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THE DUAL NARRATIVES IN THE LANDSCAPE OF MUSIC COPYRIGHT

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ABSTRACT

The challenges that new technologies bring is a constant theme in copyright law, but in the field of music the problems are particularly pronounced. Much has changed in the music industry over the past century. As new business models emerged, incumbents in the music industry fought vigorously to capture revenue streams. As a result, the fragmented copyright rights that characterize the music industry have taken on new layers of complexity. The Copyright Act, federal regulations promulgated by the Copyright Office, Copyright Royalty Board proceedings, antitrust consent decrees, and federal district courts acting as "rate courts," all play roles in establishing who has to pay, who gets paid, and how much money changes hands in the music industry. The variety of regulatory mechanisms that shape the royalty rates paid by different businesses that use and distribute music has resulted in a stunning disparity in prices paid for the music inputs used by different businesses.

This Article explores the complexity of music licensing through the lens of dual competing narratives in music copyright. The first narrative explains the varying treatment of music businesses as being aimed at maintaining fair remuneration for copyright owners in light of changing technologies. The second narrative sees the

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varying treatment as being aimed at protecting incumbent entities from the competition brought about through changing business models made possible by technological advances. Although the venues in which these narratives play out vary throughout different segments of the music industry, both narratives are clearly at play in shaping the complexity of music copyright.

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I. INTRODUCTION

Much has changed in the music industry over the past two decades. While combatting the meteoric rise of peer-to-peer file sharing networks, incumbents in the music industry fought vigorously to capture revenue streams as new business models have emerged, offering consumers multiple new ways to experience music. As a result, the fragmented copyright rights that characterize the music industry have taken on new layers of complexity, including, for example, in the market for authorized digital downloads, cell phone ringtones, and a variety of internet-based music services. While some of this new complexity stems from the statutes adopted by Congress, a more significant source of the regulatory complexity arises from: (1) lengthy regulations and rulings issued by the Copyright Office and the Copyright Royalty Board relating to a variety of music business models; (2) model licensing agreements established by private actors and then sanctioned by the Copyright Royalty Board as required by statute; and (3) court rulings concerning the scope of the antitrust decrees that govern the two major private performing rights societies, American Society of Composers, Authors and Publishers (ASCAP) and Broadcast Music, Inc. (BMI).

The challenges that new technologies bring is a constant theme in copyright law, but in the field of music the problems are particularly pronounced because any business seeking to offer a viable music service faces the inherent problem of needing to use thousands if not millions of works[1] and must obtain licenses from multiple copyright owners in each of those works. The resulting exceedingly high transaction costs are ameliorated through different collective rights management systems. These collective rights management systems, in turn, are governed by a variety of regulatory mechanisms that shape royalty rates paid by different businesses that use and distribute music. Arising from different nooks and crannies of copyright law, the wide range

1. Spotify has a library of over 20 million songs. Pandora Media, Inc. v. Am. Soc'y of Composers, Authors, & Publishers, 6 F. Supp. 3d 317, 325 (S.D.N.Y. 2014). Pandora has between 1 and 2 million songs in its database. *Id.* at 365 & n.79.

of rates results in a stunning disparity in price for the music inputs of different businesses.

This Article explores the dual competing narratives in music copyright. The first narrative explains the varying treatment of music businesses as being aimed at maintaining fair remuneration for copyright owners in light of changing technologies. The second narrative sees the varying treatment as being aimed at protecting the incumbent entities from the competition brought about through changing business models made possible with new technologies. Although the venues in which these narratives play out vary throughout the different components of the music industry, both narratives are clearly at play in shaping the complexity of music copyright.

II. The Landscape of Inequality

Consumers encounter music through a variety of means. Consumers buy their own copies (technically called "phonorecords" under the Copyright Act[2]), and they listen to music on AM/FM radio, satellite radio, and music channels available through cable television providers. Increasingly consumers also listen to music channels over the Internet, via services like Pandora, Google Play, iTunes Radio, and others that allow for a level of customization but not complete control over what is played. The Copyright Act classifies these services "noninteractive" services.[3] Fully on-demand services that permit users to dictate exactly what songs are played and in what order, are also available through businesses such as Spotify, Rhapsody, and Grooveshark. The Copyright Act classifies these services as "interactive" services.[4] Some of these interactive services also offer the ability for subscribers to download music for play on a portable device during a subscription period. Such services are categorized by Copyright Office regulations as offering "limited downloads."[5]

2. Under the terminology employed by the Copyright Act, all other copyrighted works are fixed in "copies," but sound recordings are fixed in "phonorecords," which the Copyright Act defines as: "[M]aterial objects in which sounds, other than those accompanying a motion picture or other audiovisual work, are fixed by any method now known or later developed, and from which the sounds can be perceived, reproduced, or otherwise communicated, either directly or with the aid of a machine or device." 17 U.S.C. § 101 (2012).

3. *See id.* § 114(j)(7) (defining "interactive services"); *Pandora Media, Inc.*, 6 F. Supp. 3d at 332 (providing that a noninteractive service is a digital service that does not give users the control mandated by the § 114(j)(7) for interactive services).

4. 17 U.S.C § 114(j)(7).

5. *See* 37 C.F.R. § 385.11 (2011).

Each of these different mechanisms for consumers to experience recorded music has faced challenges from incumbent entities concerning applicable copyright rights and therefore, the necessary clearances required for lawful operation. And each has encountered various regulatory responses concerning the required royalty rates as well as the terms for those clearances. The differing regulatory responses have led to a landscape of unequal costs for the same content as specified in Table 1 below. Exactly how that happened and the role of the competing narratives in shaping this landscape is described below. The result is a staggering range of royalties paid for authorization to use the copyrighted works at issue.

A. Table 1

Service Type	Percent of Revenue	Copyright Type
Terrestrial Radio	3.7% (2011–16)[6] None **3.7% Total**	musical work sound recording
Pre-Existing Satellite Radio (i.e. Sirius XM)	2.4% (2008)[7] 9%–11% (2013–17) **11.4%–13.4% Total**	musical work sound recording
Pre-Existing Cable Music Service (i.e., Music Choice)	5.5%[8] 8%–8.5% (2013–17) **13.5%–14% Total**	musical work sound recording
Noninteractive Webcasters	4% (2014)[9] 25%–56% **29%–60%[10] Total**	musical work sound recording
Interactive Webcasters	10.5% ? % (unknown[11]) **Unknown Total**	musical work sound recording

6. Rate extrapolated by using the 1.7% rate charged by ASCAP, with a 45.6% PRO market share for ASCAP, resulting in an industry-wide rate of approximately 3.7%. *See Pandora Media, Inc.*, 6 F. Supp. 3d at 361 (45.6% market share); *id.* at 366 (1.7% royalty rate).

7. Determination of Rates and Terms for Preexisting Subscription Services and Satellite Digital Audio Radio Services, 73 Fed. Reg. 4,080, 4,088 (Jan. 24, 2008) (to be codified at 37 C.F.R. pt. 382); Peter DiCola, *Copyright Equality: Free Speech, Efficiency, And Regulatory Parity in Distribution*, 93 B.U. L. REV. 1837, 1848 (2013).

8. Cable Music pays 2.5% each to BMI and ASCAP. Estimating SESAC's market share at 10% results in an overall rate of 5.5%. *See Pandora Media, Inc.*, 6 F. Supp. 3d at 351; DiCola, *supra* note 7, at 1851; *see also* Determination of Rates and Terms for Preexisting Subscription Services and Satellite Digital Audio Radio Services, 78 Fed. Reg. 23,054, 23,056 & n.7 (Apr. 17, 2013) (to be codified at 37 C.F.R. pt. 382).

9. This rate is extrapolated by using the 1.85% rate set for ASCAP. Using a 45.6% PRO market share for ASCAP, this results in an industry-wide rate of approximately 4%. *Pandora Media, Inc.*, 6 F. Supp. 3d at 361 (45.6% market share); *see id.* at 366 (1.85% royalty rate for noninteractive services). This 4% approximation was confirmed by the court's description. *Id.* at 346.

10. 60% is used here because it has been reported that "[i]n 2013, Pandora's content acquisition costs were . . . over 60% of its revenue for that fiscal year." *Id.* at 328.

11. The arrangements between interactive webcasters and sound recording copyright owners are privately negotiated and not subject to any disclosure requirements. *See* 17 U.S.C. § 114(e) (2012) (providing for private negotiations).

As Table 1 illustrates, two different copyright owners are involved: the musical work copyright owners (the songwriters and music publishers) and the sound recording copyright owners (the performing artists and the record labels). Table 1 is a generalization gleaned from rates that are either mandated by regulation or rulings. These varying rates are explored throughout this Article. However, even the rates based on "revenues" may not be comparable,[12] as the details of what deductions are permitted often are not disclosed.[13]

Not listed in the above chart is the price paid to permit consumers to obtain a copy. That type of service also has a surprisingly wide range of licensing rates paid to the musical work copyright owners. The variety in rates for this type of business activity also relates to the dual narrative that is the focus of this Article.

B. Table 2

Type of Copy	**Price**
Physical Phonorecords	9.1¢/song or 1.75¢/minute of playing time[14]
Digital Phonorecords Deliveries (DPDs)	9.1¢/song or 1.75¢/minute of playing time[15]
Limited Downloads (tethered devices)	3.9%[16] of revenue
Ringtones	24¢/song[17]

12. Noninteractive webcasters have an alternative license available that is calculated based on number of plays of songs. *See infra* Part IV.C.3.

13. *See* Determination of Rates and Terms for Preexisting Subscription Services and Satellite Digital Audio Radio Services, 78 Fed. Reg. at 23,056 n.7 (noting the difficulties with comparing the difference in "revenue" percentages without knowing how "revenue" is defined in the relevant agreements).

14. *Mechanical License Royalty Rates*, U.S. COPYRIGHT OFF., http://www.copyright.gov/carp/m200a.pdf (last visited Nov. 13, 2014).

15. *Id.*

16. This rate is arrived at by taking the 10.5% aggregate rate set by Copyright Office regulation and subtracting 6.6% as the portion to be paid for the public performance right. *See infra* notes 85–91 and accompanying text. 6.6% is arrived at by extrapolating from the 3% that ASCAP charges interactive webcasters, using a 45.6% market share for ASCAP, resulting in an industry-wide rate of 6.6%. *See* Pandora Media, Inc. v. Am. Soc'y of Composers, Authors, & Publishers, 6 F. Supp. 3d 317, 351, 365 (S.D.N.Y. 2014).

17. *Mechanical License Royalty Rates*, *supra* note 14.

Table 2 does not include the revenue paid to the sound recording copyright owners for the distribution of copies. They are typically in a direct contractual relationship with the seller of those copies and the rates paid are set by those private contracts.

When one explores each one of the rates individually, one can tell coherent stories about how the rates came to be what they are today. Looking at the bigger picture, however, one is left with the distinct impression that something has gone wildly wrong with a copyright law that has led to such wide disparities in licensing rates. And, the rates tell only part of the story. The different services also face different licensing restrictions significantly affecting the shape of the services that they can offer.[18]

The consequences of this disparate treatment have been a significant distortion in investment in new business models,[19] as well as distortions in the details of the services that are offered.[20] The discrepancies "limit consumer choice, subsidize incumbents, and slow down innovation."[21] Professor DiCola asserts this differential treatment raises serious constitutional concerns.[22] The accretion of rights granted to creators of content in the music industry together with the limits on those rights imposed through statutory licenses, antitrust consent decrees, Copyright Office regulations, and Copyright Royalty Board rate-setting proceedings result in an industry rife with inequities hidden behind a stunning complexity of music licensing.[23]

If these different services all vie for consumers' music consumption dollars, either directly or indirectly, they face different price inputs to clear the same content.[24] While these services compete for consumers' limited music-buying dollars by offering different advantages, and different features of their services, they are not on a

18. These licensing restrictions are only applicable if one chooses to rely on the statutory licenses or blanket licenses. Kristelia A. Garcia, *Penalty Default Licenses: A Case of Uncertainty*, 89 N.Y.U. L. REV. 1117, 1140–45 (2014) (exploring the "penalty default" nature of the statutory licenses in music copyright). Negotiating private licenses remains a possibility, albeit one that includes significant transaction costs. DANIEL S. PARK, JENNIFER LYNCH & JENNIFER URBAN, STREAMLINING MUSIC LICENSING TO FACILITATE DIGITAL MUSIC DELIVERY 8–9 (2011), *available at* https://www.publicknowledge.org/files/docs/crastreamingmusiclicensing.pdf.

