced concerns about reduced revenues when rejecting the copyright owners’ request that selected rates be adjusted annually for inflation.

The Board examined the relevant data and determined that there was no meaningful link between the selection of a penny-rate royalty structure for ringtones and future ringtone revenues. RIAA has failed to present any basis for us to overturn that conclusion.

We affirm the Copyright Royalty Board’s determination.

So ordered.

## Notes and Questions

1. *Whose interests?* As discussed in *RIAA v. Librarian of Congress*, in 2009 the CRB established a compulsory license rate of 24 cents per ringtone. RIAA had initially requested a rate of 15 percent of revenue or 18 cents per ringtone. Whose interests was RIAA seeking to advance?
2. *The ringtone premium.* While the court confirmed the reasonableness of this rate, it is curious that the mechanical compulsory licensing rate for full phonorecord recordings is only 9.1 cents per copy. Why the discrepancy? The Registrar of Copyrights explains:

It may seem counterintuitive that ringtones—which typically use only short excerpts of musical works—have a significantly higher royalty rate than full-length reproductions. Because

ringtones abbreviate the full-length work, it was not immediately clear whether ringtones were eligible for the section 115 license. As a result, many ringtone sellers entered into privately negotiated licensing arrangements with publishers at rates well above the statutory rate for the full use of the song. In 2006, the Copyright Office resolved the section 115 issue, opining that ringtones were subject to compulsory licensing. But in the ensuing rate-setting proceeding before the CRB, music publishers were able to introduce the previously negotiated agreements as marketplace benchmarks, and as a result secured a much higher rate for ringtones than the rate for full songs.<sup>8</sup>

3. *Harry Fox and voluntary mechanical licenses.* Not all mechanical reproductions of cover versions are made under the Section 115 compulsory license. As the Registrar of Copyrights explains, many such reproductions are made pursuant to negotiated licenses:

[I]n practice, because of the administrative burdens imposed by the [Section 115 compulsory] license—including service of a notice on the copyright owner and monthly reporting of royalties on a song-by-song basis—mechanical licensing is often handled via third-party administrators. The oldest and largest such organization is the Harry Fox Agency, Inc. (“HFA”), which was established ... in 1927 and today represents over 48,000 publishers in licensing and collection activities. Mechanical licenses issued by HFA incorporate the terms of section 115, but with certain variations from the statutory provisions. Another entity that assists with mechanical licensing is Music Reports, Inc. (“MRI”), which prepares and serves statutory notices on behalf of its clients and administers monthly royalty payments in keeping with the requirements of section 115. Mechanical licenses are also issued and administered directly by music publishers in many instances.

...

Although the use of the section 115 statutory license has increased in recent years with the advent of digital providers seeking to clear large quantities of licenses, mechanical licensing is still largely accomplished through voluntary licenses that are issued through a mechanical licensing agency such as HFA or by the publisher directly. While HFA and other licensors typically incorporate the key elements of section 115 into their direct licenses, they may also vary those terms to some degree, such as by permitting quarterly accountings rather than the monthly statements required under the statute. That said, as observed above, the terms of the statutory license act as a ghost in the attic, effectively establishing the maximum amount a copyright owner can seek under a negotiated mechanical license.<sup>9</sup>

4. *The decline of mechanical reproduction.* The rise of online music consumption has caused a drastic shift in the rights being exploited by music copyright holders. As shown in [Figure 16.4](#), between 2004 and 2013 the music industry transitioned from deriving almost all of its revenue from the sale of physical CDs to revenue that is dominated by digital downloads (also mechanical reproductions), with streaming playing an increasingly important role. Why should this shift matter to the music industry? To composers? To performing artists?
5. *Mechanical copies and digital streaming.* The streaming of music is considered a performance or broadcast, and as such is addressed by the performance licenses discussed in [Section 16.3](#). Nevertheless, streaming services are required, as a technical matter, to make reproductions of musical works in order to operate. As a result, the Copyright Office determined in 2008 that streaming services could utilize the Section 115 compulsory licensing process to cover the reproductions made to facilitate streaming. In 2009, the CRB established the first rates under Section 115 for interactive streaming services. As a result of these developments,

<sup>8</sup> Registrar of Copyrights, *supra* [note 4](#), at 30.

<sup>9</sup> *Id.* at 21.

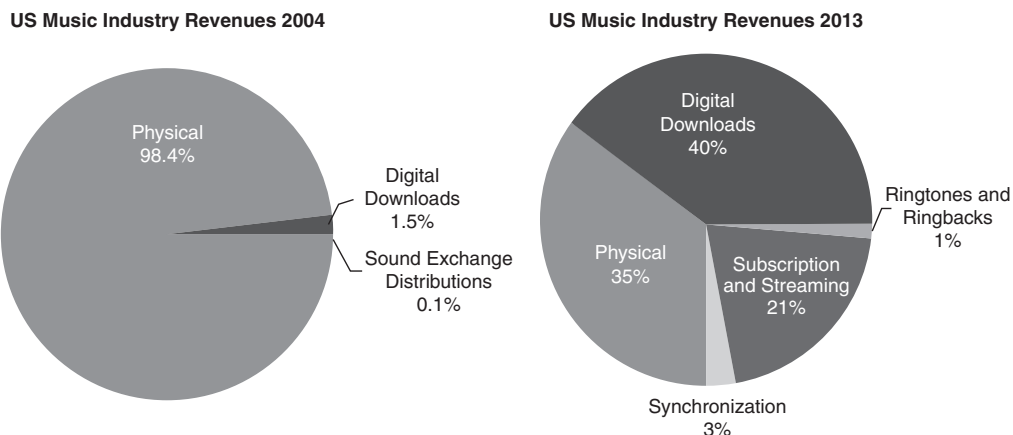


FIGURE 16.4 US music industry revenues, 2004 and 2013.

on-demand streaming services seek both mechanical and performance licenses for the musical works they use. The Music Modernization Act of 2018 created a new collecting society, the Mechanical Licensing Collective (MMA), to collect compulsory mechanical royalties from *interactive* streaming services and then distribute them to the relevant copyright holder, such as SoundExchange does for sound recordings (see [Section 16.3](#)).

6. *The rate standard.* In *RIAA v. Librarian of Congress*, Judge Kavanaugh notes that under the Copyright Act, the Board must “balance four general and sometimes conflicting policy objectives: (1) maximizing the availability of creative works to the public; (2) providing copyright owners a fair return for their creative works and copyright users a fair income; (3) recognizing the relative roles of the copyright owners and users; and (4) minimizing any disruptive impact on the industries involved.” This “four-factor” rate standard was eliminated by the Music Modernization Act of 2018 and replaced by a “willing buyer, willing seller” standard, in which the Board must estimate what rate the parties would have agreed if they were bargaining in a competitive market (17 U.S.C. §§ 114(f)(1)(B), 114(f)(2)(B)). Which of these standards do you think generally results in higher royalties? Which do you suspect is easier for the Board to implement in its decision-making? Why do you think Congress amended this standard in 2018?

### 16.2.3 Public Performance Rights and Performing Rights Organizations (PROs)

Unlike the mechanical right, the public performance of musical works and compositions is not subject to compulsory licensing under the Copyright Act. Thus, anyone wishing to perform a musical work in public, either by performing it live or by playing a recording of it, must obtain a license from the copyright owner. Public performance is defined broadly and includes any performance of a work “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” (17 U.S.C. 101). This has been interpreted to include terrestrial (i.e., AM/FM) radio,<sup>10</sup> satellite and internet radio, broadcast and cable television, online services, bars, restaurants, nightclubs, sporting events, live performance venues, and commercial establishments (offices, stores, salons, elevators) that play background music.

