

2016

The Performance Right—A World in Transition

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Recommended Citation

Brabec, Todd (2016) "The Performance Right—A World in Transition," *Mitchell Hamline Law Review*: Vol. 42: Iss. 1, Article 7.
Available at: <http://open.mitchellhamline.edu/mhlr/vol42/iss1/7>

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THE PERFORMANCE RIGHT—A WORLD IN TRANSITION*

Todd Brabec[†]

I.	INTRODUCTION.....	16
II.	THE MUSIC BUSINESS PRE-DIGITAL.....	17
III.	MUSICAL COMPOSITIONS.....	17
IV.	DMX AND PANDORA.....	22
V.	DIRECT LICENSING.....	28
VI.	DEPARTMENT OF JUSTICE INTERVENTION.....	30
VII.	SOUND RECORDINGS.....	34
VIII.	SOUNDEXCHANGE DISTRIBUTIONS AND DIRECT LICENSES.....	38
IX.	PRE-1972 SOUND RECORDINGS.....	39
X.	WHERE DO WE NOW STAND?.....	40

I. INTRODUCTION

17 U.S.C. § 106 states:

[T]he owner of [a] copyright . . . has the exclusive rights to do and to authorize any of the following: . . . (4) in the case of literary, musical, dramatic, and choreographic works, pantomimes, and motion pictures and other audiovisual works, to perform the copyrighted work publicly; . . . and (6) in the case of sound recordings, to perform the copyrighted work publicly by means of a digital audio transmission.¹

* This is an updated and revised version of an article that first appeared in the American Bar Association's *Entertainment and Sports Lawyer*. Todd Brabec, *The Performance Right: A World in Transition*, 31 ENT. & SPORTS LAW. 1 (2015).

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These two exclusive rights of copyright are at the heart of the worldwide business of music. They involve musical compositions and sound recordings, rights of copyright owners and limitations on those rights, and how creators and copyright owners are compensated.

II. THE MUSIC BUSINESS PRE-DIGITAL

In the world of traditional media—primarily radio and television—music licensing has evolved into a fairly straightforward process. For musical compositions, songwriters, composers, and music publishers join or affiliate with the American Society of Composers, Authors and Publishers (ASCAP), Broadcast Music, Inc. (BMI), or SESAC, which are performing rights organizations (PROs) who negotiate license agreements for the use of music, collect the fees, and distribute them back to writers and publishers who have performances in specific media.² If a PRO and a user cannot agree on license fees, courts intervene and determine “reasonable fees” for music use.³

In the area of sound recordings, performances on traditional over-the-air radio are exempt from royalties and considered to be “promotional” tools to drive sales.⁴ A record company’s main source of income, other than record sales, comes from the licensing of master recordings to television series, feature films, and advertising commercials, among other uses. And then came the digital world—a technological revolution that changed everything.

This is a rather simplistic view of the music business, but one that serves as an appropriate starting point for an increasingly complex and changing business.

III. MUSICAL COMPOSITIONS

In the United States, there are three primary organizations that represent songwriters, composers, and music publishers on a non-exclusive basis in the negotiation, collection, and distribution

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1. 17 U.S.C. § 106 (2012).
2. See *infra* Part III.
3. See *infra* Part III (discussing Rate Courts).
4. See *infra* Part VII.

of music performance license fees. The organizations are the ASCAP,⁵ BMI,⁶ and SESAC.⁷ The primary sources of license fees are traditional radio, broadcast and cable television, and general licensing (e.g., live performance, music in bars and restaurants, etc.).⁸

New media license fees, which include online and digital music services, currently represent a relatively small portion of U.S. domestic music license fees (approximately \$150 million of a total annual domestic PRO collection of \$1.5 billion).⁹ Royalty distributions are made—fifty percent to writers and fifty percent to music publishers—after operating costs (approximately twelve to thirteen percent in the cases of ASCAP and BMI) are taken into account.¹⁰ There is a PRO in practically every country of the world where, via reciprocal agreements with ASCAP, BMI, and SESAC, U.S. writers' and publishers' works are represented and paid for when performances occur in foreign territories.¹¹

ASCAP and BMI entered into Consent Decrees with the federal government in 1941, with amendments to those Decrees in 1950, 1960, and 2001 in the case of ASCAP, and amendments in 1966 and 1994 in the case of BMI.¹² One aspect of these Decrees, which has had a significant effect on the determination of license

5. 4 ALEXANDER LINDEY & MICHAEL LANDAU, *LINDEY ON ENTERTAINMENT, PUBLISHING AND THE ARTS* § 8:52 (3d ed.), Westlaw (database updated Jan. 2016).

6. *Id.* § 8:55.

7. *Id.* § 8:58.

8. See Todd Brabec & Jeff Brabec, *Performing Rights Licensing in the United States: A World of Multiple Choices, Considerations, and Results*, 30 ENT. & SPORTS LAW. 8, 8 (2012).

9. See AM. SOC'Y OF COMPOSERS, AUTHORS & PUBLISHERS, *ASCAP ANNUAL REPORT 2014*, at 17 (2014), http://www.ascap.com/~media/files/pdf/about/annual-reports/ascap_annual_report_2014.pdf [hereinafter *ASCAP REPORT*]; BROAD. MUSIC, INC., *BMI ANNUAL REVIEW 2013–2014*, at 12 (2014), http://www.bmi.com/pdfs/publications/2014/BMI_Annual_Review_2014.pdf [hereinafter *BMI REVIEW*]. SESAC is a private for-profit corporation that does not publicly disclose its financial information. Reliable estimates are provided by the author.

10. See LINDEY & LANDAU, *supra* note 5, §§ 8:52, 8:55; *ASCAP Payment System*, ASCAP, <http://www.ascap.com/members/payment/royalties.aspx> (last visited Feb. 8, 2016); *General Royalty Information*, BMI, http://www.bmi.com/creators/royalty/general_information (last visited Feb. 8, 2016).

11. See *infra* Part III.

12. Michael A. Einhorn, *Intellectual Property and Antitrust: Music Performing Rights in Broadcasting*, 24 COLUM.-VLAJ.L. & ARTS 349, 349 (2001).

fees, is the existence of a separate “Rate Court” for ASCAP and BMI, which comes into play when the PRO and a music user cannot come to a negotiated agreement as to what “reasonable” license fees should be in any given area.¹³ The Decrees allow any party to apply to the U.S. District Court for the Southern District of New York for a determination of interim and final fees.¹⁴ These Rate Courts have been in existence with ASCAP since 1950 and with BMI since 1994, and they have determined fees and license terms for the major traditional media areas of radio and broadcast and cable television as well as in recent years, the online music community.¹⁵ It is in these latter “new media” decisions and settlements where most of today’s complex issues have arisen.¹⁶

SESAC, the smallest of the PROs, operates on a for-profit basis as opposed to the non-profit operations of ASCAP and BMI. SESAC is not governed by a Consent Decree with the government and does not have a “Rate Court” type procedure for license fee adjudications and disputes.¹⁷ Under a recent October 2014 settlement with the Television Music License Committee (TMLC) regarding a class action antitrust suit involving local television stations though, SESAC has agreed, as part of the settlement, to binding arbitration for any future licensing fee disputes with the settlement class that cannot be resolved by negotiation.¹⁸ It was further agreed that SESAC could not interfere with the ability of any affiliate to issue a public performance rights license directly to a settlement class member.¹⁹ In July 2015, SESAC also came to a settlement with the Radio Music Licensing Committee (RMLC) to end antitrust litigation anticompetitive behavior regarding license fees.²⁰ As part of the settlement, SESAC agreed to binding arbitration if future negotiated license fee discussions were

13. *See id.* at 356.