19. *See* Michael A. Carrier, *Copyright and Innovation: The Untold Story*, 2012 WIS. L. REV. 891, 916–17.

20. *See* DiCola, *supra* note 7, at 1903.

21. *Id.* at 1841.

22. *Id.* at 1881–92.

23. Professor DiCola asserts that one of the reasons for "the music industry's hodgepodge of wildly different royalty rates [is that] the differences in rates have no empirical basis." *Id.* at 1881.

24. *See, e.g.*, *id.* at 1857 (discussing the differing rates each service-type provider is charged).

level playing field when it comes to the price of a prime input into their product: the price of music licensing. That price includes not only the percent of revenue or flat fee that must be paid, but also the cost of restrictions on activities that are built into the different licensing requirements.[25] This uneven playing field is a product of changes to the Copyright Act over the last century, significant Copyright Office actions and arbitrations undertaken pursuant to statutory directives, and important federal court litigation.

The story of the evolution of musical copyright law can be cast as one that is about maintaining fair remuneration in light of changing technologies. But it can also be told as a story that is about protecting the status quo of large incumbent actors from the competition of both changing technologies and changing business models.

III. MAINTAINING A VIABLE REVENUE STREAM WHILE GUARDING AGAINST MONOPOLIES

The complicated nature of music copyrights began over 100 years ago, with player pianos and dinner clubs. The first story is one of technological change threatening old business models and Congress responding in a way that both ensured a revenue stream for artists and guarded against monopoly power. The second is also a story of technological change that took some time to turn into a story of monopoly power. This time it was not Congress that sought to check that threat, but rather the executive and judicial branches through antitrust litigation.

A. The Mechanical License

1. Player Pianos and the Creation of the First Statutory License. At the turn of the last century, people enjoyed music largely through musicians. Musicians, in turn, purchased copies of sheet music to know what to play. That changed when Edwin Votey constructed a prototype of the player piano.[26] The design was a large wooden cabinet with protruding felt-covered wooden fingers that could be aligned with any standard piano keyboard.[27] The wooden fingers would activate the piano keys just as a human finger would.[28] Powered by a pneumatic system and operated by two foot pedals, paper rolls with tiny perforations

25. *See, e.g.*, 17 U.S.C. § 114(d)(2)(C) (2012) (detailing the requirements eligible service providers are to comply with in order to obtain licensing).

26. BRIAN DOLAN, INVENTING ENTERTAINMENT: THE PLAYER PIANO AND THE ORIGINS OF AN AMERICAN MUSIAL INDUSTRY 43 (2009).

27. U.S. Patent No. 765,645 (filed Nov. 16, 1899).

28. *Player Piano History and Development*, PIANOLA INST., http://www.pianola.com/pphist.htm (last visited Nov. 13, 2014).

dictated what notes would be played when.[29] No longer did the operator need to know how to read music and play a piano, all they needed to be able to do was pump the foot pedals.

In 1897, Votey was elected to the board of directors of the Aeolian Corporation.[30] The Aeolian company acquired Votey's rights and began marketing the Pianola. Votey applied to patent his "keyboard playing attachment" in November 1899.[31] Shortly thereafter, the Melville Clark Piano Company began marketing the Apollo player piano, with a built-in player mechanism and thus was born the player piano industry.[32]

This new way of enjoying music saw a rapid rise in popularity. During the first decades of the twentieth century, over two hundred thousand player pianos were sold each year, with over five million rolls sold each year.[33] Music publishers, those companies that at the time were in the business of buying copyrights in musical works from composers and in turn selling copies of the sheet music,[34] sued the Apollo Company for infringement.[35] The Supreme Court determined, however, that a player piano roll was not a "copy" of the musical work under the extant copyright law and thus, there could be no infringement.[36] The Court acknowledged the free-riding problem that its ruling might create but held that addressing that problem was a job for Congress.[37]

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29. *Id.*

30. 1 DAVID ROGERS, INVENTIONS AND THEIR INVENTORS 90 (2011); *Edwin Votey—Inventor of the Pianola*, PIANOLA INST., http://www.pianola.org/factsheets/votey.cfm (last visited Nov. 13, 2014).

31. U.S. Patent No. 765,645 (filed Nov. 16, 1899). The patent was granted in July 1904. *See Edwin Votey—Inventor of the Pianola*, *supra* note 30.

32. DOLAN, *supra* note 26, at 50.

33. *Id.* at xvii.

34. Music publishers play an important role in the music industry, taking assignments of copyrights from composers and working to commercially exploit the musical works in whatever markets exist. Lydia Pallas Loren, *Untangling the Web of Music Copyright*, 53 CASE W. RES. L. REV. 673, 680 (2003); *see also* Todd Brabec & Jeff Brabec, *Music Publishers and What They Do*, ASCAP, http://www.ascap.com/home/music-career/articles-advice/ascapcorner/corner1.aspx (last visited Nov. 13, 2014).

35. *See* White-Smith Music Publ'g Co. v. Apollo Co., 209 U.S. 1, 3–5, 8 (1908) (considering action brought to restrain Apollo from infringement of the copyrights of "Little Cotton Dolly" and "Kentucky Babe").

36. *Id.* at 17. The Court held that to be a "copy" of a musical composition it had to be "a written or printed record of it in intelligible notation"—i.e., intelligible to a human reader, not simply to a machine such as a player piano. *Id.*

37.

> It may be true that the use of these perforated [player piano] rolls, in the absence of statutory protection, enables the manufacturers thereof to enjoy the use of musical compositions for which they pay no value. But such considerations properly address themselves to the legislative, and not to the judicial branch of the Government.

Id. at 18.

One year later, in the 1909 Copyright Act, Congress addressed the problem identified in *White-Smith* by granting the copyright owner of a musical composition the right to control mechanical reproductions of that musical work.[38] Consistent with the first narrative in music copyrights, this new right addressed the threat to the revenue stream for musical work copyright owners; as sheet music sales slowed in the face of technological change, the revenue from "mechanical copies" of those musical works would provide the needed, and fair, remuneration to composers.[39]

However, for the first time in the history of U.S. copyright law, Congress subjected this new right granted to the copyright owner to a compulsory license: Once the copyright owner in the musical work has created and released, or authorized the creation and release of, a mechanical copy, the statute authorized others to create and distribute their own "mechanical" copies.[40] Thus, while the initial decision of whether to exploit the musical work in mechanical copies was absolute, after the publication of an authorized mechanical copy, the statute provided that any manufacturer could make and distribute their own mechanical copies, so long as the subsequent manufacturer complied with the requirements of the statute and paid a statutorily-set license fee.

The compulsory license for mechanical reproductions of musical works, sometimes called simply "mechanicals," remains a part of the Copyright Act today.[41] It is this provision that allows recording artists to record what are commonly known in the industry as "covers"[42]—musical works written by someone other than the performer and previously released on an album. And, arguably, it is the compulsory mechanical license that set the music industry on a path of inevitably increasing complexity,[43] eventually necessitating clearance from two different copyright owners whenever recorded music is used.[44]

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38. Act of Mar. 4, 1909, ch. 320, 35 Stat. 1075, 1075–76.

39. *See generally* Wendy J. Gordon, *The Core of Copyright: Authors, Not Publishers*, 52 HOUS. L. REV. 613 (2014) (discussing the constitutional importance of copyright providing the incentive for creation versus the incentive for distribution).

40. Act of Mar. 4, 1909, ch. 320, sec. 1(e), 35 Stat. 1075, 1076.

41. *See* 17 U.S.C. § 115(a)(1) (2012).

42. Indeed the right is sometimes colloquially referred to as the "cover right." *See* Michael W. Carroll, *Copyright's Creative Hierarchy in the Performing Arts*, 14 VAND. J. ENT. & TECH. L. 797, 799 (2012).

43. *See* Loren, *supra* note 34, at 710 (arguing that the root of the complexity in music copyrights can be traced to the creation of the compulsory mechanical license).

44. *See infra* Part IV (exploring the copyright granted in the "sound recording" separate from the "musical work").

The 1976 Copyright Act maintained the mechanical license, now codified in section 115.[45] The '76 Act made clear that the compulsory license applied not just to player piano rolls, but also to vinyl records, cassette tapes, and any other "phonorecord" that mechanically reproduced the musical work.[46] In 1998, Congress amended section 115 to make clear that the compulsory mechanical license also applied to the distribution of a phonorecord by means of a digital download, referred to as a digital phonorecord delivery (DPD).[47]

2. Congressional Safeguards Against Monopolistic Threats. Through the compulsory license Congress ultimately made possible a wide variety of creativity, permitting new artists to build on preexisting works while those works are still protected by copyright.[48] But that was not Congress's main objective when it created the mechanical license. Instead, Congress was focused on controlling the potential of abusive monopolistic practices.

In particular, Congress was concerned about "a cartel of music publishers exercising monopoly power over the recording of music."[49] A significant number of music publishers had collectively agreed to grant the Aeolian Company, the dominant manufacturer of player pianos, an exclusive license to manufacture piano rolls of the musical works in which the publishers owned copyrights.[50] In return, the Aeolian Company would pay the publishers 10% of the retail selling price of the piano rolls.[51] The Aeolian Company profited not only from the sales of the rolls, however, it also profited from the sales of the Pianolas. Due to the patents the Aeolian Company owned, only Aeolian player pianos could play Aeolian piano rolls.[52] This meant that without intervention in the market, the Aeolian

45. 17 U.S.C. § 115.

46. *See supra* note 2 (explaining that "phonorecords" is the copyright act's term for tangible copies of sound recordings).

47. The Act defines a DPD as "each individual delivery of a phonorecord by a digital transmission of a sound recording which results in a specifically identifiable reproduction." 17 U.S.C. § 115(d).

48. *See* Act of Mar. 4, 1909, ch. 320, 35 Stat. 1075, 1076; *see also* Carroll, *supra* note 42, at 803–04.

49. Howard B. Abrams, *Copyright's First Compulsory License*, 26 SANTA CLARA COMPUTER & HIGH TECH. L.J. 215, 219 (2010).

50. *See id.* at 219–20 ("Eighty-seven members of the Music Publishers Association controlling 381,598 compositions had agreed to give the Aeolian Company exclusive rights to manufacture piano rolls of their copyrighted compositions . . . .").

51. *Id.* The Aeolian Company had also agreed to finance the publishers' lawsuit against its competitor, the Apollo Music Company. *Id.* at 220.

52. 2 RUSSELL SANJEK, AMERICAN POPULAR MUSIC AND ITS BUSINESS: THE FIRST FOUR HUNDRED YEARS FROM 1790 TO 1909, at 398 (1988).