<sup>10</sup> Terrestrial radio is a term used to describe traditional AM/FM broadcasting, derived from the fact that broadcasting and transmission facilities (i.e., towers) are located on the ground as opposed to on satellites.

COPYRIGHT AND THE MUSIC MARKETPLACE U.S. REGISTER OF COPYRIGHTS 20,  
32–34 (2015)

[A]lthough musical compositions were expressly made subject to copyright protection starting in 1831, Congress did not grant music creators the exclusive right to publicly perform their compositions until 1897. Though this right represented a new way for copyright owners to derive profit from their musical works, the sheer number and fleeting nature of public performances made it impossible for copyright owners to individually negotiate with each user for every use, or detect every case of infringement.

Songwriters and publishers almost always associate themselves with a performing rights organization (“PRO”), which is responsible for licensing their public performance rights. The two largest PROs—the American Society of Composers, Authors and Publishers (“ASCAP”) and Broadcast Music, Inc. (“BMI”)—together represent more than 90% of the songs available for licensing in the United States. ASCAP and BMI operate on a not-for-profit basis and, as discussed below, are subject to antitrust consent decrees that impose constraints on their membership and licensing practices. In ASCAP’s case, this includes an express prohibition on licensing any rights other than public performance rights.

In addition to these larger PROs, there are two considerably smaller, for-profit PROs that license performance rights outside of direct government oversight. Nashville-based SESAC, Inc. was founded in the 1930s. SESAC’s market share of the performance rights market is unclear, but appears to be at least 5% and possibly higher. Global Music Rights (“GMR”), a newcomer to the scene established in 2013, handles performance rights licensing for a select group of songwriters. While ASCAP and BMI’s consent decrees prohibit them from excluding potential members who are able to meet fairly minimal criteria, SESAC and GMR have no such restriction and add new members by invitation only.

Today, the PROs provide various different types of licenses depending upon the nature of the use. Anyone who publicly performs a musical work may obtain a license from a PRO, including terrestrial, satellite and internet radio stations, broadcast and cable television stations, online services, bars, restaurants, live performance venues, and commercial establishments that play background music.

Most commonly, licensees obtain a blanket license, which allows the licensee to publicly perform any of the musical works in a PRO’s repertoire for a flat fee or a percentage of total revenues. Some users opt for a blanket license due to its broad coverage of musical



FIGURE 16.5 SoundExchange, BMI, ASCAP and SESAC logos.

works and relative simplicity as compared to other types of licenses. Large commercial establishments such as bars, restaurants, concert venues, stores, and hotels often enter into blanket licenses to cover their uses, paying either a percentage of gross revenues or an annual flat fee, depending on the establishment and the type and amount of use. Terrestrial radio stations obtain blanket licenses from PROs as well, usually by means of the [Radio Music License Committee (RMLC)]. Many television stations, through the [Television Music License Committee (TMLC)], also obtain blanket licenses.

Less commonly used licenses include the per-program or per-segment license, which allows the licensee to publicly perform any of the musical works in the PRO's repertoire for specified programs or parts of their programming, in exchange for a flat fee or a percentage of that program's advertising revenue. Unlike a blanket license, the per-program or per-segment license requires more detailed reporting information, including program titles, the specific music selections used, and usage dates, making the license more burdensome for the licensee to administer.

Users can also license music directly from music publishers through a direct license or a source license. A direct license is simply a license agreement directly negotiated between the copyright owner and the user who intends to publicly perform the musical work. Source licenses are commonly used in the motion picture industry, because the PROs are prohibited from licensing public performance rights directly to movie theater owners. Instead, film producers license public performance rights for the music used in films at the same time as the synchronization rights, and pass the performance rights along to the theaters that will be showing their films. In the context of motion pictures, source licenses do not typically encompass non-theatrical performances, such as on television. Thus, television stations, cable companies, and online services such as Netflix and Hulu must obtain public performance licenses from the PROs to cover the public performance of musical works in the shows and movies they transmit to end users.

### Notes and Questions

1. *Public and noncommercial broadcasting.* Section 118 of the Copyright Act creates a statutory license permitting public and noncommercial educational broadcasters to make terrestrial radio (i.e., nondigital) broadcasts of musical works at rates that are either agreed or set by the CRB. Why do you think Congress established this special licensing structure for noncommercial broadcasters? Why not subject them to the same rates charged by ASCAP and BMI to commercial broadcasters?
2. *The ASCAP/BMI antitrust decrees.* In 1934 and 1941, the Department of Justice filed actions against ASCAP and BMI under the Sherman Antitrust Act of 1890, alleging that ASCAP and BMI fixed prices for songs and committed other anticompetitive acts (see [Chapter 25](#) for discussion of the Sherman Act). These cases were settled in 1941 with the entry of consent decrees overseen by the DOJ and enforced by federal district courts in New York:

Although the ASCAP and BMI consent decrees are not identical, they share many of the same features. As most relevant here, the PROs may only acquire nonexclusive rights to license members' public performance rights; must grant a license to any user that applies, on terms that do not discriminate against similarly situated licensees; and must accept any songwriter or music publisher that applies to be a member, as long as the writer or publisher meets certain minimum standards.

ASCAP and BMI are also required to offer alternative licenses to the blanket license. One option is the adjustable fee blanket license, a blanket license with a carve-out that reduces the flat fee to account for music directly licensed from PRO members. Under the consent decrees, ASCAP and BMI must also provide, when requested, “through-to-the-audience” licenses to broadcast networks that cover performances not only by the networks themselves, but also by affiliated stations that further transmit those performances downstream. ASCAP and BMI are also required to provide per-program and per-segment licenses, as are described above.

ASCAP is expressly barred from licensing any rights other than its members’ public performance rights (i.e., ASCAP may not license mechanical or synchronization rights). Although BMI’s consent decree lacks a similar prohibition, in practice BMI does not license any rights other than public performance rights.

Finally, and perhaps most significantly, prospective licensees that are unable to agree to a royalty rate with ASCAP or BMI may seek a determination of a reasonable license fee from one of two federal district court judges in the Southern District of New York.<sup>11</sup>

The ASCAP consent decree was modified in 1950 and 2001. The BMI consent decree was superseded by a new decree in 1966, which was last amended in 1994. The Department of Justice has periodically reviewed the ASCAP and BMI consent decrees, and has recently indicated that the decrees may have outlived their usefulness. What do you think? Should ASCAP and BMI continue to enjoy the antitrust immunities granted to them in the mid-twentieth century?