14. *See id.*

15. *See id.*

16. *See, e.g., Broad. Music, Inc. v. Pandora Media, Inc.*, Nos. 13 Civ. 4037(LLS), 64 Civ. 3787(LLS), 2013 WL 6697788, at *1 (S.D.N.Y. Dec. 19, 2013).

17. Einhorn, *supra* note 12, at 355.

18. *Meredith Corp. v. SESAC, LLC*, 87 F. Supp. 3d 650, 657 (S.D.N.Y. 2015); *Meredith Corp. v. SESAC, LLC*, 1 F. Supp. 3d 180 (S.D.N.Y. 2014).

19. *Meredith Corp.*, 87 F. Supp. 3d at 657.

20. William Velez, *Radio Industry and SESAC Reach Settlement*, RADIO MUSIC LICENSE COMMITTEE (July 23, 2015), <http://www.radiomlc.org/pages/6282116.php>.

unsuccessful, as well as provisions allowing writers and publishers more flexibility in granting direct licenses to radio stations.²¹

In the online world of music licensing, the ASCAP Rate Court has been instrumental in deciding not only what “reasonable” license fees should be, but also what is actually licensable by PROs. Interim fee and final fee decisions have involved many of the biggest players in the “new media/technology” world and have resulted in license fees significantly below what PROs and copyright owners were requesting.²² To put the online fees into perspective, ASCAP, BMI, and SESAC collected approximately \$1.5 billion in domestic U.S. license fees (e.g., radio, broadcast television, cable television, live performance).²³ Of this amount, approximately \$150 million was generated from all online/digital uses.²⁴ PROs receive an additional \$700 million each year from foreign collection societies (e.g., PRS, GEMA, SACEM, SIAE, SGAE, SOCAN, APRA, IMRO, JASRAC, BUMA) for performances of U.S. writers’ works performed in foreign countries, with a small portion of that money attributable to online use.²⁵ Most publishers, incidentally, collect their foreign country performance royalties directly from those societies as direct members or through sub-publishers.

Commencing with the 2007 *AOL/RealNetworks/Yahoo* case, Rate Court filings, hearings, and decisions have involved YouTube, MobiTV, AT&T Mobility, Verizon Wireless, Spotify, Ericsson, and Netflix, among others. A brief summary of some of the most important points of these cases should help in understanding the current status of online performance licensing.²⁶

The *AOL/RealNetworks/Yahoo* Rate Court case had major worldwide significance as there was a summary judgment ruling that the downloading of a music file did not constitute a public

21. *Id.*

22. *See, e.g.,* United States v. Am. Soc’y of Composers, Authors, & Publishers (*AOL/RealNetworks/Yahoo I*), 485 F. Supp. 2d 438, 441 (S.D.N.Y. 2007).

23. *See* ASCAP REPORT, *supra* note 9, at 17; BMI REVIEW, *supra* note 9, at 13. SESAC estimates provided by the author.

24. *See* ASCAP REPORT, *supra* note 9, at 15; BMI REVIEW, *supra* note 9, at 3. SESAC estimates provided by the author.

25. ASCAP REPORT, *supra* note 9, at 15, 17; BMI REVIEW, *supra* note 9, at 12. SESAC estimates provided by the author.

26. *See* Todd Brabec & Jeff Brabec, *Online Music Licensing: From PROs, AOL, and MobiTV to SoundExchange, AT&T, and the CRB*, 29 ENT. & SPORTS LAW. 1 (2011).

performance under the Copyright Act²⁷—a ruling totally contrary to the laws of most other countries, with the exception of Canada.²⁸ This decision was affirmed by the Second Circuit Court of Appeals, with certiorari denied by the U.S. Supreme Court.²⁹ The circuit court also remanded the fee formula back to the district court for further proceedings.³⁰ The 2009 *Verizon Wireless* Rate Court case reaffirmed the “no performance in a download” decision in a ruling that stated that the transmission of a ringtone to a cellular telephone customer did not constitute a performance and the mechanical ringtone rate of twenty-four cents per download was the only appropriate right and compensation involved.³¹ The primary issue of the 2009 *AT&T* case was whether previews of ringtones were to be considered “fair use” rather than licensable performances.³² The court ruled in favor of ASCAP, and a customer’s previewing of ringtones was therefore licensable by PROs.³³

A 2009 interim fee decision regarding YouTube is a good example of the size of court-set “reasonable” music license fees, with an order of \$70,000 a month.³⁴ The 2010 *MobiTV* case involved what a reasonable license fee should be for the delivering of television programming to mobile telephones and audio channels.³⁵ In this case, the court returned to the early 1990s ASCAP performance licenses with Turner Broadcasting, which set a three-tiered license based on the music intensity of the program.³⁶

27. See *AOL/RealNetworks/Yahoo I*, 485 F. Supp. at 441.

28. See David M. Given, *A Modern Pandora’s Box Music, the Internet, and the Dilemma of Clearing Public Performance Rights*, 26 ENT. & SPORTS LAW. 1, 19 (2008).

29. See *United States v. Am. Soc’y of Composers, Authors, & Publishers (AOL/RealNetworks/Yahoo II)*, 627 F.3d 64, 73 (2d Cir. 2010) (“The downloaded songs are not performed in any perceptible manner during the transfers; the user must take some further action to play the songs after they are downloaded.”), *cert. denied*, 132 S. Ct. 366 (2011).

30. *Id.* at 76.

31. *In re Cellco P’ship (Verizon Wireless)*, 663 F. Supp. 2d 363, 374–75 (S.D.N.Y. 2009).

32. *United States v. Am. Soc’y of Composers, Authors, & Publishers (AT&T)*, 599 F. Supp. 2d 415, 422 (S.D.N.Y. 2009).

33. See *id.* at 434.

34. *United States v. Am. Soc’y of Composers, Authors, & Publishers (YouTube)*, 616 F. Supp. 2d 447, 455 (S.D.N.Y. 2009).

35. *In re Application of MobiTV, Inc. (MobiTV I)*, 712 F. Supp. 2d 206, 232 (S.D.N.Y. 2010).

36. *Id.* at 222.

The music intensive fee was 0.9% of defined revenue with a 0.375% fee for general entertainment and a 0.1375% fee for news and sports programming.³⁷ The Second Circuit Court of Appeals affirmed the lower court's decision.³⁸

All of the aforementioned cases were eventually settled with additional settlements and agreements entered into with Apple Radio, Spotify, Netflix, and Hulu, as well as others. Practically all settlements in this area are confidential.

IV. DMX AND PANDORA

Two additional Rate Court cases, *DMX* and *Pandora*, involved not only the determination of reasonable license fees, but also the role that direct licensing plays in the PRO licensing picture.³⁹ Under the ASCAP and BMI Consent Decrees, the agreements that writers and music publishers sign with ASCAP and BMI are non-exclusive; members and affiliates are allowed to directly license their works to a music user and bypass the PRO structures entirely.⁴⁰

DMX is a leading background and foreground music service provider that provides pre-programmed music for business establishments via direct broadcast satellites or on premise delivery mechanisms.⁴¹ DMX hired a company to assist and design a direct licensing program with copyright owners which eventually resulted in direct licenses representing over 7,000 catalogues, including one major music publisher, Sony.⁴² DMX requested from ASCAP and BMI a "through to the audience" blanket license which reflected the DMX direct licenses already obtained as well as those to be negotiated in the future.⁴³

In July of 2010, the BMI Rate Court entered a final rate for the blanket license, subject to adjustment of DMX's BMI directly

37. *Id.*

38. *Am. Soc'y of Composers, Authors, & Publishers v. MobiTV, Inc. (MobiTV II)*, 681 F.3d 76, 88 (2d Cir. 2012).