Company's exclusive rights from the publishers would provide it with a significant monopoly over a large catalog of music at the time.[53]

The complexity of compliance with the terms of section 115 results in a strange anomaly: almost no one uses the statutory compulsory license to obtain the necessary license to record a musical work.[54] However, section 115's terms and rates significantly affect the behavior in market transactions.[55] "Over time . . . the rationale for granting a right of access to source works through the license has shifted from undermining monopoly power to satisfying industry expectations and standardizing licensing conditions."[56]

3. Rate Setting for Mechanical Licenses. Establishing a compulsory license is only a first step. Next, a rate either needs to be set in the statute, or a process and venue for establishing the rate must be provided. Initially, the rate set for the compulsory license was provided in the statute. The 1909 Act set the rate at 2¢ per mechanical copy.[57] In the 1976 Copyright Act, Congress raised the statutory rate to 2.75¢ per phonorecord or .5¢ per minute of playing time or fraction thereof, whichever amount was larger.[58] The 1976 Act also granted the newly established Copyright Royalty Tribunal (CRT) the authority to adjust the rate at ten-year intervals.[59]

In the first rate adjustment proceeding, the CRT raised the rate to 4¢ per mechanical copy.[60] Congress abolished the CRT in 1993 and replaced it with Copyright Arbitration Royalty Panels

53. *See* 3 SANJEK, AMERICAN POPULAR MUSIC AND ITS BUSINESS: THE FIRST FOUR HUNDRED YEARS FROM 1900 TO 1984, *supra* note 52, at 22–23.

54. Instead, many music publishers authorize the Harry Fox Agency to issue mechanical licenses for the compositions in which they own copyright. *See* Loren, *supra* note 34, at 682; R. Anthony Reese, *Copyright and Internet Music Transmissions: Existing Law, Major Controversies, Possible Solutions*, 55 U. MIAMI L. REV. 237, 242–43 (2001). The license offered by Harry Fox is similar, but not identical, to the section 115 statutory license. One important difference is the burden of royalty reporting and payments: the statute requires monthly reporting and payments while the Harry Fox requires them only quarterly. *See* 17 U.S.C. § 115(c)(3)(H)(5) (2012); *Licensing General FAQ*, HFA, http://www.harryfox.com/find_out/faq.php (last visited Nov. 13, 2014).

55. *See* Garcia, *supra* note 18, at 44–45 (discussing the way in which the existence of a statutory license affects private market negotiations).

56. Carroll, *supra* note 42, at 815.

57. Act of Mar. 4, 1909, ch. 320, 35 Stat. 1075, 1076.

58. 17 U.S.C. § 115(c)(2) (1976).

59. *Id.* §§ 801, 804(a)(2)(B).

60. Recording Industry Ass'n of Am. v. Copyright Royalty Tribunal, 662 F.2d 1, 6, 11 (D.C. Cir. 1981). The CRT had also attempted to tie future adjustments to the retail price of records, but the D.C. Circuit held that such future automatic rate adjustments were beyond the CRT's statutory authority. *Id.*

(CARPs).[61] In 2004, Congress again shifted the rate-setting responsibility, this time to Copyright Royalty Judges (CRJs).[62] Subsequent rulings and industry-negotiated compromises led to rates rising steadily until 2006 when the rate was set, for a ten-year period beginning on January 1, 2006, at 9.1¢ per track or 1.75¢ per minute of playing time or fraction thereof.[63]

In 2004, Congress again identified the specific objectives that the CRJs are to employ in setting rates under section 115, as well as other statutory licenses that now are a part of the Copyright Act.[64] The mechanical license royalty rate is to be set at a level

> calculated to achieve the following objectives:
>
> (A) To maximize the availability of creative works to the public.
>
> (B) To afford the copyright owner a fair return for his or her creative work and the copyright user a fair income under existing economic conditions.
>
> (C) To reflect the relative roles of the copyright owner and the copyright user in the product made available to the public with respect to relative creative contribution, technological contribution, capital investment, cost, risk, and contribution to the opening of new markets for creative expression and media for their communication.
>
> (D) To minimize any disruptive impact on the structure of the industries involved and on generally prevailing industry practices.[65]

Perhaps it is not surprising that with four separately articulated goals, the rates set for different types of mechanical licenses are not uniform.

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61. Copyright Royalty Tribunal Reform Act of 1993, Pub. L. No. 103-198, 107 Stat. 2304.

62. Copyright Royalty and Distribution Reform Act of 2004, Pub. L. No. 108-419, 118 Stat. 2341. On February 7, 2005, the Librarian of Congress appointed an interim Chief Copyright Royalty Judge and the Copyright Royalty Board (CRB or Board) was subsequently established within the Library of Congress to house the Copyright Royalty Judges. Procedural Regulations for the Copyright Royalty Board, 70 Fed. Reg. 30,901, 30,901 (May 31, 2005).

63. Mechanical and Digital Phonorecord Delivery Rate Determination Proceeding, 74 Fed. Reg. 4,510, 4,514 (Jan. 26, 2009) (to be codified at 37 C.F.R. pt. 385).

64. Copyright Royalty and Distribution Reform Act of 2004, Pub. L. No. 108-419, sec. 3(a), § 801(b), 118 Stat. 2341 (Nov. 30, 2004) (codified as amended at 17 U.S.C. § 801(b)(1) (2012)). In addition to the section 115 mechanical license, the Copyright Act also contains two additional statutory licenses that are governed by these criteria. *See* 17 U.S.C. § 801(b)(1). The objectives for the mechanical license rates have been a part of the statute since 1976 when Congress provided for periodic rate review. *See* 17 U.S.C. § 801(b)(1) (1976). *See also Recording Industry Ass'n of America*, 662 F.2d at 6 (discussing the standards to be applied).

65. 17 U.S.C. § 801(b)(1).

Significantly, the dual narratives are embodied in the statutorily expressed goals. Objective (B) directs that the rates afford the copyright owner a "fair return . . . under existing economic conditions." This expresses a desire that the CRJs consider the revenue streams of the musical work copyright owner. Objective (A) further bolsters the sentiment that the musical copyright owner be compensated so as to continue to have the incentive to create new works, albeit indirectly. At the same time, objective (A) acknowledges that, to best achieve the progress copyright is constitutionally mandated to promote, works must not only be created, but they must be disseminated as well. Objective (D), on the other hand, directs that the rates seek to minimize disruptive impact on both the structure of the industry and prevailing industry practices. This is an invitation to protect the status quo at the expense of new market entrants. It appears that the CRJs have taken up the invitation in their subsequent rate-setting proceedings.

4. The Mechanical License Today: Protecting Business Models. Mechanical licenses continue to play an important role today. Sound recordings that are made of musical works protected by copyright (i.e., musical works that are not in the public domain) necessarily embody two copyrighted works—the sound recording copyright and the musical work copyright.[66] Thus, almost any transmission of a sound recording that results in any kind of copy being created involves payment to the musical work copyright owner, and a mechanical license is the basis of that payment.

The more recent fights over the rates to be charged in a variety of digital contexts have created the wide discrepancy in rates depicted in Table 2. The two recent fights concern ringtones and the copies created in the context of interactive digital music services. In each case the first phase of the fight involved a determination of the applicability of the mechanical license, with the second phase being a rate-setting proceeding.

a. Ringtones as Mechanical Copies. How did a ringtone come to have a mechanical license price of 24¢ per copy when a download of an entire song has a 9.1¢-per-copy rate? Initially, the owners of musical work copyright resisted classifying ringtones as DPDs because, they argued, the mechanical license was not intended to be a catchall for "licensing of musical works for

66. *Copyright Registration of Musical Compositions and Sound Recordings*, U.S. COPYRIGHT OFF. 1, *available at* http://copyright.gov/circs/circ56a.pdf (last visited Nov. 13, 2014).

functional uses in consumer products."[67] They were worried that permitting the mechanical license to authorize ringtones "would 'potentially open the door' to licensing of snippets of musical works used to enhance all sorts of other consumer products and devices, such as musical car alarms or doorbells."[68] Instead, the music publishers wanted complete control over these markets, without the possibility of a compulsory license provided by the statute.[69]

The authority to determine not only rates for mechanical licenses but also what constitutes a mechanical copy rests with the Copyright Office and the CRJs.[70] Once the Copyright Office determined that ringtones constituted a DPD,[71] the CRJs had to determine the applicable rate. In the relevant rate-setting proceeding, the Judges retained the 9.1¢ per song or 1.75¢ per minute of playing time (or fraction thereof) for physical phonorecord deliveries and for permanent digital downloads, and at the same time, adopted a license rate of 24¢ for ringtones.[72]

While the Judges acknowledged the objectives of section 801(b)(1) that govern their rate setting, they began with determining an appropriate "benchmark."[73] In doing so, the Judges cited their earlier ruling in a different rate-setting proceeding: "[T]he issue at hand . . . is whether [the section 801(b)] policy

67. Mechanical and Digital Phonorecord Delivery Rate Adjustment Proceeding, 71 Fed. Reg. 64,303, 64,306 (Nov. 1, 2006).

68. *Id.*

69. The use of sound recordings in consumer products had arisen previously with musical work copyright owners arguing that the combination of sounds with other aspects, such as a talking teddy bear, made the resulting product a derivative work, and thus, required a "synchronization" license or a license to create a derivative work. *See* Worlds of Wonder, Inc. v. Vector Intercontinental, Inc., 653 F. Supp. 135, 140, *and permanent injunction granted*, No. C86-2671, 1986 WL 15608, at *1 (N.D. Ohio Dec. 31, 1986). These types of licenses are outside the boundaries of the section 115 compulsory license. *See* Leadsinger, Inc. v. BMG Music Publ'g., 512 F.3d 522, 527 (9th Cir. 2008).

70. Section 115 divides the responsibility for setting terms governing royalty payments between the Copyright Royalty Judges and the Register of Copyrights. *See* 17 U.S.C. § 115(c)(3)(C), (D) (setting forth Judges' authority); *id.* § 115(b)(1), (c)(4)–(5) (setting forth Register's authority); *see also* Division of Authority Between the Copyright Royalty Judges and the Register of Copyrights under the section 115 Statutory License, 73 Fed. Reg. 48,396, 48,396 (Aug. 19, 2008).

71. Mechanical and Digital Phonorecord Delivery Rate Adjustment Proceeding, 71 Fed. Reg. at 64,307. The Copyright Office addressed this issue on referral from the Copyright Royalty Board. *Id.* at 64,303. In any case in which a novel question of law concerning an interpretation of a provision of the Copyright Act is presented in a rate-setting proceeding, the Board has the authority to request a decision of the Register of Copyrights, in writing, to resolve such questions. *See* 17 U.S.C. § 802(f)(1)(B)(i). The RIAA requested the referral in this instance while the musical work copyright owners opposed the referral. Mechanical and Digital Phonorecord Delivery Rate Adjustment Proceeding, 71 Fed. Reg. at 64,303–04.

72. Mechanical and Digital Phonorecord Delivery Rate Determination Proceeding, 74 Fed. Reg. 4,510, 4,510 (Jan. 26, 2009).

73. *Id.* at 4,517.

objectives weigh in favor of divergence from the results indicated by the benchmark marketplace evidence."[74] The Judges did not believe any of the objectives identified in the statute required a different rate than the benchmark determination indicated.[75] The D.C. Circuit subsequently upheld the 24¢ rate for ringtones.[76]

A large part of the rate-setting proceeding concerned the methodology of the rate to be set—should it be a per-copy "penny-rate," as all previous section 115 licenses had been, or should it be a percentage of revenue structure?[77] Over the Recording Industry Association of America's (RIAA's) objections, the Board concluded, and the D.C. Circuit affirmed, the appropriate methodology was a penny-rate structure.[78] The court believed that a royalty system based on the number of copyrighted works sold, is "more directly tied to the nature of the right being licensed than a percentage-of-revenue rate."[79]

It is debatable whether a case can be made that the 24¢ per ringtone copy preserves a revenue stream, and thus, this rate setting fits with the first narrative. Ringtones do not appear to replace or even threaten some other experience with music for which the musical work copyright owners were obtaining revenue. Instead, classifying the ringtone as a mechanical copy permitted sound recording copyright owners to license the sound recording to ringtone providers and access the compulsory license mechanism for authorization to use the musical work, but at a much higher price than a "cover" recording. The rate of 24¢ per ringtone download more comfortably fits the narrative of protecting incumbent business models in the face of new means of exploiting music. Insisting on a penny-rate affects the market: ringtones regularly still cost 99¢ or more, with alternative pricing models not common.[80]

74. *Id.* at 4,522–23 (quoting Determination of Rates and Terms for Preexisting Subscription Services and Satellite Digital Audio Radio Services, 73 Fed. Reg. 4,080, 4,094 (Jan. 24, 2008)).

