

Rights and Revenues in the U.S. Recorded Music Industry

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Problems

- Complicated licensing and rate-setting systems.
- Outdated laws enacted before digital music services emerged.
- Lack of transparency for content creators.
- Available technology not being utilized to track usage and deliver royalties.
- Results:
 - Songwriters and recording artists may fail to receive their lawful royalties.
 - Digital music services often lack efficient methods to obtain needed licenses.
 - Wildly divergent payments for similar uses of content.

Different Legal Regimes for Songwriters and Performers

- Songwriters
 - Mechanical rights
 - Compulsory licensing versus voluntary licensing
 - Public performance rights
 - Performance rights organizations (PROs)
 - Synchronization rights for audiovisual works
- Performers
 - Most rights depend on terms of recording contracts.
 - Public performance rights apply only to certain digital transmissions.
 - No rights in pre-1972 U.S. sound recordings.

Songwriters' Mechanical Rights

- Songwriter/Publisher can negotiate royalty for first sound recording of a song.
- Subsequent sound recordings of the song are eligible for sec. 115 compulsory license at relatively low statutory royalty rate.
- Digital downloads and ringtones are covered by sec. 115 as well.

Compulsory Mechanical License (sec. 115)

- Applies to records, digital downloads, ringtones, and server copies used for streaming.
- Rates set by Copyright Royalty Board every 5 years.
- Publishers rarely obtain higher rates because users can use sec. 115 instead.
- Sec. 115 rate of 9.1 cents/copy (for most records and digital downloads) has not kept up with inflation; should be around 50 cents/min. by that measure. Rate for ringtones is higher: 24 cents per use.
- No audit rights; songwriters don't know if compulsory licensees are reporting and paying accurately.
- Rates are substantially lower than rates for similar uses of sound recordings.
- Digital music services would prefer blanket licensing rather than song-by-song licensing due to efficiency.
- Repeal or modify sec. 115?

Songwriters' Public Performance Rights

- U.S. has four (4) PROs; each songwriter may choose only one.
- Two are nonprofit, subject to antitrust consent decrees and rate oversight by federal court.(S.D.N.Y)
 - ASCAP
 - BMI
- Two are for-profit, not subject to consent decrees or rate oversight
 - SESAC
 - Global Music Rights (GMR)

Songwriter/Publisher Concerns

- No way to know if streaming services report accurately to PROs.
- PROs do not precisely track radio play, and must estimate performances in public venues.
- PROs don't disclose how writers' individual royalty shares are calculated.
- Under consent decrees, ASCAP and BMI have no remedy against licensees that fail to report or pay royalties; must grant blanket license to any applicant even before the royalty rate is determined (by negotiation or by litigation in S.D.N.Y.).
- Royalty rates negotiated by ASCAP and BMI for on-demand streaming (e.g., Spotify, Rhapsody) of musical works are well below rates negotiated by record labels for streaming of sound recordings.
- Sec. 114(i) prohibits S.D.N.Y from considering public performance royalties for sound recordings when it sets public performance royalties for musical works.

Recent Developments

- Some songwriters/publishers sought to withdraw streaming rights from ASCAP/BMI so they could directly negotiate higher royalties from streaming services.
- Federal court held that consent decrees prohibit digital-only withdrawals; songwriters/publishers must withdraw all performance rights or none.
- Withdrawal of rights may lead to higher royalty rates but make it more cumbersome for streaming services to negotiate with all rights owners.
- Some digital music services would prefer bundling of mechanical and public performance rights for greater efficiency; consent decrees prohibit this.
- Dept. of Justice is re-examining the consent decrees.

Recording Artists' Performance Rights

- Limited to certain digital transmissions
 - Satellite radio (Sirius/XM)
 - Internet radio (webcasting)
 - Subscription cable TV music services
 - Streaming-on-demand (Spotify, Rhapsody)
 - Radio-like streaming services (Pandora)
- No general public performance right (e.g., clubs, restaurants, terrestrial radio)
 - Legislative reform efforts supported by Copyright Office have not succeeded.
 - Obstacle to joining Rome Convention and obtaining sound recording performance royalties from other countries.
 - Yet one major broadcast company has negotiated licenses covering both internet and terrestrial radio with several record labels.