39. *Pandora Media, Inc. v. Am. Soc'y of Composers, Authors, & Publishers (Pandora II)*, 6 F. Supp. 3d 317, 320 (S.D.N.Y. 2014), *aff'd*, 785 F.3d 73 (2d Cir. 2015); *Broad. Music, Inc. v. DMX, Inc. (DMX I)*, 726 F. Supp. 2d 355, 355 (S.D.N.Y. 2010), *aff'd*, (*DMX II*) 683 F.3d 32 (2d Cir. 2012).

40. Einhorn, *supra* note 12, at 353.

41. *DMX II*, 683 F.3d at 37.

42. *Id.* at 38.

43. *Id.* at 38–39.

licensed performances.⁴⁴ In a separate decision, the ASCAP Rate Court ruled that ASCAP is required to issue to DMX a blanket license with “carve outs” for the direct licensing program.⁴⁵ Both decisions were appealed to the Second Circuit Court of Appeals which, in June of 2012, affirmed the district court decisions.⁴⁶ The resulting rates significantly reduced the license fees that DMX was paying to ASCAP and BMI.

Pandora is the leading Internet customized radio service and is considered a non-interactive service, as opposed to an on demand/interactive service where the user chooses what they want to hear.⁴⁷ Pandora entered into license agreements with both ASCAP and BMI in 2005 and terminated those licenses at the end of 2010 and 2012 respectively.⁴⁸ In the case of ASCAP, Pandora applied to the court for a “through to the audience” blanket license for the period 2011 through 2015.⁴⁹ In the case of BMI, Pandora filed an application for a five-year license commencing January 1, 2013.⁵⁰

Based primarily on the small license fees that were awarded by the ASCAP and BMI Rate Court judges, commencing with the *AOL/RealNetworks/Yahoo* case in 2007, the major music publishers, starting with EMI (later acquired by Sony), notified ASCAP and BMI that they were withdrawing their catalogues for online licensing purposes.⁵¹ The major publishers felt strongly that they could negotiate more financially acceptable online value deals than the arrangements that had been set by prior Rate Court decisions and the subsequent settlements emanating from those decisions.⁵²

44. *DMX I*, 726 F. Supp. 2d at 355–56.

45. *In re THP Capstar Acquisition Corp.*, 756 F. Supp. 2d 516, 552 (S.D.N.Y. 2010).

46. *DMX II*, 683 F.3d at 49.

47. *Pandora II*, 6 F. Supp. 3d 317, 327, 332 (S.D.N.Y. 2014), *aff'd*, 785 F.3d 73 (2d Cir. 2015).

48. *See* *Broad. Music, Inc. v. Pandora Media, Inc.*, No. 13 Civ. 4037(LLS), 2013 WL 6697788, at *2 (S.D.N.Y. Dec. 19, 2013); *In re Pandora Media, Inc. (Pandora I)*, No. 12 Civ. 8035(DLC), 2013 WL 5211927, at *2 (S.D.N.Y. Sept. 17, 2013), *aff'd sub nom.* *Pandora Media, Inc. v. Am. Soc’y of Composers, Authors & Publishers*, 785 F.3d 73 (2d Cir. 2015).

49. *Pandora I*, 2013 WL 5211927, at *1.

50. *Broad. Music, Inc.*, 2013 WL 6697788, at *2.

51. *Pandora I*, 2013 WL 5211927, at *2–3; *Broad. Music, Inc.*, 2013 WL 6697788, at *3.

52. *Pandora I*, 2013 WL 5211927, at *3.

These online media withdrawals were accomplished by specific changes in the rules, regulations, and practices of ASCAP and BMI.⁵³ Upon withdrawing their works, a number of the publishers entered into direct licensing deals with Pandora,⁵⁴ in effect creating a system whereby Pandora had licenses with ASCAP, BMI, and SESAC, as well as short-term negotiated direct performance licenses with the major publishers. Discussions were also held between ASCAP, BMI, and the major publishers with a view toward ASCAP and BMI handling the administration of the online licenses negotiated by the publishers.

In response to a motion for summary judgment in September 2013, Judge Denise Cote, the ASCAP judge, ruled that a selective withdrawal of new media rights by publisher members could not be implemented without violating the Consent Decree.⁵⁵ Judge Cote further ruled that the ASCAP repertory subject to that license was all works in ASCAP at the time Pandora applied for a license (January 1, 2011), not when the final license arrived.⁵⁶ In short, an application for a license is treated as a license in effect, and in this case, no works could be removed by any ASCAP member during the period of 2011 through 2015. Prior to this decision, interim licenses were never considered “licenses in effect” until such time as a final Rate Court decision was rendered or an agreement was reached. Further, when works are finally removed by any publishers, those works have to be removed for all licensing purposes, not just for online licensing.⁵⁷ Any users with license agreements still in effect at the time of the withdrawal could continue to use the withdrawn works up until their specific license agreement expires.⁵⁸

In a similar summary judgment hearing in the BMI case, Judge Louis Stanton allowed the removal of works which occurred prior to January 1, 2013, but ruled that those works could not be licensed by BMI to any others after any existing license agreements expired.⁵⁹ If BMI cannot offer those compositions to new media

53. *Id.* at *2.

54. *Id.* at *3.

55. *Id.* at *10–11.

56. *Id.* at *11.

57. *Id.* at *9.

58. *Id.*

59. *Broad. Music, Inc. v. Pandora Media, Inc.*, No. 13 Civ. 4037(LLS), 2013 WL 6697788, at *5 (S.D.N.Y. Dec. 19, 2013).

applicants, their availability does not meet the standards of the BMI Decree and they cannot be held in the BMI repertory.⁶⁰

To put both judges' "all in or all out" summary judgment decisions into a real world perspective, if one were to remove works from the current \$150 million PRO annual license fee area of the online world, one would be forced, eventually, to remove those works from the other \$1.35 billion in PRO domestic license fees being generated by traditional media (e.g., radio, broadcast television, cable television, live). Not to mention the effect that such withdrawals would have on the reciprocal "flow through of money" agreements between foreign collection societies and U.S. PROs. As a point of reference, it is important to note that practically all new PRO licensing deals with traditional media include streaming, website music uses, mobile apps, digital and primary broadcasts, mobile and wireless platforms, webcasts, and multi-casts.

On March 14, 2014, Judge Cote issued her "determination of reasonable license fees" in a 136-page decision in the *Pandora* Rate Court case.⁶¹ The judge ruled that the appropriate fee for the years 2011 through 2015 was 1.85% of revenue less certain deductions.⁶² ASCAP had requested a rate of 1.85% for 2011 and 2012, 2.5% for 2013, and 3% for 2014 and 2015.⁶³ Pandora had requested a rate between 1.7% (the current traditional radio rate—Pandora had acquired a small radio station in an attempt to qualify for this rate) and 1.85% (the ASCAP form rate in effect for Pandora since 2005).⁶⁴

Two of the more important issues in the *Pandora* Rate Court proceedings involve: first, the concept of the divisibility of copyrights, which allows a publisher or copyright owner to make deals with various classes of users for their catalogue, and second, the disparity in payments between artists and record companies and songwriters and music publishers for the same type of performance.⁶⁵

As to the latter issue, the *AOL/RealNetworks/Yahoo* 2007 Rate Court case provided evidence of more than \$30 million paid by

60. *Id.* at *4.

61. *In re Pandora Media, Inc.*, 6 F. Supp. 3d 317, 317 (S.D.N.Y. 2014).

62. *Id.* at 372.

63. *Id.* at 320.