75. *Id.* at 4,510, 4,524.

76. Recording Indus. Ass'n of Am., Inc. v. Librarian of Cong., 608 F.3d 861, 870 (D.C. Cir. 2010).

77. Mechanical and Digital Phonorecord Delivery Rate Determination Proceeding 74 Fed. Reg. at 4,515. The percentage of revenue structure was becoming one that the Board had increasing familiarity with due to the statutory license for sound recording copyrights. *See infra* Part IV.C.

78. *Recording Indus. Ass'n of Am., Inc.*, 608 F.3d at 869–70.

79. *Id.* at 869 (citing Intercollegiate Broad. Sys., Inc. v. Copyright Royalty Bd., 574 F.3d 748, 760–61 (D.C. Cir. 2009)).

80. To the extent alternative pricing options are available, they have resulted from privately negotiated deals with musical work copyright owners, or occur in situations of consolidated copyrights where both the musical work and sound recording copyrights are owned by the same entity.

b. Incidental Digital Phonorecord Delivery. The second example of divergent rates concerning the mechanical copy involves what the Copyright Act refers to as "incidental" digital phonorecord deliveries (IDPD).[81] The Digital Performance Right in Sound Recordings Act created this subset of the DPD in 1995, but did not provide a definition of what constitutes an IDPD.[82] Instead, the CARPs, and later the CRJs, were tasked with establishing royalty terms and rates that distinguished between DPDs and IDPDs.[83] For many years, no rate was established. In 2006, the Copyright Office issued a notice of the commencement of a rate-setting proceeding.[84]

After almost three years locked in a rate-setting proceeding,[85] a major agreement was reached among industry players that set the rates for IDPDs.[86] These agreed-to rates and terms were adopted as the statutory rates and terms pursuant to the Copyright Act's provisions that limit the ability of the CRJs to reject a settlement reached among participants in any rate-setting proceeding.[87] The agreement covers incidental downloads, which are now defined in the regulations to include an "interactive stream."[88] It also covers "limited downloads": reproductions of sound recordings that are limited either in the duration during which the consumer can access the song or the number of times the consumer can access and play the song.[89]

In the end, the parties agreed to a royalty rate based on revenues, with 10.5% of a service's revenues being the amount of

81. 17 U.S.C. § 115(c)(3)(C) (2012).

82. Digital Performance Right in Sound Recordings Act of 1995, Pub. Law No. 104-39, 109 Stat. 336 (codified at 17 U.S.C § 115(c)(3)(C)).

83. *See* 17 U.S.C. § 115(c)(3)(C); *see also supra* text accompanying notes 61–62 (noting Congress replaced the CARPs, which were established in 1993, with CRJs in 2004).

84. *See* Adjustment or Determination of Compulsory License Rates for Making and Distributing Phonorecords, 71 Fed. Reg. 1,454 (Jan. 9, 2006) (announcing the first rate proceeding for IDPDs).

85. Mechanical and Digital Phonorecord Delivery Rate Determination Proceeding 74 Fed. Reg. 4,510, 4,510–11 (Jan. 26, 2009) (issuing a final rule in 2009, three years after the 2006 announcement). "In addition to the written direct statements and written rebuttal statements, the Judges heard 28 days of testimony, which filled over 8,000 pages of transcript. Over 140 exhibits were admitted. The docket contains over 340 pleadings, motions and orders." *Id.* at 4,511.

86. *Id.* at 4,515.

87. *See* 17 U.S.C. § 801(b)(7)(A); Mechanical and Digital Phonorecord Delivery Rate Determination Proceeding, 74 Fed. Reg. at 4,514–15. These agreed-to rates and terms are now embodied in "Subpart B" of 37 CFR Part 385. 37 C.F.R. § 385.12 (2013).

88. 37 C.F.R. § 385.11. The regulations further define "Interactive stream" with reference to the portions of the Copyright Act that concern the digital public performance right in sound recordings, described more fully *infra* Part IV.

89. 37 C.F.R. § 385.11.

royalties that would be paid to musical work copyright owners.[90] A deduction from the 10.5% is to be made for the license fee paid to publicly perform the musical work, an activity not authorized by the compulsory mechanical license, with the amount remaining paid for the mechanical license.[91] Thus, the amount paid for the mechanical license is in the neighborhood of 3.9% of revenue.[92]

This settlement created a new arrangement in the music world, permitting interactive services some measure of stability of rates for the use of the musical works that underlie the sound recordings that these services employ. By capping the overall rate paid for the use of the underlying musical work, the exact amount of the mechanical license will fluctuate depending on how much is paid for the public performance rate.[93] But in no event will the combined royalty rate exceed 10.5%. This settlement also marked a shift in the per-copy rate approach that the Board had favored for the compulsory mechanical license.[94]

As described by the Copyright Office, in adopting the Digital Performance Right in Sound Recordings Act of 1995 and expressly expanding the mechanical license to encompass digital downloads, Congress wanted "to minimize the burden on transmission services by placing record companies in the position to license not only their own rights, but also, if they chose to do so, the rights of writers and music publishers to authorize digital phonorecord delivery."[95] Subsequent developments have taken the record companies out of the middle of the payment stream for IDPDs and allow the transmitting services to pay the mechanical license directly.

Shifting the methodology from "penny-rate" to "percent of revenue" could be consistent with the narrative of needing to maintain revenues streams for the musical work copyright owner. However, the music publishers have long wanted rates that were

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90. *Id.* § 385.12(c).

91. *Id.* § 385.12(b)(2).

92. This rate is arrived at by taking the 10.5% aggregate rate and subtracting 6.6% as the portion to be paid for the public performance right. 6.6% is arrived at by extrapolating from the 3% that ASCAP charges interactive webcasters. Using a 45.6% market share for ASCAP, this results in an industry-wide rate of 6.6%. *See* Pandora Media, Inc. v. Am. Soc'y of Composers, Authors, & Publishers, 6 F. Supp. 3d 317, 351, 364–65 (S.D.N.Y. 2014); *see also supra* note 16.

93. *See* 37 C.F.R. § 385.12(b)(2); Mechanical and Digital Phonorecord Delivery Rate Determination Proceeding, 74 Fed. Reg. 4,510, 4,531 (Jan. 26, 2009).

94. At the time of this rate proceeding, the Board at least had familiarity with rates based on a percentage of revenue, albeit from a different compulsory license. *See infra* Part IV.C.2–3.

95. Mechanical and Digital Phonorecord Delivery Rate Adjustment Proceeding, 71 Fed. Reg. 64,303, 64,305 (Nov. 1, 2006) (citing S. REP. NO. 104-128, at 37 (1995)).

tied to the price charged for mechanical copies.[96] Their desires have finally been fulfilled with the implementation of the combined 10.5% rate. At the same time, prior to the establishment of the 10.5% rate, interactive webcasters were not paying for the incidental or temporary copies. Now they must do so, albeit at a rate that has been set through industry negotiation and subsequently embodied in the regulations. This new reality results in increased licensing and royalty burdens on these new services at a rate that is different from those faced by traditional incumbent music industry entities that sell copies of phonorecords.

B. Performance Rights Organizations

The second story of the beginning of the complexities of music copyright also begins with the 1909 Copyright Act. In addition to setting in motion the music industry's first compulsory license, the 1909 Copyright Act also played a pivotal role in laying the groundwork for the rise of Performance Rights Organizations (PROs): ASCAP, BMI, and SESAC. This groundwork came in the form of granting the copyright owner of a musical work the exclusive right to perform the work publicly *for profit*.[97] The grant of a public performance right was, in part, a story of protecting revenue streams that were threatened by new technology.

1. Early Establishment of the Scope of "For Profit" Public Performance. In the 1909 Copyright Act, Congress was trying to shape the copyright owner's rights to ensure that actionable infringement only resulted from uses that interfered with a copyright owner's commercial exploitation of the work, and thereby affected the incentive to create new works.[98] A defendant's "for profit" use was a proxy for those uses most likely to cause commercial harm to a plaintiff.[99]

The public performance rights that Congress had previously granted to other types of copyrighted works in 1856 and to

96. *See* Mechanical and Digital Phonorecord Delivery Rate Determination Proceeding, 74 Fed. Reg. at 4,515 (showing music publishers, collectively referred to as "Copyright Owners" in the proceeding, requesting rates tied to the price of mechanical copies).

97. Act of Mar. 4, 1909, ch. 320, sec. 1(e), 35 Stat. 1075.

98. Lydia Pallas Loren, *The Evolving Role of "For Profit" Use in Copyright Law: Lessons from the 1909 Act*, 26 SANTA CLARA COMPUTER & HIGH TECH. L.J. 255, 262–69 (2010); *see also To Amend and Consolidate the Acts Respecting the Copyright: Hearing on S. 6330 and H.R. 19853 Before the J. Comm. on Patents*, 59th Cong. 162 (1906) [hereinafter Steuart Statement] (statement of Arthur Steuart, Chairman, Copyright Committee, American Bar Association), *reprinted in* 4 LEGISLATIVE HISTORY OF THE 1909 COPYRIGHT ACT (E. Fulton Brylawski & Abe Goldman eds., 1976).

99. Steuart Statement, *supra* note 98, at 162.

musical works in 1897 did not limit them to "for profit" public performances.[100] Rather, those were general public performance rights.[101] The addition of the "for profit" requirement in the 1909 Copyright Act was meant to address the objections made against the public performance right "by those who think it is too drastic a restraint upon the free use and the free enjoyment of music."[102] When the addition of the "for profit" phrase was discussed at the congressional hearing, Congress heard testimony to the effect that "*[t]he thing to be protected is the business of the music publishers* and not to cut off the public from the enjoyment of music which can be received or enjoyed by any mode in which it is publicly performed."[103] The player piano made concrete the threat of public performances affecting the business of music publishers. It seemed quite possible that far fewer copies of sheet music would be sold if businesses no longer needed bands and orchestras to perform music.[104]

Unlike the new exclusive right to control mechanical copies, Congress did not anticipate the threat to competition that the for-profit public performance rights would lead to. It would take two decades before that threat became a reality.[105] But first, the PROs needed to be created.

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100. Borge Varmer, *Study No.16: Limitations on Performing Rights*, *in* 2 STUDIES ON COPYRIGHT 835, 837 (Arthur Fisher Memorial ed. 1963) (citing Act of Jan. 6, 1897, ch. 4, 29 Stat. 481, 481–82).

101. *Id.* The distinction here is between "general" public performance rights and public performance rights that are limited by an additional requirement in the prima facie case, such as a "for profit" requirement. The distinction between general and limited public performance rights should not be confused with "grand" and "small" performance rights which concern dramatic versus nondramatic performances. *See* Vincent Louis Perrone, *Small and Grand Performing Rights? (Who Cared Before "Jesus Christ Superstar")*, 20 BULL. COPYRIGHT SOC'Y U.S.A. 19, 25 (1972).

102. Steuart Statement, *supra* note 98, at 162.

103. *Id.* (emphasis added).