3. *Pandora v. ASCAP*. Beginning in 2010, online streaming service Pandora developed a dispute with ASCAP regarding the rates at which ASCAP licensed works to Pandora for online streaming. Pandora initiated a rate-setting action in New York, and the court fixed the rate payable by Pandora at 1.85 percent for a five-year period. ASCAP appealed, but the Second Circuit upheld the district court’s rate, holding that the district court did not commit error by establishing the 1.85 percent rate. More interestingly, in view of the “below market” rates that ASCAP was charging Pandora, three large music publishers (Universal, Sony and EMI) sought to withdraw from ASCAP the right to license their works to “new media” outlets such as Pandora. The Second Circuit, in rejecting the publishers’ right to exclude new media outlets from their ASCAP licenses, held that “as ASCAP is required [under the consent decree] to license its entire repertory to all eligible users, publishers may not license works to ASCAP for licensing to some eligible users but not others.”<sup>12</sup>
4. *How have artists fared?* Even though digital streaming services are required to pay the owners of musical works, many songwriters complain that their compensation has fallen with the rise of digital streaming. Bette Midler, a major recording star, tweeted in 2014: “@Spotify and @Pandora have made it impossible for songwriters to earn a living: three months streaming on Pandora, 4,175,149 plays = \$114.11.”<sup>13</sup>

The Registrar of Copyrights offers the following response to complaints such as Ms. Midler’s:

For their part, the digital music services deny that they are the cause of the decline in songwriter income. These services note that they pay royalties for the public performance of sound recordings, while terrestrial radio does not, and so the total royalties they pay to both

<sup>11</sup> Registrar of Copyrights, *supra* note 4, at 36–37.

<sup>12</sup> *Pandora Media, Inc. v. Am. Soc’y of Composers, Authors and Publishers*, 785 F.3d 73 (2d Cir. 2015).

<sup>13</sup> Quoted in Registrar of Copyrights, *supra* note 4, at 75.

sound recording and musical work owners must be considered. Accordingly, Pandora challenged the numbers cited by Midler ... by publicizing the total amounts paid for all rights to perform the songs, including sound recording rights—stating that they paid \$6,400 in royalties in Midler’s case ...<sup>4</sup>

Who do you believe? Should the system be changed to become more favorable to composers and songwriters? How?

### 16.3 LICENSING SOUND RECORDINGS

In [Section 16.2](#) we discussed the industry and statutory framework for licensing musical works or compositions. In this section we will discuss the other major set of rights that must be considered in music licensing: sound recordings. Under the Copyright Act, “sound recordings” are “works that result from the fixation of a series of musical, spoken, or other sounds, but not including the sounds accompanying a motion picture or other audiovisual work, 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). In other words, a sound recording is a particular recorded performance of a work by a particular artist. A separate copyright exists in every sound recording independent of the copyright in the underlying musical work. The protection of sound recordings in the United States was not introduced until the Copyright Act of 1976, which extends protection to all sound recordings made on or after February 15, 1972. Traditionally, we speak of the owner of a sound recording as a “record label,” though that nomenclature is understandably outdated today.

#### 16.3.1 *Reproduction and Distribution Rights*

With a few exceptions discussed below, a sound recording may not be reproduced or distributed without the authorization of the owner of the sound recording copyright. For the most part, the necessary licenses for such rights are obtained through direct negotiation between the distributor and the record label that controls the sound recording. Thus, if an online merchant wished to distribute downloaded copies of Imagine Dragons’ 2013 hit “Radioactive,” it would require a license from both the band’s record label, KIDinaCORNER, which owns the sound recording, as well as Universal Music Publishing Group, which holds the copyright in the composition. As discussed in [Section 16.2](#), the compulsory license under Section 115 may be available with respect to the mechanical rights to the musical work, though a license from Harry Fox Agency may also be available.

#### 16.3.2 *Public Performance Rights: Nondigital*

When the sound recording copyright was first recognized in the United States in 1971, the exclusive right to publicly perform a sound recording was not granted. That is, the owner of a sound recording does *not* have the exclusive right to perform that sound recording and, by extension, cannot prevent others from making such a public performance. Thus, in 2004 the singer Beyoncé performed a memorable rendition of the “Star Spangled Banner” at the opening of SuperBowl XXXVIII. Anyone who bought an authorized audio recording of that performance

<sup>4</sup> *Id.* at 76.



has the right to play it at sporting events, high school dances, restaurants and bars and, most importantly, to broadcast it via terrestrial radio and HD radio,<sup>15</sup> without permission of Beyoncé or her record label, and without paying anything to do so.<sup>16</sup>

This result is surprising to many. The lack of an exclusive right for the public performance of a sound recording can be traced back to arguments that the public performance of phonorecords (generally via terrestrial radio) served primarily to advertise the sale of records. And since, as discussed in [Section 16.3.1](#), the owner of a sound recording is entitled to charge a royalty for sales of phonorecords, there was no need to burden radio broadcasters with the payment of a royalty to record labels. So, to this day, terrestrial radio broadcasters, not to mention sports arenas, dance halls and restaurants, are not required to compensate the performers whose recordings they play.

### Notes and Questions

1. *Political rally tunes.* Politicians wishing to rouse their supporters often adopt musical theme songs that they blast over loudspeakers at public rallies, speeches and events. In many cases, the public performance of these musical works has not been authorized by the relevant copyright holders, much to the consternation of bands and composers who do not support the player's political message. For example, in 2020 Neil Young brought suit against the Trump campaign for unauthorized use of the songs "Rockin' in the Free World" and "Devil's Sidewalk" at a number of campaign rallies. The complaint states that "in good conscience [Young] cannot allow his music to be used as a 'theme song' for a divisive, un-American campaign of ignorance and hate."<sup>17</sup>

Young alleges that the Trump campaign did not have a license to publicly perform his songs. But in an increasing number of cases, campaign managers *do* acquire the necessary licenses to perform the musical compositions from ASCAP or BMI (no license being required for a live performance of the sound recording). What recourse, if any, does a musician or composer have to prevent a candidate from playing a work at a rally, even if properly licensed?<sup>18</sup> Does a candidate's public performance of a recorded work imply that the artist supports the candidate's political message?

In its license agreements, BMI allows artists to opt out of having their music played at political events. The Rolling Stones, which took this option, threatened to sue the Trump campaign for playing their song "You Can't Always Get What You Want" at a political rally in Tulsa, Oklahoma.<sup>19</sup> What would be the basis for the Rolling Stones' claim?

<sup>15</sup> Though HD radio technology is technically "digital," HD radio is treated comparably to AM/FM analog radio for the purposes of the Act.

<sup>16</sup> Because the "Star Spangled Banner" is in the public domain, there is no musical work copyright to contend with in this scenario.

<sup>17</sup> *Young v. Donald J. Trump For President, Inc.*, Case No. 1:20-cv-06063 (S.D.N.Y., filed June 8, 2020).

<sup>18</sup> Donald Trump, in particular, has attracted the ire of recording artists. In addition to Neil Young, performers/groups Adele, Steven Tyler from Aerosmith, Rihanna, Pharrell Williams, R.E.M., Elton John, Dee Snider from Twisted Sister, Queen, the Rolling Stones, Nickelback, Prince, Tom Petty, Brendon Urie from Panic! At the Disco, and Guns n' Roses have all objected to Trump's public performance of their works. See Antonia Noori Farzan, *Rihanna Doesn't Want Trump Playing Her Music at His "Tragic Rallies," But She May Not Have a Choice*, Wash. Post, November 5, 2018; Andrew Solender, *All the Artists Who Have Told Trump to Stop Using Their Songs at His Rallies*, Forbes, June 28, 2020.

<sup>19</sup> Assoc. Press, *Rolling Stones Threatening to Sue Trump over Using Band's Songs*, June 28, 2020.