64. *Id.*

65. *Id.*

these services to the major record companies over a two-year period, whereas their fees to PROs were, in comparison, very small.⁶⁶ According to Pandora's Securities and Exchange Commission Form 10-K filing, the company expended approximately 48% of its total revenue of \$920.8 million on Content Acquisition costs in 2014.⁶⁷ As to the 48% figure, 44% represented costs for internet transmissions of sound recordings (primarily to SoundExchange, as well as some direct license with labels), with the remaining 4% paid for the musical composition performance right (PROs and music publishers).⁶⁸

In July of 2014, ASCAP—with Universal Music Publishing, Sony/ATV Music, and EMI Music as intervenors—appealed the two district court opinions to the Second Circuit.⁶⁹ The basis of the appeal was that the district court erred in ruling that the Amended Final Judgment of 2001 (AFJ 2) prohibited ASCAP from accepting partial grants of public performance rights and that the district court, in setting a final license fee, ignored recent arm's length relevant benchmark agreements.⁷⁰

As to the "partial grants" prohibition, ASCAP's position was that the Consent Decree long ago removed any prohibition on the right of members to reserve for themselves the right to grant exclusive licensing rights to music users.⁷¹ Further, such a prohibition is in direct conflict with the exclusive rights provided by the copyright law to copyright owners.⁷²

As to the issue of ignoring benchmark agreements in the setting of final reasonable license fees, ASCAP pointed out that the Sony/ATV Music, EMI Music, and Universal Music Pandora direct license deals were all in excess of the 1.85% court set fee,⁷³ as was the 2013 negotiated ASCAP Apple iTunes radio license—all "arms

66. See *AOL/RealNetworks/Yahoo I*, 485 F. Supp. 2d 438 (S.D.N.Y. 2007).

67. PANDORA MEDIA, INC., ANNUAL REPORT (Form 10-K) 247 (Jan. 31, 2012), <http://www.sec.gov/Archives/edgar/data/1230276/000119312512120024/d280023d10k.htm>.

68. *Id.* at 20.

69. Brief of Respondent-Appellant, *Pandora Media, Inc. v. Am. Soc'y of Composers, Authors, & Publishers*, No. 14-1158-cv(L) (2d Cir. July 28, 2014), 2014 WL 3887402.

70. *Id.* at *2, *5, *29.

71. *Id.* at *25.

72. *Id.* at *26.

73. *Id.* at *19.

length willing buyer and willing seller agreements.”⁷⁴ Further, the Second Circuit, in its 2010 *AOL/RealNetworks/Yahoo* decision, confirmed that a 2.5% rate was a valid benchmark even though it vacated the district court’s across-the-board application of that rate to all of Yahoo and RealNetwork’s services.⁷⁵ Accordingly, the current “District Court erred in ignoring [the Second Circuit’s] guidance in *RealNetworks*, which established that a rate of 2.5% revenue (or higher) is reasonable for all-audio, music-intensive digital music services similar to Pandora’s.”⁷⁶

In May 2015, the Second Circuit affirmed the March 2014 Federal Rate Court decision, which set the rate of the ASCAP blanket license at 1.85% of revenue and prevented music publishers from partially withdrawing the public performance licensing rights from ASCAP.⁷⁷

As to the BMI/Pandora Media litigation concerning reasonable fees and terms for an adjustable fee blanket license, Judge Stanton issued a decision—after a five-week jury trial—on May 27, 2015, that the 2.5% of revenue rate and other terms offered by BMI to Pandora were reasonable.⁷⁸ The 2.5% of gross revenue is subject to adjustments to accommodate performances of works that Pandora licensed directly.⁷⁹ Further, Pandora may deduct up to 15% of commissions paid to third party advertising agencies.⁸⁰ The benchmarks the judge relied upon in determining the “reasonable” fee included those between Pandora, Sony EMI, and the Universal Music Group, which ranged from 2.25% to 5.85% of Pandora’s revenue; the direct licenses with EMI and BMG; its license with ASCAP; and BMI’s agreement with the RMLC.⁸¹ The term of the deal is four years and runs from 2013 through 2016.⁸² Pandora subsequently appealed the decision to the Second Circuit.⁸³

74. *Id.* at *9.

75. *Id.* at *21.

76. *Id.* at *27.

77. *Pandora Media, Inc. v. Am. Soc’y of Composers, Authors, & Publishers (Pandora III)*, 785 F.3d 73, 75 (2d Cir. 2015).

78. *Broad. Music, Inc. v. Pandora Media, Inc.*, No. 13 Civ. 4037(LLS), 2015 WL 3526105, at *15 (S.D.N.Y. May 28, 2015).

79. *Id.* at *24–25.

80. *Id.* at *26.

81. *Id.* at *23–24.

82. *Id.* at *26.

83. *See Broad. Music, Inc.*, 2015 WL 3526105, at *1, *appeal docketed*, No. 15-2060

V. DIRECT LICENSING

The ability of a copyright owner to directly license a work to a music user and bypass PROs was a major issue in the *AOL/RealNetworks/Yahoo* and *BMI/DMX* Rate Court decisions, as well as the current Pandora litigation.⁸⁴ Language in both the ASCAP and BMI Consent Decrees guarantee the right of any member or affiliate to directly license their works to a user.⁸⁵ SESAC, as it is not under a Consent Decree with the government, incorporates the following language in its writer and publisher affiliation agreements that insures the right to directly license: “Publisher retains the right to issue non-exclusive licenses directly to any third person for the public performance in the U.S., its territories and possessions, of any work subject to this Agreement.”⁸⁶

When songwriters, composers, and music publishers join or affiliate with ASCAP, BMI, or SESAC, they sign representation agreements granting to the PRO the non-exclusive right to license the non-dramatic public performances of their works. Though each PRO contract and governing documents are different as to terms, length of contract, withdrawal of works, resignation or termination provisions, dispute resolution procedures, payments schedules, distribution rules, and benefits, they all are non-exclusive agreements whereby the writer or publisher can license a work directly.⁸⁷ PROs cannot interfere in any way with this right or the ability to exercise this right.

Language as to the ability to direct license as well as the effect of a direct license has been standard in many types of industry

(2d Cir. 2015).

84. See *Pandora III*, 785 F.3d 73, 76 (2d Cir. 2015); see also *Broad. Music, Inc.*, 2015 WL 3526105, at *6–7.

85. See *Broad. Music, Inc.*, 2015 WL 3526105, at *6–7.

86. See generally Todd Brabec & Jeff Brabec, *Performing Rights Licensing in the United States: A World of Multiple Choices, Considerations, and Results*, 30 ENT. & SPORTS LAW. 8, 10 (2012) (discussing the standard SESAC writer or publisher affiliation agreement).

87. See, e.g., AM. SOC'Y OF COMPOSERS, AUTHORS & PUBLISHERS, ASCAP PUBLISHER AGREEMENTS 1–3 (2015), <http://www.ascap.com/~media/files/pdf/join/ascap-publisher-agreement.pdf> (last visited Feb. 8, 2016); BROAD. MUSIC, INC., WRITER APPLICATION 3 (2014), http://www.bmi.com/forms/affiliation/bmi_writer_kit.pdf (May 2014).

license agreements, including work-for-hire and employee-for-hire contracts for many decades. A sample clause might read:

The performing rights in the composition, to the extent permitted by law, shall be assigned to and licensed by the applicable [PRO] with said organization authorized to collect and receive all monies earned from the public performance of the composition and to pay the writers and publishers directly. If to the extent it is unlawful for the PRO, or any of its affiliates, to issue blanket small performing right licenses or the applicable performing rights society does not from time to time, for any reason whatsoever maintain a regular system of collecting performance fees and/or a third party licensee (i.e., a television network, independent television station, digital music service, etc.) requires direct licensing of such rights, company and publisher shall have the right to directly license their respective shares of the public performances rights in the composition to such third parties. If the company or publishing designee receives a distribution of earned public performance fees from any source that does not make a separate distribution directly or indirectly to publisher and to composer, then publisher shall be entitled to receive its portion of such fees and composer shall be entitled to receive the writer's share of such fees.