104. At the time of the debates leading to the 1909 Act there was a sense of an "implied right" to publicly perform a musical work when one purchased a copy of the work, for example in sheet music form. Jessica Litman, *War Stories*, 20 CARDOZO ARTS & ENT. L.J. 337, 351 n.71 (2002). Many copies of sheet music expressly stated that the purchaser of the sheet music had permission to publicly perform the musical work. *See* Bernard Korman, *Performance Rights in Music Under Sections 110 and 118 of the 1976 Copyright Act*, 22 N.Y.L. SCH. L. REV. 521, 523–24 (1977); *see also* Loren, *supra* note 34, at 679–80. In one of the two cases that eventually led to the Supreme Court's decision in *Herbert v. Shanley Co.*, 242 U.S. 591 (1917), the Second Circuit noted that "[w]hen the copyright proprietor of a musical composition sells printed copies of it to the public, the performing right goes with them." John Church Co. v. Hilliard Hotel Co., 221 F. 229, 230 (2d Cir. 1915).

105. *See* Glynn Lunney, *Copyright Collectives and Collecting Societies: The United States Experience*, *in* COLLECTIVE MANAGEMENT OF COPYRIGHT AND RELATED RIGHTS 339, 349 (Daniel Gervais ed., 2d ed. 2010) (indicating that the first antitrust action brought by the government against the ASCAP occurred in 1934, approximately two decades after the 1909 Act); *infra* text accompanying notes 134–35.

In 1913, musical composers and music publishers, led by New York lawyer Nathan Burkan, founded the American Society of Composers, Authors and Publishers.[106] At first, ASCAP attempted to convince hotels and restaurants to voluntarily enter into license agreements with ASCAP that would permit those businesses to continue publicly performing the musical works owned by ASCAP members.[107] Restaurants were not quick to sign up, believing their performances were not "for profit" because no direct admission was charged to enter the restaurant; rather, the music was merely part of the dining experience.[108] It would take several lawsuits, and ultimately the Supreme Court decision in *Herbert v. Shanley Co.*, to convince these businesses otherwise and establish the meaning of "for profit."[109]

When the case arrived at the Supreme Court, it had been only eight years since *White-Smith Music Publishing Co. v. Apollo Co.*, the case involving the player piano rolls.[110] In the interim, Congress had passed the 1909 Copyright Act. Citing no authority, statutory language, or legislative history, Justice Holmes's decision in *Herbert* is clear that the Court was concerned with protecting the monopoly granted to the copyright owners.[111] The sole paragraph of legal analysis begins:

> If the rights under the copyright are infringed only by a performance where money is taken at the door they are very imperfectly protected. Performances not different in kind from those of the defendants could be given that might compete with and even destroy the success of the monopoly that the law intends the plaintiffs to have. It is enough to say that there is no need to construe the statute so narrowly.[112]

The 1909 Copyright Act did not express a Congressional intent to "perfectly protect" the rights under copyright. In fact, the legislative history shows that the addition of the for-profit requirement was meant to strike a balance in providing some remuneration for copyright owners while permitting the public to

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106. Loren, *supra* note 98, at 270; *see also* PAUL GOLDSTEIN, COPYRIGHT'S HIGHWAY 68–69 (1994).

107. GOLDSTEIN, *supra* note 106, at 69.

108. *See, e.g.*, *id.*; Timothy Wu, *Copyright's Communications Policy*, 103 MICH. L. REV. 278, 305 (2004).

109. *Herbert*, 242 U.S. at 594–95.

110. White-Smith Music Publ'g Co. v. Apollo Co., 209 U.S. 1, 8–9 (1908); *see also supra* Part III.A.1.

111. *Herbert*, 242 U.S. at 594.

112. *Id.*

enjoy performances of musical works that were not for profit.[113] The Court's single paragraph of analysis concludes:

> The defendants' performances are not eleemosynary. They are part of a total for which the public pays, and the fact that the price of the whole is attributed to a particular item which those present are expected to order, is not important. It is true that the music is not the sole object, but neither is the food, which probably could be got cheaper elsewhere. The object is a repast in surroundings that to people having limited powers of conversation or disliking the rival noise give a luxurious pleasure not to be had from eating a silent meal. If music did not pay it would be given up. If it pays it pays out of the public's pocket. Whether it pays or not the purpose of employing it is profit and that is enough.[114]

The Court's opinion has been cited by over seventy federal court decisions and its effect has even reached beyond the borders of the United States to influence copyright cases in foreign countries.[115] Immediate reaction in the scholarly literature appeared favorable.[116] And, importantly, it gave ASCAP the legal backing it needed to convince for-profit businesses of the need for licenses to play music in their establishments.

The 1976 Copyright Act no longer limits the public performance rights of musical work copyright owners to only those performances engaged in "for profit," although it does provide some narrow exemptions for certain nonprofit public performances.[117] Today, any entity engaged in a nonexempt public performance of music must obtain authorization from the copyright owners of the musical works being performed or played.[118] Without such authorization, the businesses face copyright infringement liability, which can be quite significant under the Copyright Act's statutory damages provision.[119] Today, the need for authorization means obtaining authorization from at least two, if not three, PROs.

113. Steuart Statement, *supra* note 98, at 162.

114. *Herbert*, 242 U.S. at 594–95.

115. *E.g.*, Soc'y of Composers, Authors & Music Publishers of Can. v. 348803 Alta. Ltd., (1997) 79 Canadian Pat. Rep. 3d (Can. Law Book) 449, 458 (Fed. Ct.).

116. "As a case of first impression it would seem that the decision, although unsupported by authorities, is correct." Recent Cases, Herbert v. Shanley Co., 26 YALE L.J. 412, 417–18 (1917); *see also* Walter L. Pforzheimer, Comment, *Copyright Reform and the Duffy Bill*, 47 YALE L.J. 433, 439–40 (1938).

117. 17 U.S.C. § 110 (2012).

118. *Id.* § 106.

119. *Id.* § 504 (setting the range of statutory damages at a maximum of $30,000 per work infringed, or in the case of willful infringement, $150,000 per work infringed).

2. Growth of the PROs. Once the Supreme Court established the breadth of what constituted "for profit" public performance, ASCAP grew significantly. When radio broadcasts of music became popular, ASCAP insisted on collecting performance royalties for the musical work copyright owners—the members of ASCAP.[120] Founded by the broadcast industry in 1939 as an alternative to ASCAP, Broadcast Music, Inc. offered a different catalog of music.[121] Access to an alternative catalog facilitated a 1940 radio boycott of ASCAP music and resulted in some kind of check on the prices that ASCAP was charging.[122] However, because ASCAP and BMI have different catalogs of music, in order to publicly perform a wide variety of music, an entity will need to have licenses from both organizations.[123] Additionally, a third smaller PRO, SESAC,[124] also provides a blanket license for its catalog.[125] Music publishers, and others who own the copyright in musical works, enter into agreements with one of these entities. Today, BMI has agreements with over 600,000 composers, songwriters, and music publishers, and BMI's repertory consists of approximately 7.5 million musical compositions.[126] ASCAP's membership and catalog size is similar.[127] Membership numbers are not reported for SESAC, but estimates are that SESAC has approximately a 10% market share.[128]

Each of these PROs seek out entities engaged in public performances of music contained in that PRO's catalog, offering the entities a license for a set term (license terms of one to five years are typical).[129] The license permits the licensed entities, during the license term, to engage in public performances of

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120. During the 1920s ASCAP grew to license close to 80% of all music played on the radio. Michael A. Einhorn, *Intellectual Property and Antitrust: Music Performing Rights in Broadcasting*, 24 COLUM.-VLA J.L. & ARTS 349, 354–55 (2001).

121. Broad. Music, Inc. v. Columbia Broad. Sys., Inc., 441 U.S. 1, 5 (1979); Lunney, *supra* note 105, at 344.

122. Lunney, *supra* note 105, at 344.

123. *Id.*

124. The original name of this for-profit entity was the Society of European Stage Authors & Composers. It is now officially named SESAC. *Id.* at 344–45.

125. Am. Soc'y of Composers, Authors & Publishers v. Showtime/The Movie Channel, Inc., 912 F.2d 563, 583 (2d Cir. 1990).

126. 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).

127. Pandora Media, Inc. v. Am. Soc'y of Composers, Authors, & Publishers, 6 F. Supp. 3d 317, 322 (S.D.N.Y. 2014); *see* ASCAP, 2012 ANNUAL REPORT 11 (2012), *available at* http://www.ascap.com/~/media/files/pdf/about/annual-reports/2012-annual-report.pdf.

128. *Pandora Media, Inc.*, 6 F. Supp. 3d at 351.

129. DONALD S. PASSMAN, ALL YOU NEED TO KNOW ABOUT THE MUSIC BUSINESS 238–39 (8th ed. 2012).

musical works in the PRO's catalog.[130] If an entity does not enter into the license, but continues to publicly perform musical works, litigation ensues, often with damages, costs, and attorney's fees awarded against the recalcitrant businesses.[131]

3. Monopoly Power and Antitrust Decrees. Rather than compete for licensees on prices or other terms, musical work copyright owners act collectively through the PRO they elect to join. Even these three PROs are not effective competition for the customers of the PROs (i.e., licensees) because today most music services that are engaged in public performances need to be able to use a wide variety of music,[132] meaning that they will need licenses from both ASCAP and BMI, and possibly also SESAC. Under these market dynamics, the PROs have the potential for abuse of monopoly power. While Congress addressed the concern over the Aeolian Company's monopoly power in the 1909 Copyright Act, Congress did not address the monopoly power problem with the PROs.[133] Instead, the regulatory mechanism imposed upon the PROs that seeks to curb the potential for abuse of monopoly power is antitrust consent decrees.

The government brought the first antitrust action against ASCAP in 1934.[134] It sought to dissolve ASCAP as an unlawful combination.[135] Following settlement negotiations with ASCAP, that criminal action was ultimately dismissed and, instead the Department of Justice filed a civil action in 1941 targeting specific business practices.[136] By 1941, BMI had also entered the

130. *Id.* at 239.

131. *See, e.g.*, EMI April Music, Inc. v. White, 618 F. Supp. 2d 497, 512–13 (E.D. Va. 2009) (awarding $10,500 in statutory damages plus costs and attorney's fees); Girlsongs v. 609 Indus., Inc., 625 F. Supp. 2d 1127, 1129–30, 1133 (D. Colo. 2008) (awarding $10,000 in statutory damages plus costs and attorney's fees); Broad. Music, Inc. v. R Bar of Manhattan, Inc., 919 F. Supp. 656, 658–62 (S.D.N.Y. 1996) (awarding BMI over $1 million in statutory damages, prejudgment interest, and attorney fees).

132. The PROs, in fact, may compete on the other side of the equation—in offering competitive terms for the musical work copyright owners to choose that PRO over one of the other two possibilities. *See Pandora Media, Inc.*, 6 F. Supp. 3d at 322; United States v. Am. Soc'y of Composers, Authors & Publishers, No. 13-95 (WCC), 1993 WL 60687, at *17 (S.D.N.Y. Mar. 1, 1993).

133. This oversight is entirely logical given that the PROs did not exist until after the 1909 Act was adopted. *See supra* text accompanying notes 106–09, 120–29 (discussing the establishment of PROs beginning in 1913).