Recording Artists' Performance Rights

- “Interactive” streaming services
 - User chooses which recording to hear.
 - Spotify, Rhapsody.
 - Service must obtain performance license from music publisher.
- “Non-interactive” services
 - Similar to traditional radio; user cannot choose specific recordings.
 - SiriusXM satellite radio, cable music services, Pandora, webcasters.
 - Statutory license rates set by CRB every 5 years

Interactive Performance Royalties

- Performer's right to share in performance royalties is dictated by contract with record label.
- Royalties depend on record label's negotiation with digital service.
- Record labels sometimes receive advance payments or equity interest in digital service in exchange for lower royalties, allegedly without sharing this with performers.
- Record labels may allow digital service to stream some music for free, generating no royalties for performers.
- Performers cannot be sure they are receiving an accurate accounting from the record label.

Non-interactive Performance Royalties

- Sec. 114 guarantees a specified share of royalties for recording artists (featured and nonfeatured).
- SoundExchange (nonprofit) collects royalties from streaming services and aggressively seeks out performers entitled to payment.
- Fewer performer complaints about accuracy of these payouts.
- However, no remedies against non-compliant services.
- Music services complain about restrictions (e.g., cannot announce playlist in advance; limit on number of tracks from a single album or particular artist within specified time frame)
- Different legal standards govern CRB rate-setting for pre-1999 music services than for newer ones.

Sec. 112

- Compulsory license to make server copies of sound recordings used for streaming.
- SoundExchange is not authorized to distribute sec. 112 royalties directly to performers; instead it sends the funds to record labels.
- Record labels generally keep these royalties rather than distribute them to performers.

Better Data is Needed

- Getting revenues to rights holders requires embedding identifying data in digital music files.
- Identifiers are needed for songwriters, publishers, record labels, and performers on each recording.
- Often this data is missing, incomplete, or inaccurate.
- No centralized database.
- Some data may become inaccurate as ownership changes hands (especially music copyrights).
- Data will enable better tracking so rights holders can see how their content is used and assess accuracy of their royalty payments.

Public Performance Rights in Sound Recordings

- Copyright Office has long supported legislation to broaden these rights beyond digital services.
- Legislative efforts have failed so far.
- Failure to broaden this right
 - reduces domestic performance royalties for recording artists
 - prevents U.S. from joining Rome Convention
 - prevents U.S. record companies from receiving public performance royalties collected by foreign PROs (at least \$70-100 million per year)
 - prevents U.S. recording artists from receiving their share of foreign performance royalties

Pre-1972 Recordings

- Sound recordings made in the U.S. before February 15, 1972, are not protected by federal copyright law. Record labels and performers receive no royalties from sales, downloads, synchronization, or streaming.
- Not applicable to recordings made in Berne or WTO countries; these receive federal copyright protection.

State Protection for Pre-1972 Recordings

- State law can protect these recordings.
- Potentially 50+ different state copyright regimes
- Courts have held that New York and California laws protect public performance rights in pre-1972 sound recordings.
- Cases involved satellite radio, but same reasoning could lead courts to recognize other public performance rights (e.g., terrestrial radio) for these recordings.
- DMCA safe harbors probably not apply; ISPs that qualify for DMCA safe harbors could still be liable for infringing pre-1972 sound recordings in some states.

Reform Proposal

- Copyright Office recommends extending federal copyright protection to pre-1972 U.S. sound recordings.
- Preferable to piecemeal and non-uniform state protection.
- Who will own the copyrights?

Better Data Needed

- Need standardized coding to identify all rights holders in the recording and facilitate channeling royalty shares accurately and quickly.
- Need centralized database.
- Rights holders need access to the database.
- Who will do this? Government? Are there incentives for record labels, publishers, and music services to collaborate?

Sources

- U.S. Copyright Office, *Copyright and the Music Marketplace* (Feb. 2015)
- Rethink Music Initiative, *Fair Music: Transparency and Payment Flows in the Music Industry* (with Berklee Institute of Creative Entrepreneurship) (2015)
- Mary LaFrance, *From Whether to How: The Challenge of Implementing a Full Public Performance Right in Sound Recordings*, 2 *Harvard J. Sports & Ent. Law* 221 (2011).