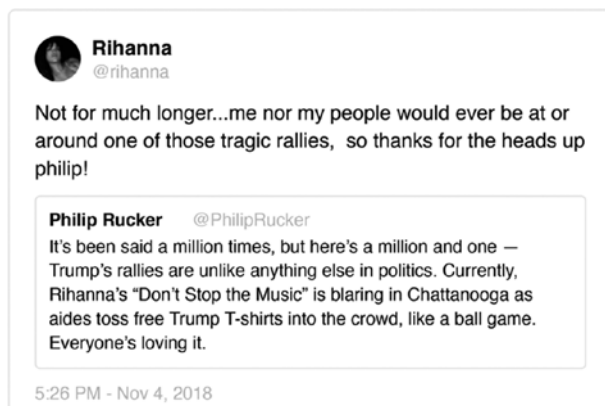


FIGURE 16.6 Recording artist Rihanna objected via Twitter to the Trump campaign's performance of her song "Don't Stop the Music."

### 16.3.3 *Public Performance Rights: Digital*

By 1995 Congress had become convinced that the owners of sound recordings deserved to receive some revenue from digital transmissions made via satellite radio and the Internet. But rather than create a general performance right for sound recordings, Congress elected to leave in place the existing no-royalty structure for terrestrial radio, reasoning that, unlike digital services, traditional radio broadcasters posed no threat to the recording industry. The resulting Digital Performance Right in Sound Recordings Act of 1995 (DPRSRA) created a specific set of rules for digital performances of sound recordings in Sections 112 and 114 of the Copyright Act.

#### 16.3.3.1 Interactive and Noninteractive Services

The digital performance rights created under Sections 112 and 114 depend on whether a digital broadcast service is classified as "interactive" or "noninteractive." Noninteractive services are those that resemble traditional radio broadcasts and which the user has little opportunity to customize. These include satellite radio and webcasting. An interactive service, on the other hand, is one that enables a listener to receive either "a transmission of a program specially created for the recipient," or "on request, a transmission of a particular sound recording, whether or not as part of a program, which is selected by or on behalf of the recipient." Spotify is a typical example of an interactive digital service, in which the songs streamed to the listener are determined by the listener's choices. Nevertheless, there are a number of gray areas between interactive and noninteractive services which are discussed in the *Launch Media* case excerpted below.

#### 16.3.3.2 The Statutory License for Noninteractive Services

Under Sections 112 and 114, noninteractive digital services may avail themselves of a compulsory license to publicly perform sound recordings at rates established by the CRB. All such royalties are paid to an independent nonprofit entity called SoundExchange. After deducting an administrative fee, SoundExchange distributes royalties paid under Section 114 to the owner of the sound recording copyright (50 percent), the featured recording artist(s) (45 percent), an agent representing nonfeatured musicians who perform on the recording (2.5 percent), and an agent representing nonfeatured vocalists who perform on the recording (2.5 percent). It

distributes royalties paid under Section 112 directly to the sound recording owner. Through 2015, SoundExchange had distributed more than \$2 billion to artists and record labels.

### 16.3.3.3 Privately Negotiated Licenses for Interactive Services

Interactive digital broadcasters cannot take advantage of the compulsory licenses under Sections 112 and 114. Instead, they must negotiate licenses directly with record labels to broadcast their sound recordings. As explained by the Registrar of Copyrights,

It is common for a music service seeking a sound recording license from a label to pay a substantial advance against future royalties, and sometimes an administrative fee. Other types of consideration may also be involved. For example, the major labels acquired a reported combined 18% equity stake in the on-demand streaming service Spotify allegedly based, at least in part, on their willingness to grant Spotify rights to use their sound recordings on its service.<sup>20</sup>

Because significant sums of money can depend on whether a digital music service is treated as noninteractive or interactive, disputes over this distinction have arisen as the music streaming industry has matured. The *Launch Media* case exemplifies the interpretations that have had to be made in this area.

#### *Arista Records, LLC v. Launch Media, Inc.*

578 F.3D 148 (2D CIR. 2009)

#### WESLEY, CIRCUIT JUDGE

We are the first federal appellate court called upon to determine whether a webcasting service that provides users with individualized internet radio stations—the content of which can be affected by users’ ratings of songs, artists, and albums—is an interactive service within the meaning of 17 U.S.C. § 114(j)(7). If it is an interactive service, the webcasting service would be required to pay individual licensing fees to those copyright holders of the sound recordings of songs the webcasting service plays for its users. If it is not an interactive service, the webcasting service must only pay a statutory licensing fee set by the Copyright Royalty Board. A jury determined that the defendant does not provide an interactive service and therefore is not liable for paying the copyright holders, a group of recording companies, a licensing fee for each individual song. The recording companies appeal claiming that as a matter of law the webcasting service is an interactive service.

#### Background

Launch operates an internet radio website, or “webcasting” service, called LAUNCHcast, which enables a user to create “stations” that play songs that are within a particular genre or similar to a particular artist or song the user selects. BMG holds the copyrights in the sound recordings of some of the songs LAUNCHcast plays for users.

BMG, as a sound recording copyright holder, has no copyright in the general performance of a sound recording, but BMG does have the exclusive right “to perform the copyrighted [sound recording] publicly by means of a digital audio transmission”. Launch does

<sup>20</sup> Registrar of Copyrights, *supra* note 4, at 52.

not dispute that LAUNCHcast provides a digital audio transmission within the definition of § 106(6). BMG has a right to demand that those who perform—i.e., play or broadcast—its copyrighted sound recording pay an individual licensing fee to BMG if the performance of the sound recording occurs through an “interactive service.”

An interactive service is defined as a service “that enables a member of the public to receive a transmission of a program specially created for the recipient, or on request, a transmission of a particular sound recording ..., which is selected by or on behalf of the recipient.” If a digital audio transmission is not an interactive service and its “primary purpose ... is to provide to the public such audio or other entertainment programming,” the transmitter need only pay a compulsory or statutory licensing fee set by the Copyright Royalty Board.

At trial, BMG claimed that between November 1999 and May 2001 Launch—through LAUNCHcast—provided an interactive service and therefore was required to obtain individual licenses from BMG to play BMG’s sound recordings. The jury returned a verdict in favor of Launch.

BMG appeals ... arguing that LAUNCHcast is an interactive service as a matter of law because LAUNCHcast is “designed and operated to enable members of the public to receive transmissions of programs specially created for them.” BMG claims that under the DMCA there is no tipping point for the level of influence a user must assert before the program becomes an interactive service—all that matters is that the alleged copyright infringer is “transmi[tting] ... a program specially created for” the user.

## Discussion

The parties do not materially disagree on how LAUNCHcast works; their point of conflict centers on whether the program is “interactive” as defined by the statute. An “interactive service” according to the statute “is one that enables a member of the public to receive a transmission of a program specially created for the recipient, or on request, a transmission of a particular sound recording, whether or not as part of a program, which is selected by or on behalf of the recipient.” The statute provides little guidance as to the meaning of its operative term “specially created.”

BMG sees the issue as a simple one. BMG argues that any service that reflects user input is specially created for and by the user and therefore qualifies as an interactive service. But we should not read the statute so broadly. The meaning of the phrase in question must significantly depend on the context in which Congress chose to employ it.