Additional variations of a direct license clause are as follows:

Licensee desires to obtain from publisher a blanket license for all necessary performance, reproduction and distribution rights implicated by the delivery of programming embodying publisher's catalogue and publisher is willing to grant such right to license on a non-exclusive basis.

The right to publicly perform and to authorize others to perform the composition by means of a media entity not licensed by ASCAP, BMI, or SESAC is subject to clearance of the performing right either from Licensor or from any other duly authorized licensor acting for or on behalf of Licensor subject to good faith negotiations in accordance with established industry customs and practices.

An issue in many agreements is what happens to the writer's share when a copyright owner, usually the music publisher, directly licenses a work to a user. Clauses range from "payments to be made based upon the prevailing PRO rates for the specific use," "compensation to be negotiated in good faith," "reasonable fee," "fee subject to arbitration," "a complete buyout with no further

compensation or continuing royalties,” or “50% of any license fee received.”

A further unresolved issue as to an allowable and effective direct license under court or Consent Decree interpretation involves the situation where a music user (e.g., traditional broadcaster, online music service, etc.) contacts a copyright owner directly with the request, versus the situation where the ASCAP or BMI copyright owner approaches the user to negotiate a direct license. This is a fine distinction, but an important one in current litigation and Consent Decree interpretation.

VI. DEPARTMENT OF JUSTICE INTERVENTION

In part because of the *Pandora* decisions, a major development occurred in June 2014 when the Department of Justice announced that it would review both the ASCAP and BMI Consent Decrees “to account for changes in how music is delivered to and experienced by listeners”⁸⁸ The Department allowed a sixty-day period for comments from any interested party (e.g., music publishers, songwriters and composers, PROs, online service companies, music users of any nature, the general public, etc.).⁸⁹

A cross-section of some of the views was illustrative of the issues as well as the diametrically opposed positions of many of the parties. The comments very much reflected a creators versus users scenario.

On the music user side, the National Association of Broadcasters (NAB), the Digital Media Association (DiMA), Netflix, Fox News, the RMLC, the National Restaurant Association, and the Consumer Electronics Association, among others, submitted comments.⁹⁰ The creator/copyright representative side

88. *Antitrust Consent Decree Review—ASCAP and BMI 2014*, U.S. DEP’T JUST., <http://www.justice.gov/atr/ascap-bmi-decree-review> (last updated Dec. 16, 2015).

89. *See id.*

90. *See* National Association of Broadcasters, Comment on Antitrust Consent Decree Review (Aug. 6, 2014), <http://www.justice.gov/atr/cases/ascapbmi/comments/307974.pdf>; Digital Media Association, Comment on Antitrust Consent Decree Review, <http://www.justice.gov/atr/cases/ascapbmi/comments/307972.pdf> (last visited Feb. 8, 2016); Netflix, Comments on Antitrust Consent Decree Review (Aug. 6, 2014), <http://www.justice.gov/atr/cases/ascapbmi/comments/307908.pdf>; Fox News, Comment on Antitrust Consent Decree Review (Aug. 6, 2014), <http://www.justice.gov/atr/cases/ascapbmi/comments/307811.pdf>; Radio Music License Committee, Comment on Antitrust Consent

included comments from the performing right organizations ASCAP, BMI, PRS for Music (U.K.), SOCAN (Canada), JASRAC (Japan), SIAE (Italy), as well as the Society of Composers and Lyricists (SCL—film and television composers), Nashville Songwriters Association International (NSAI), the National Music Publishers Association (NMPA), and the Screen Actors Guild-American Federation of Television and Radio Artists (SAG-AFTRA), among others.⁹¹

ASCAP, in its comments, requested that the Rate Court be replaced with a faster and cheaper dispute resolution procedure, that ASCAP be allowed to bundle and license multiple rights (the current Decree prohibits ASCAP from licensing any right other than performance), and allowed partial grants of rights from its members.⁹² The arguments centered on the fact that new media

Decree Review (Aug. 6, 2014), <http://www.justice.gov/atr/cases/ascapbmi/comments/307977.pdf>; Letter from David Matthews, Nat'l Restaurant Ass'n, to John R. Read, U.S. Dep't of Justice (July 22, 2014), <http://www.justice.gov/atr/cases/ascapbmi/comments/307607.pdf>.

91. American Society of Composers, Authors, and Publishers, Comment Regarding Review of the ASCAP and BMI Consent Decrees (Aug. 6, 2014), <http://www.justice.gov/atr/cases/ascapbmi/comments/307803.pdf>; Broadcast Music, Inc., Comments Regarding Review of BMI Consent Decree (Aug. 6, 2014), <http://www.justice.gov/atr/cases/ascapbmi/comments/307859.pdf>; Memorandum from Performing Right Soc'y, Ltd. on Review of ASCAP and BMI Consent Decrees, to Chief, Litig. III Section, Antitrust Div. (Aug. 5, 2014), <http://www.justice.gov/atr/cases/ascapbmi/comments/307652.pdf>; E-mail from Gilles Daigle, Soc'y of Composers, Authors, & Music Publishers of Can., to Chief, Litig. III Section, Antitrust Div. (Aug. 6, 2014), <http://www.justice.gov/atr/cases/ascapbmi/comments/307844.pdf>; Letter from Satoshi Watanabe, Japanese Soc'y for Rights of Authors, Composers, & Publishers, to Chief, Litig. III, Section Antitrust Division (Aug. 5, 2014), <http://www.justice.gov/atr/cases/ascapbmi/comments/307760.pdf>; E-mail from Societa' Italiana Delgi Autori ed Editori, to Chief, Litig. III, Section Antitrust Division (Aug. 5, 2014), <http://www.justice.gov/atr/cases/ascapbmi/comments/307727.pdf>; Society of Composers and Lyricists, Comment on Antitrust Consent Decree Review as Pertaining to ASCAP and BMI (Aug. 6, 2014), <http://www.justice.gov/atr/cases/ascapbmi/comments/307971.pdf>; Nashville Songwriters Association International, Comment on Review of ASCAP and BMI Consent (Aug. 5, 2014), <http://www.justice.gov/atr/cases/ascapbmi/comments/307686.pdf>; National Music Publishers' Association, Comment Regarding Review of the ASCAP and BMI Consent Decrees, <http://www.justice.gov/atr/cases/ascapbmi/comments/307900.pdf> (last visited Feb. 8, 2016); Screen Actors Guild—American Federation of Television and Radio Artists, Comments on Antitrust Consent Decree Review (Aug. 6, 2014), <http://www.justice.gov/atr/cases/ascapbmi/comments/307818.pdf>.