134. Lunney, *supra* note 105, at 349.

135. *Id.*

136. *Id.* at 349 & n.42. ASCAP also faced private claims of antitrust violations that proved successful. *See* Alden-Rochelle, Inc. v. Am. Soc'y of Composers, Authors & Publishers, 80 F. Supp. 888, 890, 899–900 (S.D.N.Y. 1948); M. Whitmark & Sons v. Jensen, 80 F. Supp. 843, 847, 850 (D. Minn. 1948), *appeal dismissed sub nom.* M. Whitmark & Sons v. Berger Amusement Co., 177 F.2d 515 (8th Cir. 1949). The results in these private actions influenced subsequent amendments of the consent decrees. *See* Lunney, *supra* note 105, at 351–53.

picture and also was subject to a civil antitrust action.[137] The initial consent decrees entered into in those actions addressed several practices of the PROs.[138] Among other provisions, the consent decrees prohibit ASCAP and BMI from obtaining exclusive assignments of the public performance rights from their members, thereby allowing musical work copyright owners to grant licenses independent of their chosen PRO.[139] The consent decrees also prohibit ASCAP and BMI from discriminating against similarly situated licensees on price or terms.[140]

The PROs significantly reduce transaction costs associated with licensing and enforcing the public performance right in musical works.[141] Imagine hundreds of thousands of individual copyright owners seeking payments from the hundreds of thousands of businesses, broadcasters, and others that engage in public performances of their works. Alternatively, consider each business that publicly performs music having to seek out all copyright owners of the works they perform. The PROs "create a market in which otherwise there would be only infringement."[142] But, the PRO blanket license itself eliminates competition among the copyright owners.[143]

In the 1970s, Columbia Broadcasting System (CBS) challenged the blanket licensing practice of both ASCAP and BMI as illegal price-fixing in violation of the antitrust laws.[144] The Supreme Court rejected the characterization of the blanket licenses as per se unlawful, finding that the blanket license facilitated a market in which individual copyright owners would not be able to compete effectively.[145] Instead, the Court held that the blanket license should be subject to "examination under the rule of reason."[146] The ability to negotiate licenses directly with members of a PRO, the result of the prohibition on exclusive licenses contained in the

137. *See* Lunney, *supra* note 105, at 349; *see also* United States v. Broad. Music, Inc., 1940–1943 Trade Cas. (CCH) ¶ 56,096 (E.D. Wis. 1941).

138. United States v. Am. Soc'y of Composers, Authors & Publishers, 1940–1943 Trade Cas. (CCH) ¶ 56,104 (S.D.N.Y. 1941); *Broad. Music, Inc.*, 1940–1943 Trade Cas. (CCH) ¶ 56,096; *see* Lunney, *supra* note 105, at 350 (summarizing the major points of the antitrust consent decrees).

139. Lunney, *supra* note 105, at 350.

140. *Id.* The third, much smaller PRO, SESAC, has not been the target of a government antitrust lawsuit, but has faced private antitrust claims. *See* Meredith Corp. v. SESAC, Inc., 1 F. Supp. 3d 180, 185–86 (S.D.N.Y. 2014).

141. Lunney, *supra* note 105, at 340.

142. *Id.*

143. *Id.*; *see* Gen. Leaseways, Inc. v. Nat'l Truck Leasing Ass'n, 744 F.2d 588, 593 (7th Cir. 1984).

144. Broad. Music, Inc. v. Columbia Broad. Sys., Inc., 441 U.S. 1, 4 (1979).

145. *Id.* at 22–24.

146. *Id.* at 24.

consent decrees, saved the blanket license in the subsequent "rule of reason" analysis undertaken by the lower court.[147]

These initial consent decrees have been amended several times and remain an important regulatory mechanism today.[148] A 1950 amendment brought the innovation that is now referred to as the "Rate Court." If ASCAP and a licensee cannot agree on the price for a license, the licensee can apply to the U.S. District Court for the Southern District of New York to set a "reasonable" fee.[149] Subsequent amendments of BMI's consent decree included similar provisions.[150]

The Rate Court itself has become an important regulatory mechanism governing the licensing activities of ASCAP and BMI. As Professor Glynn Lunney has observed, identifying the "'ideal' rate in practice would inevitably require so much guesswork, uncertainty and relative valuation of different productive activities that it is fairly characterized more as a question of policy for the legislature, than a question of fact for the courts."[151] Nonetheless, in the first appeal of a Rate Court determination, the Second Circuit established that "fair market value" was important in establishing the "reasonable" fee required by the consent decrees.[152] It defined "fair market value" to be "the price that a willing buyer and a willing seller would agree to in an arm's length transaction."[153] Importantly the court acknowledged that the licensing fees ASCAP had charged others similarly situated was relevant, but that such fees could be of diminished weight due to the monopoly position of ASCAP.[154]

Following the Second Circuit's interpretation of what a "reasonable" fee means, the Rate Court battles seek to set a

147. Columbia Broad. Sys., Inc. v. Am. Soc'y of Composers, Authors & Publishers, 620 F.2d 930, 934, 937–39 (2d Cir. 1980).

148. The most recent amendment of the consent decree with ASCAP occurred in 2001. United States v. Am. Soc'y of Composers, Authors & Publishers, No. 41-CV-1395, 2001 WL 1589999, at *1 (S.D.N.Y. June 11, 2001). The most recent amendment of the consent decree with BMI occurred in 1994. United States v. Broad. Music, Inc., 1996-1 Trade Cas. (CCH) ¶ 71,378 (S.D.N.Y. 1994).

149. United States v. Am. Soc'y of Composers, Authors & Publishers, 1950–1951 Trade Cas. (CCH) ¶ 62,595 (S.D.N.Y. 1950).

150. Broad. Music, Inc. v. Pandora Media, Inc., Nos. 13 Civ. 4037(LLS), 64 Civ. 3787(LLS), 2013 WL 6697788 (S.D.N.Y. Dec. 19, 2013).

151. Lunney, *supra* note 105, at 361.

152. Am. Soc'y of Composers, Authors & Publishers v. Showtime/The Movie Channel, Inc., 912 F.2d 563, 568–70 (2d Cir. 1990).

153. *Id.* at 569.

154. *Id.* at 569–70; *see also* Pandora Media, Inc. v. Am. Soc'y of Composers, Authors, & Publishers, 6 F. Supp. 3d 317, 353–54 (S.D.N.Y. 2014) (pointing out that the court must consider licensing fees charged to others similarly situated as well as ASCAP's "market-distorting power").

market price. The Rate Courts sometime face arguments for higher rates based on concerns that the nature of the public performance at issue has a negative effect on other revenue streams of the musical work copyright owners.[155] The argument for higher rates in light of other dwindling revenues, echoes the arguments that musical work copyright owners made when seeking to convince Congress to grant both the exclusive rights to reproduce a musical work in mechanical copies and to control the public performance of the musical work.[156] However, the public performances that occur through traditional radio and internet radio, may in fact help increase sales of musical works.[157] Thus, the Rate Courts have rejected the argument for a higher rate based on the narrative of *maintaining* revenue streams.[158]

The alternative narrative of protecting incumbent industries also finds expression in the Rate Court proceedings. The current consent decree requires that "similarly situated" licensees be treated by the PROs in a nondiscriminatory fashion.[159] The definition of what it means for a licensee to be "similarly situated" invites distinguishing new business models and charging them a different, and often higher, fee. For example, ASCAP's current consent decree defines a "similarly situated" licensee as "licensees in the same industry that perform ASCAP music and that operate similar businesses and use music in similar ways and with similar frequency."[160] The consent decree lists factors to consider in making this determination including "the nature and frequency of musical performances, ASCAP's cost of administering licenses, whether the music users or licensees compete with one another, and the amount and source of the music users' revenue."[161] It is this provision that led the recent Rate Court judge to determine that Pandora (a customizable but noninteractive internet-based radio station) should pay a higher rate than traditional radio stations.[162]

155. *See Pandora Media, Inc.*, 6 F. Supp. 3d at 356.

156. *See supra* Part III.A.1 (discussing similar arguments surrounding player pianos and copyright owners' demands for exclusive rights to mechanical copies).

157. *See Pandora Media, Inc.*, 6 F. Supp. 3d at 367 n.84 ("Pandora's 'buy button' resulted in over $3 million per month in music sales on Amazon and the iTunes Store during 2013.")

158. *See, e.g.*, *id.* at 367–68.

159. United States v. Am. Soc'y of Composers, Authors & Publishers, No. 41-1395 (WCC), 2001 WL 1589999, at *3 (S.D.N.Y. June 11, 2014) (Second Amended Final Judgment).

160. *Id.*

161. *Id.*

162. *Pandora Media, Inc.*, 6 F. Supp. 3d at 370–71. The Rate Court in that case was comparing Pandora to the radio stations covered by the Radio Music License Committee

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The story of congressional response to the then-new technology of the player piano reveals a desire to preserve the potential for a healthy revenue stream for music copyright owners, through both mechanical licenses and a "for profit" public performance right, but it also reveals a congressional willingness to guard against the potential lock-up of an important part of our common culture, music, that can result from monopoly power. The story of the rise of collective licensing through performance rights organizations also demonstrates a willingness of the executive and the courts to put in place safeguards against the abuse of monopoly power. The implementation of those safeguards, through the mechanism of the rate-setting proceedings of the Copyright Royalty Judges and the Rate Court proceedings created by the antitrust consent decrees, not only shifted the venue for the dual competing narratives to these proceedings, but saw an increased prominence, especially in the last decade, of the narrative of protecting incumbent businesses in light of new technologies and business models.

IV. Protecting Business Models While Granting Copyrights in Sound Recordings

The next stories in the evolution of music copyrights involve a more pronounced willingness by Congress to protect not just the potential for a healthy revenue stream for copyright owners, but also to protect existing business models to the disadvantage of new market entrants. It begins with the story of the sound recording copyright.

A. Copyrights Sound Recordings: Half a Loaf

While the first recorded sounds occurred in the late 1800s[163] and the first commercial "Victrola" phonograph machine was introduced into the market in 1906,[164] it was not until 1971 that Congress included "sound recordings" as a category of creative

(RMLC) license that ASCAP had negotiated. *Id.* at 325–26. The RMLC license covers RMLC members who own commercial radio stations, many that simulcast their programming for their terrestrial radio stations over the internet, and some who have internet-only radio stations as well. *Id.* at 370. The court noted that while some RMLC stations had internet radio stations similar to Pandora (i.e., customizable stations), the revenues of the RMLC members were overwhelmingly from the terrestrial stations. *Id.* at 371.

163. Jeffery A. Abrahamson, *Tuning Up for a New Musical Age: Sound Recording Copyright Protection in a Digital Environment*, 25 AIPLA Q.J. 181, 188 (1997).

164. Mary Seelhorst, *The Progressives*, POPULAR MECHANICS, June 2000, at 102.

works eligible for federal copyright protection.[165] Prior to 1971, some states specifically recognized a state-law copyright in sound recordings, but Congress had resisted calls for federal protection.[166] While providing federal copyright protection for sound recordings was discussed in Congress as early as the 1920s,[167] it was not until 1965, when record companies joined the performers' unions in actively supporting a performance right, that the idea had traction in Congress.[168]

Among the arguments made supporting the grant of federal copyright protection for sound recording was a fear that recorded performances would displace the performer:

> Complaints were also registered about the phenomenon which found performers competing with themselves through the unauthorized broadcasts of their recorded performances simultaneously with the broadcast of their live performance on another radio station, as well as the phenomenon of a performer's job being replaced by the use of his own recorded performance.[169]

Businesses, on the other hand, had voiced strong opposition to suggestions of paying additional royalties, as did owners of copyright in musical compositions who feared they would receive a "smaller slice of the pie."[170] The additional burden of paying and collecting royalties for public performances of sound recordings on top of those already in existence for the benefit of composers had long been an objection to sound recording copyrights.[171]

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165. Act of Oct. 15, 1971, Pub. L. No. 92-140, 85 Stat. 391 (effective Feb. 15, 1972).

166. Abrahamson, *supra* note 163, at 188, 189 n.17 (noting state-law copyright protections for sound recordings in Pennsylvania and New York prior to federal protections).

167. STAFF OF S. COMM. ON THE JUDICIARY, 86TH CONG., 2D SESS., COPYRIGHT LAW REVISION STUDY NO. 26, at 21, 25 (Comm. Print 1961) (Barbara A. Ringer)

168. *See* STAFF OF H. COMM. ON THE JUDICIARY, 95TH CONG., 2D SESS., PERFORMANCE RIGHTS IN SOUND RECORDINGS, SUBCOMMITTEE ON COURTS, CIVIL LIBERTIES, AND THE ADMINISTRATION OF JUSTICE 28 (Comm. Print 1978).