Congress extended the first copyright protection for sound recordings in 1971 by creating a right “[t]o reproduce and distribute” “tangible” copies of sound recordings. Sound Recording Act of 1971 (the “SRA”). Congress drafted the SRA to address its concern about preventing “phonorecord piracy due to advances in duplicating technology.” Notably, unlike the copyright of musical works, the sound recording copyright created by the SRA did not include a right of performance. Therefore, holders of sound recording copyrights—principally recording companies such as BMG—had no right to extract licensing fees from radio stations and other broadcasters of recorded music. The reason for this lack of copyright protection in sound recordings, as the Third Circuit has put it, was that the “recording industry and [radio] broadcasters existed in a sort of symbiotic relationship wherein the recording industry recognized that radio airplay was free advertising that lured consumers to retail stores where they would purchase recordings.” *Bonneville Int’l Corp.*,

347 F.3d at 487. As the *Bonneville* court also noted, however, the relationship has been, and continues to be, “more nuanced” and occasionally antagonistic.

With the inception and public use of the internet in the early 1990s, the recording industry became concerned that existing copyright law was insufficient to protect the industry from music piracy. At the time, the United States Register of Copyrights referred to the internet as “the world’s biggest copying machine.” What made copying music transmitted over the internet more dangerous to recording companies than traditional analog copying with a tape recorder was the fact that there is far less degradation of sound quality in a digital recording than an analog recording. Although data transmission over the internet was slow—in 1994 it took on average twenty minutes to download one song—the recording industry foresaw the internet as a threat to the industry’s business model. If an internet user could listen to music broadcast over, or downloaded from, the internet for free, the recording industry worried that the user would stop purchasing music. Jason Berman, president of the Recording Industry Association of America (the “RIAA”), the lobbying arm of the recording industry, stated in 1994 that without a copyright in a right of performance via internet technology, the industry would be “unable to compete in this emerging digital era.” Berman warned that “digital delivery would siphon off and eventually eliminate the major source of revenue for investing in future recordings” and that “[o]ver time, this [would] lead to a vast reduction in the production of recorded music.”

In light of these concerns, and recognizing that “digital transmission of sound recordings [were] likely to become a very important outlet for the performance of recorded music,” Congress enacted the Digital Performance Right in Sound Recordings Act of 1995 (the “DPSR”), giving sound recording copyright holders an exclusive but “narrow” right to perform—play or broadcast—sound recordings via a digital audio transmission. The right was limited to exclusive performance of digital audio transmissions through paid subscriptions services and “interactive services.” While non-interactive subscription services qualified for statutory licensing, interactive services were required to obtain individual licenses for each sound recording those interactive services played via a digital transmission. Under the DPSR, interactive service was defined as one that enables a member of the public to receive, on request, a transmission of a particular sound recording chosen by or on behalf of the recipient. The ability of individuals to request that particular sound recordings be performed for reception by the public at large does not make a service interactive. If an entity offers both interactive and non-interactive services (either concurrently or at different times), the non-interactive component shall not be treated as part of an interactive service.

Fairly soon after Congress enacted the DPSR, critics began to call for further legislation, charging that the DPSR was too narrowly drawn and did not sufficiently protect sound recording copyright holders from further internet piracy. For instance, webcasting services, which provide free—i.e., nonsubscription—services that do not provide particular sound recording on request and are therefore not interactive within the meaning of term under the DPSR, at that time fell outside the sound recording copyright holder’s right of control. Recording companies became concerned that these webcasting services were allowing users to copy music transmitted to their computer via webcast for free, or to listen to these webcasting services in lieu of purchasing music. Record companies were concerned that these webcasting services were causing a diminution in record sales, which the companies feared would cut into profits and stunt development of the recording industry. According

to Cary Sherman, Senior Executive Vice President and General Counsel of the RIAA, by 1997, the record industry was losing \$1 million a day due to music piracy.

In light of these concerns, Congress enacted the current version of § 114 under the DMCA in 1998. The term “interactive service” was expanded to include “those that are specially created for a particular individual.” As enacted, the definition of “interactive service” was now a service “that enables a member of the public to receive a transmission of a program specially created for the recipient, or on request, a transmission of a particular sound recording, whether or not as part of a program, which is selected by or on behalf of the recipient.”

According to the House conference report,

The conferees intend that the phrase “program specially created for the recipient” be interpreted reasonably in light of the remainder of the definition of “interactive service.” For example, a service would be interactive if it allowed a small number of individuals to request that sound recordings be performed in a program specially created for that group and not available to any individuals outside of that group. In contrast, a service would not be interactive if it merely transmitted to a large number of recipients of the service’s transmissions a program consisting of sound recordings requested by a small number of those listeners.

The House report continued that a transmission is considered interactive “if a transmission recipient is permitted to select particular sound recordings in a prerecorded or pre-determined program.” *Id.* at 88. “For example, if a transmission recipient has the ability to move forward and backward between songs in a program, the transmission is interactive. It is not necessary that the transmission recipient be able to select the actual songs that comprise the program.”

In sum, from the SRA to the DMCA, Congress enacted copyright legislation directed at preventing the diminution in record sales through outright piracy of music or new digital media that offered listeners the ability to select music in such a way that they would forego purchasing records.

*[The court next describes the complex methodology by which LAUNCHcast dynamically creates a “personalized radio station” for each user based on the user’s ratings of songs, albums and artists, similar ratings by DJs followed by the user, songs deleted or skipped by the user and songs played for the user within the past three hours.]*

Given LAUNCHcast’s format, we turn to the question of whether LAUNCHcast is an interactive service as a matter of law. As we have already noted, a webcasting service such as LAUNCHcast is interactive under the statute if a user can either (1) request—and have played—a particular sound recording, or (2) receive a transmission of a program “specially created” for the user. A LAUNCHcast user cannot request and expect to hear a particular song on demand; therefore, LAUNCHcast does not meet the first definition of interactive. But LAUNCHcast may still be liable if it enables the user to receive a transmission of a program “specially created” for the user. It comes as no surprise to us that the district court, the parties, and others have struggled with what Congress meant by this term.

The language and development of the DPSR and DMCA make clear that Congress enacted both statutes to create a narrow copyright in the performance of digital audio transmissions to protect sound recording copyright holders—principally recording companies—from the diminution in record sales. Congress created this narrow right to ensure that “the creation of new sound recordings and musical works [would not] be discouraged,”

and to prevent the “threat to the livelihoods of those whose income depends upon revenues derived from traditional record sales.”

Contrary to BMG’s contentions, Congress was clear that the statute sought to prevent further decreases in revenues for sound recording copyright holders due to significant reductions in record sales, perceived in turn to be a result of the proliferation of interactive listening services.<sup>21</sup> If the user has sufficient control over the interactive service such that she can predict the songs she will hear, much as she would if she owned the music herself and could play each song at will, she would have no need to purchase the music she wishes to hear. Therefore, part and parcel of the concern about a diminution in record sales is the concern that an interactive service provides a degree of predictability—based on choices made by the user—that approximates the predictability the music listener seeks when purchasing music.

The current version § 114(j)(7) was enacted because Congress determined that the DPSR was not up to the task of protecting sound recording copyright holders from diminution in record sales, presumably because programs not covered by the DPSR’s definition of interactive service provided a degree of control—predictability—to internet music listeners that dampened the music listeners’ need to purchase music recordings. By giving sound recording copyright holders the right to require individual licenses for transmissions of programs specially created for users, Congress hoped to plug the loophole the DPSR had left open for webcasting services.