92. See American Society of Composers, Authors and Publishers, Comments

users need multiple rights in their business; that publishers need flexibility to manage rights and negotiate contracts terms; and that property rights are divisible, assignable, and licensable either in whole or in part.⁹³ BMI, which is not prevented from bundling or licensing multiple rights, requested that publishers be allowed to withdraw digital rights and that a binding arbitration model replace the Consent Decree mandate.⁹⁴

The SCL were in favor of Consent Decree changes and expressed concerns that if the major music publishers withdrew completely from ASCAP and BMI, “the transparency of accountability currently afforded . . . by the PROs and the collective licensing model” would be affected.⁹⁵ The SCL further asserted that in a bundled rights situation, it would be difficult to ascertain the value of the performance right in bundled transactions.⁹⁶ Most writers in this field sign “work-for-hire” contracts where the back end performance royalties represent a substantial portion of their income.⁹⁷ The 165,000-member organization, SAG-AFTRA, the “largest labor union representing working media artists,” commented that the “scales have tipped too far in favor of licensees’ interests over those of the artists” and that the rate-setting process set forth by the Consent Decrees is inefficient, expensive, and burdensome upon PROs and if not modified will significantly devalue writers’ works.⁹⁸

Sony/ATV Music supported amending the Consent Decrees to allow copyright owners the ability to limit the scope of the rights they grant to ASCAP and BMI in their musical compositions and to require PROs to accept those grants; supported an expedited arbitration process for resolving rate disputes; and recommended that the reviews of the Decrees occur periodically to take into account new technology changes and conditions.⁹⁹ Sony/ATV was

Regarding Review of the ASCAP and BMI Consent Decrees 3, 16 (Aug. 6, 2014), <http://www.justice.gov/atr/cases/ascapbmi/comments/307803.pdf>.

93. *See id.* at 16, 19–21.

94. *See* Broadcast Music, Inc., *supra* note 91, at 2.

95. *See* Society of Composers and Lyricists, *supra* note 91, at 2.

96. *Id.*

97. *See id.* at 1 (describing the uniqueness of American work-for-hire contracts).

98. Screen Actors Guild—American Federation of Television and Radio Artists, *supra* note 91, at 3.

99. *See* Sony/ATV Music Publishing LLC, Comments on ASCAP and BMI Consent Decrees, at 1–2 (Aug. 6, 2014), <http://www.justice.gov/atr/cases>

not in favor of allowing PROs to handle rights other than performing rights, as it was their position that these markets already functioned well and that the introduction of such regulated entities into the market for these other rights would be “costly and disruptive.”¹⁰⁰

As to the foreign performing right organizations who submitted comments, widespread concern centered on the belief that the current Consent Decrees were outdated in today’s world and that changes were essential if music was to be appropriately licensed and compensated.¹⁰¹ Partial grants of rights and the bundling of multiple rights are commonplace in the foreign marketplace, and dispute resolution procedures are less cumbersome than the U.S. Rate Court.¹⁰² PRS for Music in the U.K., which receives over \$100 million a year in U.S. performance royalties for its members from ASCAP and BMI, expressed concerns over the present Decrees and stated that they would consider licensing the British repertory directly in the United States rather than through intermediaries if it proved more efficient.¹⁰³

DIMA, a trade organization whose members include Apple, Amazon, Microsoft, and YouTube, stated that the Decrees have not harmed ASCAP or BMI financially in terms of the music industry generally, and that PROs must be subject to oversight as their anti-competitive behavior continues to this day.¹⁰⁴ Further, if the Justice Department does allow all PROs to bundle rights, as well as allow partial withdrawals, then substantial oversight must be put in place and songwriters must be allowed to keep their rights with their PRO if that’s what they wanted regardless of whether the publisher removed the works.¹⁰⁵

The RMLC strongly felt that the Decrees were necessary to keep the market power of ASCAP and BMI in check.¹⁰⁶ Also, if publishers were allowed to withdraw from PROs, they could

/ascapbmi/comments/307983.pdf.

100. *Id.* at 26.

101. *See, e.g.*, Memorandum from Performing Right Soc’y, Ltd., *supra* note 91, at 2; Society of Composers, Authors and Music Publishers, *supra* note 91, at 1; Societa’ Italiana Delgi Autori ed Editori, *supra* note 91, at 1–2.

102. Memorandum from Performing Right Soc’y, Ltd., *supra* note 91, at 3.

103. *Id.* at 2.

104. Digital Media Association, *supra* note 90.

105. *Id.* at 23.

106. Radio Music License Committee, *supra* note 90.

leverage their outsize market share to extract exorbitant license fees from licensees. Both the NAB and TMLC also shared these views.¹⁰⁷ As to Netflix, their position was that the Decrees were in place to constrain PROs' market power.¹⁰⁸ They were against allowing partial publisher withdrawals, but if the Department allowed them, then conditions would have to be imposed to mitigate any adverse consequences.¹⁰⁹ Finally, the Rate Court must stay in place, though it does need to be streamlined.

VII. SOUND RECORDINGS

Prior to 1972, no federal copyright protection existed for sound recordings. Congress rectified that situation by extending copyright to any recordings that were fixed on or after February 15, 1972.¹¹⁰ The owners of the copyright, therefore, had the exclusive right to reproduce and distribute phonorecords embodying the sound recording, including by means of digital transmission, and to authorize others to do the same.¹¹¹ Pre-February 15, 1972, recordings remained subject to the protection afforded by state laws.¹¹²

As to the performance right aspect of sound recordings, the right that was enjoyed by musical compositions was non-existent for records. No performance royalty existed in any medium for sound recordings.¹¹³ That changed in 1995 with the passage of the Digital Performance Rights in Sound Recordings Act (DPRSRA), which provided for a limited right when sound recordings are publicly performed "by means of a digital audio transmission."¹¹⁴ The 1998

107. See National Association of Broadcasters, Comment Regarding Antitrust Consent Decree Review, *2 (Aug. 6, 2014), http://www.nab.org/documents/newsRoom/pdfs/080614_DOJ_consent_decree_comments.pdf.

108. Netflix, *supra* note 90.

109. *Id.* at 9.

110. See Sound Recording Act of 1971, Pub. L. No. 92-140, 85 Stat. 391. *But see* Eric Charles Osterberg, *Should Sound Recordings Really Be Treated Differently than Other Copyrighted Works? The Illogic of Bridgeport v. Dimension Films*, 53 J. COPYRIGHT SOC'Y U.S.A. 619, 631 (2006).

111. Osterberg, *supra* note 110, at 633-37.

112. See *Goldstein v. California*, 412 U.S. 546, 552 (1973).

113. Joshua D. Levine, *Dancing to a New Tune, A Digital One: The Digital Performance Right in Sound Recordings Act of 1995*, 20 SETON HALL LEGIS. J. 624, 628 (1996).

114. Digital Performance Rights in Sound Recordings Act, Pub. L. No. 104-39, 109 Stat. 336 (1995).

Digital Millennium Copyright Act (DMCA) included webcasting as a category of performance applicable to this limited performance right.¹¹⁵ This new right applied specifically to satellite radio (e.g. Sirius XM), internet radio (e.g. Pandora), and cable television music channels (e.g. Music Choice).¹¹⁶ Broadcast radio continued to be exempt.¹¹⁷

It is important to note that the statutory license applies only to non-interactive services.¹¹⁸ The right to perform copyrighted sound recordings for on-demand services (interactive services) remains with the copyright owner (normally the label) and is a negotiated agreement between the label and the music user.¹¹⁹ These deals have taken many forms, including percentage of gross or net revenue formulas, per performance rates, an equity stake in the business, or a combination of these and other elements.

The rates and terms of the sound recording statutory license are set by the Copyright Royalty Board (CRB), an administrative body created by Congress.¹²⁰ SoundExchange, a non-profit organization, has been designated by the Librarian of Congress and the CRB to be the sole entity to collect, administer, and distribute the royalties from non-interactive webcasting, digital cable and satellite transmissions, and satellite audio services.¹²¹ Congress also gave SoundExchange the right to negotiate agreements separate from those set by the CRB through the Webcaster Settlement Acts of 2008 and 2009.¹²² Services therefore can choose whether to be licensed under the CRB rates or the SoundExchange negotiated rates.

There are five major sound recording licensing categories, each of which is subject to a separate rate proceeding.¹²³ The categories are webcasting, satellite radio, pre-existing music

115. Digital Millennium Copyright Act, Pub. L. No. 105-304, § 405, 112 Stat. 2860 (1998).

116. See 17 U.S.C. §§ 112, 114 (2012).

117. *Id.* §§ 112(a)(1), 114(d)(1).