169. *Id.* at 32 (citing *Revision of Copyright Law: Hearings Before the H. Comm. on Patents*, 74th Cong., 2d Sess. (1936)).

170. STAFF OF H. COMM. ON THE JUDICIARY, 89TH CONG, SUPPLEMENTARY REGISTER'S REPORT ON THE GENERAL REVISION OF THE U.S. COPYRIGHT LAW 51 (Comm. Print 1965). Music Publishers argued that the total revenues that radio stations and others that engage in public performances would be willing to pay would remain the same, leaving the performing rights societies "to battle the recording industry over the slice of the pie that each obtains." Paul Goldstein, *Commentary on "An Economic Analysis of Copyright Collectives"*, 78 VA. L. REV. 413, 414 (1992).

171. *See, e.g.*, *Revision of Copyright Law*, *supra* note 169, at 1083; STAFF OF H. COMM. ON THE JUDICIARY, 95TH CONG., 2D SESS., PERFORMANCE RIGHTS IN SOUND RECORDINGS, SUBCOMMITTEE ON COURTS, CIVIL LIBERTIES, AND THE ADMINISTRATION OF JUSTICE 32–38 (Comm. Print 1978) (discussing objections in Congress throughout the 1940's and 1950's to granting sound recording copyright protections because of the economic impact on interested parties).

In 1971, when Congress added "sound recordings" as a category of works for which federal copyright protection could be granted, it limited the scope of exclusive rights granted to a sound recording copyright owner in important ways.[172] The most significant limit was that sound recording copyright owners were not provided with a public performance right.[173] Ironically, the performers' displacement fears were not addressed by the grant of copyright protection for sound recordings because the rights initially granted did not include a public performance right. The Register of Copyright described this compromise as granting sound recording copyright owners "half a loaf."[174]

In 1971, the revision process leading to the 1976 Copyright Act was well underway. The initial draft of the Senate bill for that comprehensive new copyright act sought to grant a performance right to sound recording copyright owners with a compulsory licensing system similar to that for mechanical reproductions of musical works.[175] Opposition from broadcasters, PROs, and others helped to defeat that provision and it was deleted from the final bill on the Senate floor.[176]

Instead, in the 1976 Act, Congress directed the Copyright Office to study the issue of granting a performance right to sound recording copyright owners and provide a report on its findings and recommendations by February 3, 1978.[177] In that report, the Copyright Office described the testimony it heard from those opposed to such a right:

> The arguments put forward in these comments and hearings generally echoed those heard earlier in Congress with one apparent change: authors' organizations, which had earlier

172. Act of Oct. 15, 1971, Pub. L. No. 92-140, 85 Stat. 391 (amending 17 U.S.C. § 5(n) (1976)).

173. *Id.* Other limits in the 1971 act included protecting sound recordings from only direct reproductions. *See* 17 U.S.C. § 114. Sound-alike reproductions were not within either the sound recording copyright owner's reproduction right or derivative work right, *id.*, while other copyright owners enjoy rights that include substantially similar copying. Pamela Samuelson, *The Quest for a Sound Conception of Copyright's Derivative Work Right*, 101 GEO. L.J. 1505, 1521 n.76 (2013).

174. *Copyright Law Revision: Hearings on H.R. 4347 Before Subcomm. No.3 of the H. Judiciary Comm.*, 89th Cong. 1863 (1965) (statement of Abraham L. Kaminstein, Register of Copyrights).

175. *Performance Royalty: Hearings on S. 1111 Before the Subcomm. on Patents, Trademarks, and Copyright of the S. Comm. on the Judiciary*, 94th Cong. 1–4 (1975) (statement of Sen. Hugh Scott).

176. STAFF OF H. COMM. ON THE JUDICIARY, 95TH CONG., 2D SESS., PERFORMANCE RIGHTS IN SOUND RECORDINGS, SUBCOMMITTEE ON COURTS, CIVIL LIBERTIES, AND THE ADMINISTRATION OF JUSTICE 4, 28 (Comm. Print 1978) (recounting how, on September 9, 1974, the provision was stricken based "largely on Senator Sam Ervin's prestige as a constitutional authority . . .").

177. Copyright Act of 1976, Pub. L. No. 94-553, § 114(d), 90 Stat. 2541, 2560–61.

> opposed performers' rights for fear that payments might reduce those made to authors and composers for performance rights, did not voice opposition. (One performing rights society expressly stated it would not oppose performance rights so long as there is no reduction in the statutory rights of authors). Broadcasters and other users maintained their opposition to the principle of a performance royalty, though their arguments were founded less on the law than on equities. They maintained that air play promotes record sales and boosts performers' popularity; therefore, they urged that users are providing an advertising service for which they should not be required to pay. A few broadcasters suggested, not entirely with tongue in cheek, that producers and performers should pay them.[178]

Protecting broadcasters from having to pay additional royalties while at the same time ensuring that the royalties paid to musical work copyright owners were not reduced, translated into continued congressional refusal to grant sound recording copyright owners the right to control public performances.[179] That refusal lasted for over two decades.

B. A Limited Public Performance Right: Picking Winners

Efforts to add a public performance right began almost immediately after passage of the 1976 Copyright Act,[180] but Congress was not willing to act until the sound recording copyright owners presented a credible story of a threat to established revenue streams.[181] Throughout the twentieth century, the record companies made the vast majority of their money through sales of "phonorecords"—vinyl, cassette tapes, and CDs. In the 1990s the possibility of a "celestial jukebox" that would permit anyone to play any song at any time, on demand, started to no longer sound like science fiction.[182] The record companies feared that business models offering "audio-on-demand" and "pay-per-listen" services could allow a level of interactivity between a subscriber and the service that

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178. STAFF OF H. COMM. ON THE JUDICIARY, 95TH CONG., 2D SESS., PERFORMANCE RIGHTS IN SOUND RECORDINGS, SUBCOMMITTEE ON COURTS, CIVIL LIBERTIES, AND THE ADMINISTRATION OF JUSTICE 5 (Comm. Print 1978).

179. *Id.* at 52–55 (discussing the strong congressional concern about broadcasters having to pay additional fees and protecting the royalties already being provided to other copyright holders).

180. On April 5, 1977, Representative George E. Danielson introduced the first attempt at such amendment: H.R. 6063, 95th Cong. (1st Sess. 1977).

181. H.R. REP. NO. 104-274, at 13 (1995) [hereinafter DPRSRA House Report] (discussing that proposed legislation was designed to protect revenues in light of technological advances toward subscription and interactive models).

182. *Id.* at 12.

would translate into consumers purchasing far fewer copies of sound recordings.[183]

Sympathetic to the argument concerning a threat to the established revenue stream of sound recording copyright owners (i.e., record labels), Congress enacted the Digital Performance Right in Sound Recordings Act of 1995.[184] This Act did not, however, grant a general public performance right to sound recording copyright owners. Instead, it granted only the exclusive right "to perform the copyrighted work publicly by means of a digital audio transmission"[185] and it further limited the obligation to pay royalties for such performances only to subscription-based services.[186]

The Copyright Office, the Patent and Trademark Office, and the Clinton Administration all had recommended that sound recording copyright owners be granted a full public performance right.[187] But again, Congress heeded the desires of the broadcasting entities and the musical work copyright owners in crafting this more limited public performance right.[188] The House Report notes that the act was meant to not "upset[] the longstanding business and contractual relationships among record producers and performers, music composers and publishers and broadcasters."[189]

When Congress had granted federal copyright protection to sound recording copyright owners in 1971 it elected to not disadvantage existing copyright owners: the musical work copyright owners.[190] It also elected to protect broadcasters from a potential increase in royalties.[191] In 1995, Congress now faced two sets of copyright owners: the musical work copyright owners (songwriters and music publishers) and the sound recording copyright owners (performing artists and record labels). This time Congress was picking winners and losers. While one narrative is that Congress was seeking to maintain a fair revenue stream for sound recording

183. *Id.* at. 12–13; S. REP. NO. 104-128, at 14 (1995).

184. Digital Performance Right in Sound Recordings Act of 1995, Pub. L. No. 104-39, 109 Stat. 336. Congress added this new right "to ensure that performing artists, record companies, and others whose livelihood depends upon effective copyright protection for sound recordings, will be protected as new technologies affect the ways in which their creative works are used." DPRSRA House Report, *supra* note 181, at 10.

185. Digital Performance Right in Sound Recordings Act of 1995, Pub. L. No. 104-39, 109 Stat. 336 (amending 17 U.S.C. § 106(6) (2012)).

186. *Id.*

187. DPRSRA House Report, *supra* note 181, at 12; BRUCE A. LEHMAN, WORKING GROUP ON INTELLECTUAL PROPERTY RIGHTS, INTELLECTUAL PROPERTY AND THE NATIONAL INFORMATION INFRASTRUCTURE 222–25 (1995) (commonly referred to as the "White Paper").

188. DPRSRA House Report, *supra* note 181, at 12.

189. *Id.*

190. *See supra* notes 170–74 and accompanying text (discussing Congressional concerns surrounding the economic circumstances of granting additional copyright protections).

191. *See supra* notes 170–74 and accompanying text.

copyright owners, another way to view the choice that Congress made is that it chose to protect the long-standing incumbents: the musical work copyright owners. Another group of long-standing incumbents was radio broadcasters. They, too, were protected by Congress's choices in 1971, 1976, and also 1995.[192] It was only the new market entrants that were required to pay additional royalties.[193]

Congress has stuck with that choice for almost twenty years, with terrestrial broadcasters continuing to lobby against granting a broader public performance right.[194]

C. Blurring Lines: Distributing Reproductions and (or?) Public Performance

The fear that digital music services would cannibalize sales of CDs strongly shaped the scope of the public performance right granted to sound recording copyright owners.[195] In effect, Congress was attempting to grant only enough of a public performance right to guard against the threats that these new business models posed to the established revenue stream of sound recording copyright owners.[196] In doing so, however, Congress was favoring incumbent business models over emerging services, burdening the latter with new licensing and royalty obligations that were not imposed on pre-existing services. Those pre-existing services were not perceived as posing a threat to sales, or at least not an increased threat, but by not having to pay the new royalties the incumbent businesses gained a significant advantage thanks to Congress.[197]

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192. *See* Act of Oct. 15, 1971, Pub. L. No. 92-140, 85 Stat. 391; Copyright Act of 1976, Pub. L. No. 94-553, §§ 110–111, 90 Stat. 2541, 2549–51; Digital Performance Right in Sound Recordings Act of 1995, Pub. L. No. 104-39, § 3, 109 Stat. 336, 336–37 (codifying protections for radio broadcasts of performances).

193. *See* Kimberly L. Craft, *The Webcasting Music Revolution Is Ready to Begin, as Soon as We Figure Out the Copyright Law: The Story of the Music Industry at War with Itself*, 24 HASTINGS COMM. & ENT. L.J. 1, 10–11 (2001) ("The Act targeted only the new subscription music services offered primarily by digital 'newcomers': cable, satellite and, soon, Internet providers.").

194. *See* Kristina Sherry, *Performance Rights Act Sending Radio into a Spin*, L.A. TIMES, July 3, 2009, at B3. When Congress was considering one of the many bills introduced in the last twenty years to add a general public performance right, executives from the National Association of Broadcasters, called the act "the biggest threat to radio in 50 years." *Id.* (quoting Dennis Wharton, executive vice president of media relations for the NAB).

195. DiCola, *supra* note. 7, at 1880–81.

196. *See* DPRSRA House Report, *supra* note 181, at 13 (discussing the need to protect copyright holders from new technologies).