Launch does not deny that each playlist generated when a LAUNCHcast user selects a radio station is unique to that user at that particular time. However, this does not necessarily make the LAUNCHcast playlist specially created for the user. Based on a review of how LAUNCHcast functions, it is clear that LAUNCHcast does not provide a specially created program within the meaning of § 114(j)(7) because the webcasting service does not provide sufficient control to users such that playlists are so predictable that users will choose to listen to the webcast in lieu of purchasing music, thereby—in the aggregate—diminishing record sales.

First, the rules governing what songs are pooled ... ensure that the user has almost no ability to choose, let alone predict, which specific songs will be pooled in anticipation for selection to the playlist. Second, the selection of songs ... to be included in the playlist is governed by rules preventing the user’s explicitly rated songs from being anywhere near a majority of the songs on the playlist.

Even the ways in which songs are rated include variables beyond the user’s control. For instance, the ratings by all of the user’s subscribed-to DJs are included in the playlist selection process. When the user rates a particular song, LAUNCHcast then implicitly rates all other songs by that artist, subjecting the user to many songs the user may have never heard or does not even like. There are restrictions placed on the number of times songs by a particular artist or from a particular album can be played, and there are restrictions on consecutive play of the same artist or album. Finally, because each playlist is unique to

<sup>21</sup> While file-sharing services like Napster initially caused a decline in record sales, recently webcasting services have been credited with “becom[ing] a massive driver in digital [music] sales” by exposing users to new music and providing an easy link to sites where users can purchase this music. The difference between the two types of services likely explains the different effect on record sales. File-sharing services allow users to copy music files to their computer, thereby enabling the user to listen to the music at any time. Webcasting services, however, do not allow the user to download the files of the music being webcast, and therefore do not enable music piracy.

each user each time the user logs in, a user cannot listen to the playlist of another user and anticipate the songs to be played from that playlist, even if the user has selected the same preferences and rated all songs, artists, and albums identically as the other user. Relatedly, a user who hears a song she likes and wants to hear again cannot do so by logging off and back on to reset her station to disable the restriction against playing the same song twice on a playlist. Even if a user logs off LAUNCHcast then logs back on and selects the same station, the user will still hear the remainder of the playlist to which she had previously been listening with its restrictions still in operation, provided there were at least eight songs left to be played on the playlist—or, in other words, until the user listens to at least forty-two of the playlist's songs.

Finally, after navigating these criteria to ... generate a playlist, LAUNCHcast randomly orders the playlist. This randomization is limited by restrictions on the consecutive play of artists or albums,<sup>22</sup> which further restricts the user's ability to choose the artists or albums they wish to hear. LAUNCHcast also does not enable the user to view the unplayed songs in the playlist, ensuring that a user cannot sift through a playlist to choose the songs the user wishes to hear.

It appears the only thing a user can predict with certainty—the only thing the user can control—is that by rating a song at zero the user will not hear that song on that station again. But the ability not to listen to a particular song is certainly not a violation of a copyright holder's right to be compensated when the sound recording is played.

In short, to the degree that LAUNCHcast's playlists are uniquely created for each user, that feature does not ensure predictability. Indeed, the unique nature of the playlist helps Launch ensure that it does not provide a service so specially created for the user that the user ceases to purchase music. LAUNCHcast listeners do not even enjoy the limited predictability that once graced the AM airwaves on weekends in America when "special requests" represented love-struck adolescents' attempts to communicate their feelings to "that special friend." Therefore, we cannot say LAUNCHcast falls within the scope of the DMCA's definition of an interactive service created for individual users.

When Congress created the sound recording copyright, it explicitly characterized it as "narrow." There is no general right of performance in the sound recording copyright. There is only a limited right to performance of digital audio transmission with several exceptions to the copyright, including the one at issue in this case. We find that LAUNCHcast is not an interactive service within the meaning of 17 U.S.C. § 114(j)(7).

The district court's judgment of May 16, 2007 in favor of Appellee is hereby AFFIRMED with costs.

### Notes and Questions

1. *Legislative intent.* What do you make of the Congressional rationale for giving record labels the exclusive right to perform sound recordings digitally? Should this right have been extended to terrestrial radio and other nondigital broadcast channels?
2. *Interactive versus noninteractive digital services.* Following the *Launch Media* decision, personalized music streaming services such as Pandora and Rdio took pains to ensure that they

<sup>22</sup> Under the "sound recording performance complement," webcasters are limited to playing no more than three selections from a given record in a three-hour period (17 U.S.C. § 114(d)(2)(C)(i), (j)(13)) – Ed.



continue to be recognized as noninteractive services. Why should so much ride on whether a digital music service is interactive or noninteractive? Does this distinction make sense today?

3. *SoundExchange*. As noted above, after deducting an administrative fee, SoundExchange distributes royalties paid under Section 114 to the owner of the sound recording copyright (50 percent), the featured recording artist(s) (45 percent), an agent representing nonfeatured musicians who perform on the recording (2.5 percent) and an agent representing nonfeatured vocalists who perform on the recording (2.5 percent). Is this split sensible?
4. *Pre-1972 sound recordings*. When Congress granted federal copyright protection to sound recordings in 1971, it extended protection only to recordings created on or after February 15, 1972. Sound recordings fixed before that date are protected not by federal law, but by a patchwork of inconsistent and often vague state laws. The disparate treatment of pre-1972 sound recordings under federal and state law has given rise to a number of significant policy issues. For example, some digital broadcasters, including YouTube and Spotify, have negotiated deals with record labels that expressly cover pre-1972 sound recordings, and others, such as Music Choice, pay statutory rates for pre-1972 recordings to SoundExchange. Sirius XM and Spotify, however, have taken the position that state law does not grant the owners of sound recordings any exclusive right to perform those sound recordings; accordingly, they do not pay royalties either to owners directly or to SoundExchange for performances of pre-1972 sound recordings. This position has led to significant litigation. As summarized by the Registrar of Copyrights:

Recently, three courts—two in California and one in New York—have held that the unauthorized public performance of pre-1972 sound recordings violates applicable state law. In the initial case, a California federal district court ruled that Sirius XM infringed rights guaranteed to plaintiffs by state statute. A state court in California subsequently adopted the federal court's reading of the California statute in a second action against Sirius XM. Following these decisions, in a third case against Sirius XM, a federal district court in New York has indicated that the public performance of pre-1972 sound recordings constitutes common law copyright infringement and unfair competition under New York law. Notably, the reasoning employed in these decisions is not expressly limited to digital performances (i.e., internet streaming and satellite radio); they thus could have potentially broad implications for terrestrial radio (currently exempt under federal law for the public performance of sound recordings) as well. In the meantime, similar lawsuits have been filed against other digital providers, including Pandora, Google, Apple's Beats service, and Rdio, alleging the unauthorized use of pre-1972 recordings.<sup>23</sup>

The Music Modernization Act of 2018 seeks to bring some clarity to this area by requiring that noninteractive digital services such as Sirius XM and Pandora pay performance royalties to SoundExchange for pre-1972 sound recordings at rates established by the CRB, while interactive services such as Spotify and Apple Music would continue to negotiate private licenses with record labels. What the MMA does not do, however, is establish a general performance right for pre-1972 (or post-1972) sound recordings, leaving terrestrial radio stations, sports arenas, bars, restaurants, office buildings and supermarkets free to perform these sound recordings without charge.