118. *Id.* § 114(d)(2).

119. *Id.* § 114(d)(3)(C).

120. *Id.* § 801.

121. SOUNDExchange, <http://www.soundexchange.com> (last visited Feb. 8, 2016).

122. Webcaster Settlement Act, Pub. L. No. 110-435, 112 Stat. 4974 (2008); Webcaster Settlement Act, Pub. L. No. 111-36, 123 Stat. 1926 (2009); see also 17 U.S.C. § 114(f)(5).

123. See 17 U.S.C. § 114(f)(2)-(3).

services, other cable and satellite music providers, and business establishments. An example of a rate proceeding involved Sirius XM satellite radio; the proceeding concluded in 2012 and set rates at 9% of gross revenue for a five-year period beginning in 2013, and increasing to 11% in 2017.¹²⁴

Webcasting IV—the proceeding regarding future webcasting rates—commenced in early 2014 and concluded at the end of 2015 and set rates for the period 2016 through 2020.¹²⁵ Recent five-year CRB per performance statutory webcasting rates were \$0.0019 for 2011, \$0.0021 for 2012 and 2013, and \$0.0023 for 2014 and 2015.¹²⁶

The Webcaster Settlement Acts of 2008 and 2009 allowed SoundExchange to negotiate alternative royalty rates (“Pureplay” rates) with certain webcasters.¹²⁷ For non-subscription services and broadcasters streaming their content on the internet, the “Pureplay” per performance rate started as \$0.00102 for 2011 and increased to \$0.0013 in 2014 and \$0.0014 in 2015.¹²⁸ The rate applicable is the greater of the per performance rate or 25% of U.S. gross revenue.¹²⁹ The “Pureplay” per performance rate for subscription services started at \$0.0017 in 2011 and increased to \$0.0023 and \$0.0025 for 2014 and 2015, respectively.¹³⁰ No percentage of revenue figures applied to the subscription rate.¹³¹ Under those agreements, Webcasters therefore had a choice to be licensed through 2015 either with the CRB rates or the SoundExchange “Pureplay” rates.

As to the current *Webcasting IV* CRB proceeding, SoundExchange’s rate proposal for the 2016–2020 period was a “greater of” formula taking into account a per-performance rate and a percentage of the service’s revenue.¹³² Specifically, the per-

124. *In re* Determination of Rates and Terms for Preexisting Subscription Servs. and Satellite Dig. Audio Radio Servs., No. 2011-1 (C.R.B. Dec. 14, 2012), http://www.loc.gov/crb/comments/2012-12/Public_Initial_Determination.pdf.

125. *See In re* Determination of Royalty Rates and Terms for Ephemeral Recording and Digital Performance of Sound Recordings (*Webcasting IV*), No. 14-CRB-0001-WR (C.R.B. 2014).

126. 37 C.F.R. § 380.3(a)(1) (2014).

127. Notification of Agreements Under the Webcaster Settlement Act of 2009, 74 Fed. Reg. 34,796, 34,796–97 (July 17, 2009).

128. *Id.* at 34,799.

129. *Id.*

130. *Id.*

131. *See id.*

132. Introductory Memorandum to the Written Direct Statement of

performance rate for commercial webcasters would commence at \$0.0025 in 2016, then escalate to \$0.0029 in 2020.¹³³ The percentage of revenue figure would be 55% of attributable revenue from activities in the United States for all five years.¹³⁴ Non-commercial webcaster per-performance rates would be the same as the commercial rates but would only contain a minimum fee and no percentage of revenue calculation.¹³⁵ Their proposal was based on the facts that webcasting is a vibrant and growing industry, that it has widespread adoption by consumers, and that direct licensing deals between record companies and on demand services (interactive streaming) were the most appropriate benchmarks to use. A review of these deals confirmed that the record companies received a minimum share of 50% to 60% of a service's revenue with allocations based on each record company's share of total streams.¹³⁶

Music services, on the other hand, argued in their case that the industry is not profitable even considering payments under the reduced Webcaster Settlement Act agreements.¹³⁷ Pandora's proposal for non-subscription services was a per-performance rate of \$0.0011 in 2016 increasing to \$0.00118 in 2020, a subscription rate \$0.00215 in 2016 increasing to \$0.0023 in 2020, and a "greater of" figure that is 25% of revenue.¹³⁸ iHeartMedia and the NAB proposed a per-performance rate of \$0.0005 for five years with no

SoundExchange, Inc. at 1, *Webcasting IV*, No. 14-CRB-0001-WR (C.R.B. Oct. 7, 2014), http://www.loc.gov/crb/rate/14-CRB-0001-WR/statements/SX/1A_Introductory_Memorandum.pdf.

133. *Id.*

134. *Id.*

135. *Id.* at 2.

136. *See id.* at 13.

137. *See generally* Written Direct Testimony of Michael Herring at 2–3, *Webcasting IV*, No. 14-CRB-0001-WR (C.R.B. Oct. 6, 2014), http://www.loc.gov/crb/rate/14-CRB-0001WR/statements/Pandora/11_Written_Direct_Testimony_of_Michael_Herring_with_Exhibits_PUBLIC.pdf; Testimony of David B. Packman at 3, *Webcasting IV*, No. 14-CRB-0001-WR (C.R.B. Oct. 7, 2014), http://www.loc.gov/crb/rate/14-CRB-0001WR/statements/iHeartMedia/Vol%20205_01%20Testimony%20of%20D%20Pakman/2014_10_07_Testimony_of_D_Pakman_with_Appendices.pdf.

138. Proposed Rates and Terms of Pandora, Inc. at 1–2, *Webcasting IV*, No. 14-CRB-0001-WR (C.R.B. Oct. 7, 2014), http://www.loc.gov/crb/rate/14-CRB-0001WR/statements/Pandora/2_Pandora_Proposed_Rates_and_Terms.pdf.

percentage of revenue alternative.¹³⁹ Any direct licenses entered into would be excluded from the calculations.¹⁴⁰

On December 16, 2015, the CRB issued their written determination as to the royalty rates and terms applicable to the digital performance of sound recordings over the Internet by nonexempt, non-interactive transmission services (webcasters).¹⁴¹

The rate for commercial subscription services in 2016 is \$0.0022 per performance with commercial nonsubscription services at \$0.0017 per performance.¹⁴² The rates for 2017 through 2020 for both types of services shall be adjusted to reflect the increases or decreases as measured by the Consumer Price Index applicable to that rate year. In addition, the rates for noncommercial webcasters are \$500 annually for each station or channel for all webcast transmissions totaling not more than 159,140 Aggregate Tuning Hours (ATH) with a per performance rate of \$0.0017 for any performances in excess of the ATH figure.¹⁴³

The “greater of [percentage] of revenue versus per performance rate” (Revenue Share) concept, as set forth in the prior Webcaster Settlement Acts, was not included in the 2016-2020 rate determination.¹⁴⁴ CRB decisions are appealable to the United States Court of Appeals for the District of Columbia Circuit within thirty days after publication of the determination in the Federal Register.¹⁴⁵

VIII. SOUNDEXCHANGE DISTRIBUTIONS AND DIRECT LICENSES

The total of all royalties collected by SoundExchange in 2014 was \$788 million, with the statutory license accounting for \$755

139. Written Direct Statement of the National Association of Broadcasters app. B at 3–4, *Webcasting IV*, No. 14-CRB-0001-WR (C.R.B. Oct. 7, 2014), http://www.loc.gov/crb/rate/14-CRB-0001WR/statements/NAB/NAB_FINAL_VOLUME_1_PUBLIC.pdf; Proposed Rates and Terms of iHeartMedia, Inc. at 1, *Webcasting IV*, No. 14-CRB-0001-WR (C.R.B. Oct. 7, 2014), http://www.loc.gov/crb/rate/14-CRB-0001WR/statements/iHeartMedia/Vol%20Introductory%20Documents/Vol_1_02_2014_10_07_Rate_and_Terms_Proposal.pdf.

140. See 17 U.S.C. § 114(3) (2014).

141. See *Current Developments*, COPYRIGHT ROYALTY BOARD (Dec. 16, 2015), <https://www.loc.gov/crb/>.

142. *Id.*

143. *Id.*

144. *Id.*

145. See 4 WEST’S FED. ADMIN. PRAC. § 4018, Westlaw (database updated July 2015).

million of that figure.¹⁴⁶ The remaining collections represent royalties received from non-statutory services, including foreign country collective management organizations.¹⁴⁷ Total gross distributions were \$773 million to artists and sound recording copyright owners.¹⁴⁸ Royalty distributions are allocated 50% to sound recording copyright owners (many times the label), 45% to featured artists, and 2.5% each to non-featured musicians and non-featured vocalists via the Intellectual Property Rights Distribution Fund, administered by the American Federation of Musicians (AFM) and the SAG-AFTRA.¹⁴⁹ As to the amount of sound recording royalties coming in from foreign countries, it is important to note that it is limited based on the reciprocal right being administered in each country. As the U.S. sound recording performance right is a very limited one (non-interactive streaming primarily), it substantially reduces the amount of royalties coming into the United States for overseas sound recording performances.

Finally, in the case of rights owners wishing to directly license their works to non-interactive services and not rely on the statutory license or SoundExchange separately negotiated deals, SoundExchange does offer administration services to both labels as well as artists for those works.

IX. PRE-1972 SOUND RECORDINGS

As previously mentioned, sound recordings fixed prior to February 15, 1972, are not subject to copyright under § 301(c), and further, any rights they do have depend solely on whatever rights are afforded to sound recording owners under state law.¹⁵⁰

146. SOUND EXCHANGE, SOUND EXCHANGE ANNUAL REPORT FOR 2014 PROVIDED PURSUANT TO 37 C.F.R. § 370.5(c) 4 (2015), http://www.soundexchange.com/wp-content/uploads/2015/03/2014-SoundExchange-Fiscal-Report-FINAL-REPORT_ISSUED_3-31-2015.pdf.

147. *Id.* at 4 n.2.

148. *Id.*

149. 17 U.S.C. § 114(g)(2)(A)–(D) (2014).

150. 17 U.S.C. § 301(c); *see also* Flo & Eddie, Inc. v. Sirius XM Radio, Inc., 62 F. Supp. 3d 325, 336 (S.D.N.Y. 2014) (“Recordings ‘fixed’ (recorded) prior to February 15, 1972 were not, and still are not, eligible for federal copyright protection.”); Capitol Records, Inc. v. Naxos of Am., Inc., 830 N.E.2d 250, 252 (N.Y. 2005) (“Sound recordings produced after February 15, 1972 can be protected from infringement under federal copyright law but Congress did not extend statutory protection to recordings created before that date.”).

In September 2014, in the U.S. District Court for the Central District of California case *Flo & Eddie, Inc. v. Sirius XM Radio, Inc.*, the court ruled in a motion for summary judgment that copyright ownership of a sound recording under the California statute includes the right to publicly perform the recording.¹⁵¹ The court further held that Sirius XM's streaming of the 1960s band The Turtles' pre-1972 recordings without authorization and without paying royalties constituted copyright infringement.¹⁵² In November 2014, the U.S. District Court for the Southern District of New York ruled in *Flo & Eddie, Inc. v. Sirius XM Radio, Inc.* that Sirius had committed copyright infringement and engaged in unfair competition by publicly performing sound recordings owned by Flo & Eddie.¹⁵³ These cases and their appeals, as well as similar pending cases regarding the same or similar issues, need to be watched as they will have a very significant impact on future sound recording license fees as well as royalties to labels and artists.¹⁵⁴

X. WHERE DO WE NOW STAND?

Of the two performance areas under discussion—musical composition rights and sound recording rights—the sound recording seems much clearer than the composition side. The sound recording performance right, at least for now, is a very limited right (traditional radio, for example, is not included) and has a statutory scheme in place with rates set by either the CRB, by SoundExchange with users, or by direct negotiations between copyright owners and users. Over the past ten years, this has been, percentage-wise, by far the biggest growth area for sound recording copyright owners. Though the status of pre-1972 sound recordings is not yet finalized, all indications are that significant royalties will start to flow for this category of works.

151. Order Granting Plaintiff's Motion for Summary Judgment, *Flo & Eddie*, No. CV 13-5693 PSG (RZx), 2014 WL 4725382, (C.D. Cal. Sept. 22, 2014).

152. *Id.*

153. Memorandum Decision & Order Denying Defendant's Motion for Summary Judgment, *Flo & Eddie*, 62 F. Supp. 3d 325 (No. 13 Civ. 5784(CM)), 2014 WL 6670201.

154. *Flo & Eddie*, No. 13 Civ. 5784(CM), 2014 WL 6670201 (S.D.N.Y. Nov. 14, 2014), *appeal docketed*, No. 15-1164 (2d Cir. 2015); *Flo & Eddie*, No. CV 13-5693 PSG (RZx), 2014 WL 4725382 (C.D. Cal. Sept. 22, 2014), *appeal docketed*, No. 15-80102 (9th Cir. 2015).

The musical composition performance right, on the other hand, has more questions and unresolved issues in the licensing process than ever before. Not only are there unresolved Rate Court cases and issues affecting every aspect of the licensing of music in the “new media” world (not to mention the effect on traditional media licensing), but also the entrance into the field of new types of PRO models (e.g., music publishers, business entities, administration services, foreign territory rights management organizations, etc.) which could, depending on one’s point of view, significantly complicate the existing licensing structure for music users, achieve “willing buyer, willing seller” market rates for the creative community and their representatives, strengthen the arguments for licensing through the traditional PRO model, weaken the current traditional PRO structures, increase license fees and royalties in some areas with reductions in others, initiate an era of PRO selective administration services only, and create new writer and music publisher royalty payment formulas, values, compensation plans, guarantee arrangements, competitive matching payment systems, royalty advance deals, bonus and “rewards for success” policies as well as other financial incentive plans, among other possibilities and results.

In addition, the direct licensing of works by copyright owners, never a major factor in the past, has taken on new significance in not only the online “new media” world of music licensing, but also in traditional media music licensing practices. Finally, the Department of Justice review of the ASCAP and BMI Consent Decrees, in effect since 1941, could have a significant effect on the future of music performance licensing, assuming that any changes encompass more than just minor modifications.

The foreign marketplace, responsible for the collection of an excess of \$1.5 billion in annual U.S. writer and publisher performance fees, represents an additional area of concern regarding the stability, continuation, and accuracy of “overseas” royalty collections and payments. The issues in this area are more significant for songwriters and composers than music publishers, as many publishers collect their monies directly from foreign societies as direct members or via sub-publishers. For successful songwriters, film and television composers, and writer estates, foreign royalties—for many, easily in excess of 50% of their short-term and long-term royalty income—have always flowed through the societies through reciprocal agreements. Therefore, any change in those

relationships could have a major impact on the ability to license, track, audit, collect, and receive foreign country songwriter and composer royalties.

The best advice for the future—in all of your deals, negotiations, and contracts—prepare for every contingency and possibility,” as they may very well come true.

Welcome to the “new world of performance licensing.”