5. *International rights*. The United States is something of an outlier with respect to sound recording rights. As observed by the Registrar of Copyrights in 2015, “[v]irtually all industrialized

<sup>23</sup> Registrar of Copyrights, *supra* note 4, at 54-55.

nations recognize a more complete public performance right for sound recordings than does the United States ... Only a handful of countries – including Iran and North Korea – lack [the exclusive right to publicly perform a sound recording].”<sup>24</sup> Why do you think the United States diverges from international norms to this degree? Do you think the US position helps or hurts recording artists as compared to other countries?

#### 16.4 SYNCHRONIZATION RIGHTS

All of the rights and licenses discussed so far in this chapter relate to the distribution and performance of music on a standalone basis. To incorporate music into an audiovisual work – a film, television program, advertisement, music video or video game – a separate license is required from both the owner of the copyright in the musical work and the sound recording. This right is generally called a “synchronization (or ‘synch’) license” with respect to the musical work, and a “master recording license” with respect to the sound recording. Although the Copyright Act does not refer explicitly to a synchronization or master recording right, these are generally understood to be aspects of a copyright owner’s reproduction and derivative work rights.

There is no statutory scheme for licensing music for audiovisual works, and all such arrangements must be negotiated separately. In practice, similar amounts are typically paid to acquire synch rights for a musical work and its sound recording. A number of specialized intermediaries exist to facilitate licensing of musical works in multimedia productions. These include companies such as Greenlight, Dashbox, Cue Songs and Rumblefish, which provide online services that offer different songs for synchronization purposes.

In the early 2000s, major record labels and publishers entered into “New Digital Media Agreements” (“NDMAs”) to allow labels efficiently to obtain licenses from their major publisher counterparts so they could pursue new digital products and exploit music videos in online markets. These licensing arrangements, in turn, became a model for a more recent 2012 agreement between UMG and NMPA that allowed UMG to seek similar rights from smaller independent publishers on an “opt-in” basis. The licensing arrangement includes rights for the use of musical works in “MTV-style” videos, live concert footage, and similar exploitations.

Like the major record labels, larger music publishers have entered into direct licensing relationships with the on-demand video provider YouTube that allow them some amount of control over the use of user-uploaded videos incorporating their music and provide for payment of royalties. Following the settlement of infringement litigation by a class of independent music publishers against YouTube in 2011, NMPA and its licensing subsidiary HFA announced an agreement with YouTube under which smaller publishers could choose to license their musical works to YouTube by opting in to prescribed licensing terms. Those who choose to participate in the arrangement grant YouTube the right to “reproduce, distribute and to prepare derivative works (including synchronization rights)” for videos posted by YouTube’s users. The license does not, however, cover the public performance right. Music publishers who opt into the YouTube deal receive royalties from YouTube and have some ability to manage the use of their music through HFA, which administers the relationship and can access YouTube’s content identification tools on behalf of individual publishers. Over 3,000 music publishers have entered into this licensing arrangement with YouTube.

<sup>24</sup> *Id.* at 45.

Another developing area is the market for so-called “micro-licenses” for music that is used in videos of modest economic value, such as wedding videos and corporate presentations. In the past, income received by rightsholders from licensing such uses might not overcome administrative or other costs. But the market is moving to take advantage of technological developments—especially online applications—that make micro-licensing more viable. This includes the aforementioned services like Rumblefish, but also efforts by NMPA, HFA, and RIAA to license more synchronization rights through programs that allow individual copyright owners to effectuate small licensing transactions.<sup>25</sup>

### Notes and Questions

1. *Synch rates.* Rates for synchronization rights vary dramatically based on the intended use of a song and the popularity of the song. The use of a song in a single US television episode broadcast for a five-year term would run approximately \$1,000. That rate increases to \$7,000–10,000 if rights are worldwide with no expiration. Fees for motion picture synchronization can be significantly higher, running into the low six figures for recent hits that are used in the opening or closing credits.
2. *Clearing rights in advance.* The producer of a work that requires music licenses is well-advised to obtain those rights as early in the production process as possible. Once principal photography for a motion picture has been completed, altering a scene to remove a work that has not been authorized can be prohibitively expensive. Take, for example, the case of performer Sam Cooke, owner of the hit song “Wonderful World.” After Cooke’s death in 1964 his manager, the notorious music industry figure Allen Klein, who also managed the Beatles and the Rolling Stones, gained control of the copyright in Cooke’s songs.

When Klein saw a rough cut of the Harrison Ford movie *Witness* in 1984 and realised the barn dance sequence would have to be reshot if the producers couldn’t get “Wonderful World”, he demanded and got \$200,000 for the use of that one song, thereby triggering the sync-rights gold rush that rages to this day. He was, as Goodman puts it, “the first hardball player in a slow-pitch league”.<sup>26</sup>

3. *Works made for hire.* Not all music synchronized with video content is subject to the licensing considerations discussed above. Much of the music that accompanies video – TV theme songs, advertising jingles, video game soundtracks – is commissioned specifically for the programming that it accompanies. As such, the copyright owner is considered to be the commissioner of the work (usually the production company). Though composition credits may be given under industry collective bargaining agreements, the individual composers and performers of such works generally do not collect ongoing royalties.
4. As you have seen in this chapter, music licensing can be complex, with numerous moving parts and parties in every transaction. [Table 16.1](#) can help to organize the different rights and parties involved in a given transaction.

<sup>25</sup> *Id.* at 58.

<sup>26</sup> David Hepworth, *The Biggest Bastard in Pop: How Allen Klein Changed the Game for Music Revenue*, *NewStatesman America*, February 9, 2016.

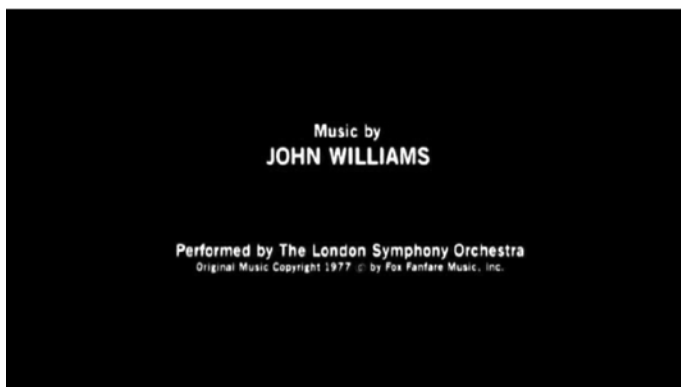


FIGURE 16.7 John Williams, who composed the music for *Star Wars*, won the 1978 Oscar for Best Original Score. But as a work made for hire, the copyright in the score was owned by a subsidiary of Twentieth Century Fox, which distributed the film.

TABLE 16.1 Summary of music licensing provisions

	Musical composition	Sound recording
<b>Print</b> (musical score, lyrics)	Negotiated between composer and publisher	N/A
<b>Performance right</b> (live performance, broadcast, streaming)	Licensed by PROs (ASCAP, BMI, SESAC)	<p><b>Live performance, analog or HD broadcast:</b> No license needed</p> <p><b>Digital broadcast</b> (section 114) – <i>noninteractive</i> (streaming, webcast, satellite radio – Pandora): compulsory license collected by SoundExchange – <i>interactive</i> (Spotify): license negotiated with performer/record label</p>
<b>Mechanical right</b> (reproduction and distribution of copies: CD, DVD, MP3, ringtones, iTunes downloads, interactive streaming)	<p><b>First release:</b> negotiated by publisher and composer</p> <p><b>Subsequent (cover) recordings:</b> – Section 115 compulsory license, OR – negotiated license with Harry Fox Agency or publisher</p> <p><b>Interactive streaming:</b> Section 115 compulsory blanket license administered by Mechanical Licensing Collective</p>	Negotiated license with performer/record label
<b>Synchronization</b> with video (film, TV, advertising, music video, video games)	Synchronization license negotiated with publisher	Master recording license negotiated with performer/record label

16.5 MUSIC SAMPLING

It is increasingly common in certain musical genres – hip hop, rap, dance club – to incorporate or “sample” short portions of existing sound recordings into new, combined works. Some artists, operating primarily online (e.g., Girl Talk), create works of significant length and complexity doing nothing more than combining portions of dozens or hundreds of existing works over a new beat or rhythm track. As such, sampling usually implicates both the copyright in a musical composition and a sound recording.<sup>27</sup>

Absent the existence of a legal exception such as “fair use,”<sup>28</sup> copying or imitating even a very small segment of a copyrighted musical work generally requires permission of the copyright holder.<sup>29</sup> Failure to obtain that permission constitutes copyright infringement.

Professors Kembrew McLeod and Peter DiCola have extensively analyzed the practice of sampling in the music industry.

As shown in the Table 16.2,<sup>30</sup> the use of a “small” sample of a work of “medium” popularity would cost \$2,500 (up-front) or \$0.01 per copy for the sound recording rights, and \$4,000 (up-front) or 10 percent of revenues for the musical composition rights, while a “small” sample of a “superstar” recording (e.g., the Beatles or Led Zeppelin) would cost \$100,000 or \$0.15 per copy for the sound recording, and 100 percent of revenue or assignment of the copyright in the new work for the musical composition (a prohibitive proposition).

Against this backdrop, MacLeod and DiCola analyzed two popular albums by the artists Public Enemy and the Beastie Boys. They identified a total of 81 and 125 identifiable samples on

TABLE 16.2 Sampling costs

Profile of the sampled work	Use in the sampling work		
	Small	Moderate	Extensive
Low	SR: \$0 to \$500 MC: Not infringement	SR: \$2,500 or \$0.01/copy MC: \$4,000 or 10%	SR: \$5,000 or \$0.025/copy MC: 25%
Medium	SR: \$2,500 or \$0.01/copy MC: \$4,000 or 10%	SR: \$5,000 or \$0.025/copy MC: 25%	SR: \$15,000 or \$0.05/ copy MC: 40%
High	SR: \$5,000 or \$0.025/copy MC: 25%	SR: \$15,000 or \$0.05/copy MC: 40%	SR: \$25,000 or \$0.10/copy MC: 50% or co-ownership
Famous	SR: \$50,000 or \$0.12/copy MC: 100% (assignment)		
Superstar	SR: \$100,000 or \$0.15/copy MC: 100% (assignment)		

SR denotes the sound recording copyright in the sampled song; MC denotes the musical composition copyright in the sampled song.

<sup>27</sup> Sampling should not be confused with unauthorized use of a musical composition. For example, in the famous fair use case *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569 (1994), the band 2LiveCrew appropriated the principal melody and several lyrics from Roy Orbison’s popular ballad “Pretty Woman.” 2LiveCrew did not incorporate Orbison’s actual sound recording into their work; they merely used the musical composition owned by his publisher without authorization.

<sup>28</sup> Under Section 107 of the Copyright Act, certain uses of copyrighted material that otherwise would be infringing are permitted “for purposes such as criticism, comment, news reporting, teaching . . . , scholarship, or research.”

<sup>29</sup> As the court famously held in *Bright Tunes Music v. Harrisongs Music*, 420 F. Supp. 177 (S.D.N.Y. 1976), as little as three consecutive notes can constitute infringement of a song if they are confusingly similar to the original.

<sup>30</sup> Kembrew MacLeod and Peter DiCola, Creative License: The Law and Culture of Digital Sampling (Duke University Press, 2011) table 2, p. 55 (the authors credit Whitney Broussard for contributions to the table).

each album and estimated the cost that would have been required to clear and license each of these samples.<sup>31</sup> The end result of this analysis: If the two artists had cleared the rights necessary to sample each of the works on their albums, Public Enemy would have lost \$4.47 per copy sold, and the Beastie Boys would have lost \$7.87 per copy sold.<sup>32</sup>

As the above passage illustrates, many bands do not clear all necessary rights with respect to sampled tracks, often with few or no consequences. Yet artists who are sampled without permission have become increasingly litigious, and the rise of sampling infringement suits is clearly having an impact on the industry.

### Notes and Questions

1. “*Bittersweet Symphony*.” One of the most notorious sampling cases on record pitted Allen Klein (again), this time in his capacity as the manager of the Rolling Stones, against Brit-pop group The Verve. The controversy concerned The Verve’s 1997 hit single “Bittersweet Symphony,” which gained fame both on the pop charts as well as the soundtrack to the 1999 teen romance film *Cruel Intentions*. Though the lyrics were original, the instrumental backing was partially sampled from a slowed-down symphonic version of the Rolling Stones’ song “The Last Time.” The Verve licensed a five-note segment of the recording from the Stones in exchange for 50 percent of the song’s royalties, but Klein claimed that they exceeded this licensed use. He sued on behalf of Stones members Mick Jagger and Keith Richards, and won. As a result, The Verve forfeited all songwriting royalties and publishing rights to “Bittersweet Symphony,” and Jagger and Richards were credited as its writers. To make matters worse, Andrew Oldham, another former Rolling Stones manager who owned the sound recording that was sampled, sued The Verve for \$1.7 million in mechanical royalties. In the end, the Verve lost all control of their biggest hit. It was used in a Nike commercial without their permission, earning them nothing. Then, when “Bittersweet Symphony” was nominated for a “Best Song” Grammy, Jagger and Richards, and not the Verve, were named on the ballot.<sup>33</sup> Were The Verve treated unfairly by Klein and his clients? As the attorney for The Verve, how would you have advised them to avoid some of their legal woes?

In an unexpected turn of events, in 2019 Mick Jagger and Keith Richards of the Rolling Stones voluntarily assigned their rights in “Bittersweet Symphony” back to Richard Ashcroft of The Verve. Ashcroft, who announced the resolution of the decades-long dispute at a British music awards event, called it, “a kind and magnanimous gesture from Mick and Keith.”<sup>34</sup>

2. *Amending the law to accommodate sampling?* What, if anything, should be done about the law and music sampling? MacLeod and DiCola offer several possibilities, including the enactment of a compulsory licensing scheme for sampling (along the lines of the existing licenses under Sections 114 and 115 of the Copyright Act), the establishment of a “de minimis” threshold for music copyright infringement and the expansion of “fair use” to cover sampling more explicitly. What problem are MacLeod and DiCola trying to solve? Which, if any, of these proposals do you think would be effective?

<sup>31</sup> *Id.* at 57–58.

<sup>32</sup> *Id.* at 60.

<sup>33</sup> Jordan Runtagh, *Songs on Trial: 12 Landmark Music Copyright Cases*, Rolling Stone, June 8, 2016.

<sup>34</sup> Jem Aswad, *Rolling Stones Give “Bittersweet Symphony” Songwriter Royalties to the Verve’s Richard Ashcroft*, Variety, May 23, 2019.