197. *See id.* at 12–15 (defending the House of Representative's choice to only levy new royalty fees on emerging technologies such as cable and digital distribution and not on preexisting services).

To shape the licensing obligations of these newer business models, Congress turned to a tool it had used before: a statutory compulsory license. This time, however, the statutory license was more nuanced, creating different levels of obligations. Fundamentally, for purposes of understanding the scope of the sound recording copyright owner's digital public performance right, today there are three categories of digital public performances: (1) exempt; (2) statutory license eligible; and (3) everything else.[198] A business that falls into the final category must obtain permission from the copyright owners with no ability to resort to a statutory license.[199] Additionally, within the second "statutory license eligible" category, there are two different standards for rate setting—one has consistently resulted in a higher royalty fee and has additional licensing constraints on the activities of the licensed entity.[200]

How "incumbent" a business model is largely dictates where on that spectrum a business falls.[201] Over-the-air broadcasts, even if digital, are exempt—category (1).[202] The newest internet models of fully subscriber-controlled music streaming lie at the other end—category (3), requiring a negotiated license from the sound recording copyright owners.[203] How that spectrum came to be requires a deeper dive into the interstices of the digital performance right.

The narrative of maintaining the advantage obtained by the incumbents is easy to see as Congress modified the contours of this new licensing obligation three times in the span of the next thirteen years. The amendments occurred as part of the Digital Millennium Copyright Act (in 1998),[204] the Small Webcaster Settlement Act of 2002,[205] and the Webcaster Settlement Act of 2008.[206] Each of these modifications involved intensive lobbying and ultimately, continued

198. *See* Bonneville Int'l Corp. v. Peters, 347 F.3d 485, 488–89 (3d Cir. 2003).

199. *See infra* Part IV.C.4 (noting that interactive services and noninteractive services not in compliance with statutory requirements must negotiate licenses with copyright owners).

200. *See infra* Part IV.C.2–3 (explaining how rates are calculated and set for different types of music distributors who are able to rely on statutory compulsory licensing).

201. *See infra* Part IV.C.1–4 (linking the royalty fee spectrum to the level of incumbency in the digital public performance industry).

202. Sherry, *supra* note 194.

203. *See infra* Part IV.C.4.

204. Digital Millennium Copyright Act, Pub. L. No. 105-304, 112 Stat. 2860 (1998) (amending 17 U.S.C. § 114 (2012)).

205. Small Webcaster Settlement Act of 2002, Pub. L. No. 107-321, § 3, 116 Stat. 2780, 2781.

206. Webcaster Settlement Act of 2008, Pub. L. No. 110-435, 122 Stat. 4974 (amending 17 U.S.C. § 114(f)(5)).

protection for incumbents.[207] Just which type of business was an incumbent, however, slowly changed, as initial "new comers" became more established industry players with grounds to argue that their licensing obligations should not increase with any new legislative change.[208]

1. Category 1: Longstanding Incumbent and Exempt. When Congress added the digital performance right for sound recording copyright owners in 1995, it exempted "nonsubscription" digital transmissions.[209] This exemption meant that free, "nonsubscription" internet radio stations faced the same royalty obligations that terrestrial radios stations faced: a requirement to pay public performance royalties to the musical work copyright owners through the PROs.[210] But as internet radio ballooned in significance, traditional radio stations recognized the threat that internet radio presented to the industry.[211] At the same time they also were interested in ensuring that they were not burdened with any new royalty obligations.[212]

Only three years after initially providing this broad exemption, Congress revised the category of exempt businesses, shifting to a distinction based not on "subscription" versus "nonsubscription," but instead one based on whether the service was "interactive" versus "noninteractive."[213] The National Association of Broadcasters (NAB) viewed these amendments as preserving the pre-1995 status quo.[214] Specifically, the NAB believed that the 1998 amendments still exempted terrestrial broadcasters, even if those broadcasters did, at times, broadcast their program over the Internet.[215] In shifting away from "nonsubscription" as the basis of exemption, Congress maintained its favoritism for the NAB incumbents and burdened the new business models with additional licensing obligations.

207. *See* Craft, *supra* note 193, at 13–15; *see also* Peter DiCola & Matthew Sag, *An Information-Gathering Approach to Copyright Policy*, 34 CARDOZO L. REV. 173, 228–36 (2012).

208. *See infra* Part IV.C.2 (discussing how newer market entrants such as SiriusXM received incumbency-favored treatment in the Digital Millennium Copyright Act of 1998).

209. Digital Performance Right in Sound Recordings Act of 1995, Pub. L. No. 104-39, § 3, 109 Stat. 336, 336.

210. *See id.* § 2, 109 Stat. at 336; *supra* Part III.B (discussing the rise of PROs and the ways royalty payment obligations are regulated).

211. Bonneville Int'l Corp. v. Peters, 347 F.3d 485, 489 (3d Cir. 2003).

212. *See* Craft, *supra* note 193, at 22–30.

213. Digital Millennium Copyright Act, Pub. L. No. 105-304, 112 Stat. 2860, 2890–91, 2898–99 (1998).

214. Craft, *supra* note 193, at 13–14, 19–20.

215. *Id.* at 14. Subsequently, the Copyright Office's ruling that the broadcasters' understanding of the law was incorrect was upheld by the Third Circuit. *Bonneville Int'l Corp.*, 347 F.3d at 486–87.

2. Category 2A: Newer "Incumbents" with Lower Statutory Rates. Incumbency has a way of shifting through time. In 1971, satellite radio was still a long way off.[216] In 1995, satellite radio was in its infancy, the FCC having established the Digital Audio Radio Service (DARS) just three years earlier.[217] When Congress narrowed the scope of the initial exemption in 1998, it provided "preexisting satellite digital audio radio service[s]" with eligibility for a statutorily-imposed license.[218] That special statutory license was also made available to "preexisting subscription services," which basically translated into the existing cable music services.[219]

Congress directed that the statutory license rate for these incumbents was to be calculated to achieve four statutorily defined objectives:

> (A) To maximize the availability of creative works to the public.
>
> (B) To afford the copyright owner a fair return for his or her creative work and the copyright user a fair income under existing economic conditions.
>
> (C) To reflect the relative roles of the copyright owner and the copyright user in the product made available to the public with respect to relative creative contribution, technological contribution, capital investment, cost, risk, and contribution to the opening of new markets for creative expression and media for their communication.
>
> (D) To minimize any disruptive impact on the structure of the industries involved and on generally prevailing industry practices.[220]

These goals are the same as those employed when setting the mechanical royalty rates.[221]

Applying these criteria, the Copyright Royalty Board (CRB) has established the applicable statutory license rates.[222]

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216. The FCC established certain segments of radio frequency for satellite broadcast on radio in 1995. *In re* Amendment of the Commission's Rules with Regard to the Establishment & Regulation of New Digital Audio Radio Services, 10 F.C.C. Rcd. 2310, 2314–15 (1995).

217. *In re* Amendment of the Commission's Rules with Regard to the Establishment & Regulation of New Digital Audio Radio Services, 7 F.C.C. Rcd. 7776 (1992).

218. Digital Millennium Copyright Act, Pub. L. No. 105-304, § 405, 112 Stat. 2860, 2890–99 (1998) (codified as amended at 17 U.S.C. § 114 (2012)).

219. *Id.* § 405, 112 Stat at 2890–91; *see also* H.R. REP. NO. 105-796, at 89 (1998) (Conf. Rep.) (noting that "if a cable subscription music service making transmissions on July 31, 1998, were to offer the same music service through the Internet, then such Internet service would be considered part of a preexisting subscription service").

220. 17 U.S.C. § 801(b)(1).

221. *See supra* Part III.A.3.

222. Initially the CRT was tasked with this rate-setting obligation. Today the rates are set by the CRJs. *See supra* notes 60–62 and accompanying text.

SiriusXM is the only remaining satellite broadcasting company eligible for this incumbency-favored treatment.[223] The CRB set the rate for SiriusXM at 9% of revenue in 2013, increasing annually to 11% of revenue in 2017.[224] Music Choice, arguably, is the only remaining cable broadcasting entity eligible for this incumbency-favored treatment.[225] The CRB set the rate for pre-existing music services at 8% of revenue in 2013, increasing annually to 8.5% of revenue in 2017.[226]

To be eligible for the statutory license, these pre-existing music services must not meet the Copyright Act's definition of "interactive" and must include copyright-status information that is contained in many sound recording files today.[227] It must also adhere to limits on the content of its broadcast, known as the "sound recording performance complement," which prohibits playing too many recordings by any one artist or from any one album in specified time intervals.[228] In keeping with a focus on preventing substitutes for purchasing music, the service must not preannounce the exact recordings it is going to play, and it must not allow automatic switching between channels to avoid the content restrictions.[229] These restrictions on the content that the service can offer and related requirements are not imposed on the longer-standing exempt incumbents.

3. Category 2B: New Media Noninteractive Services with Higher Statutory Rates. In addition to preexisting satellite and cable services, another segment of digital public performance services are also eligible for a statutory license. Often referred to as webcasters, these are entities that engage in digital public performances that comply with a variety of detailed requirements that make their services "noninteractive" as defined, somewhat counterintuitively, by the Copyright Act.[230]

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223. *See* DiCola, *supra* note 7, at 1848 (observing that due to mergers SiriusXM is the only satellite radio company remaining in operation).

224. Determination of Rates and Terms for Preexisting Subscription Services and Satellite Digital Audio Radio Services, 78 Fed. Reg. 23,054 (Apr. 17, 2013) (codified at 37 C.F.R. pt. 382).

225. Mood argues that it stands in the shoes of a predecessor, DMX, that had filed for bankruptcy. The Copyright Office has refused to determine this issue. *See* DiCola, *supra* note 7, at 1852 (citing Designation as a Preexisting Subscription Service, 71 Fed. Reg. 64,639, 64,646 (Nov. 3, 2006) (to be codified at 37 C.F.R. pt. 201)).

226. Determination of Rates and Terms for Preexisting Subscription Services and Satellite Digital Audio Radio Services, 78 Fed. Reg. at 23,061.

227. 17 U.S.C. § 114(d)(2)(A)(i), (iii) (2012).

228. *Id.* § 114(d)(2)(B)(i), (j)(13).

229. *Id.* § 114(d)(2)(A)(ii), (B)(ii).

230. The Act defines an "interactive service" as a service "that enables a member of the public to receive a transmission of a program specially created for the recipient, or on

While these services are eligible for a statutory license, the criteria for setting the rate are different than those services in category 2A. Specifically, Congress directed the rates are to "most clearly represent the rates and terms that would have been negotiated in the marketplace between a willing buyer and a willing seller."[231] Congress also provided that the rate should be based on:

> [E]conomic, competitive and programming information presented by the parties, including—
>
> (i) whether use of the service may substitute for or may promote the sales of phonorecords or otherwise may interfere with or may enhance the sound recording copyright owner's other streams of revenue from its sound recordings; and
>
> (ii) the relative roles of the copyright owner and the transmitting entity in the copyrighted work and the service made available to the public with respect to relative creative contribution, technological contribution, capital investment, cost, and risk.[232]

Congress indicated that the Copyright Royalty Judges may also consider "the rates and terms for comparable types of digital audio transmission services and comparable circumstances under voluntary license agreements . . . ."[233]

In addition to facing different standards for rate setting, noninteractive music services that fall into the 2B category also must comply with the requirements concerning content restrictions applicable to those in category 2A, as well as seven *additional* requirements:

> These requirements (1) limit the ability to offer archived programs or programs that play in a continuous loop; (2) forbid any suggestion of connections to advertising unrelated products; (3) require cooperation with efforts to prevent scanning webcasts for particular recordings; (4) forbid any inducement for users to make recordings of webcasts and mandate the implementation of technology to prevent such recording; (5) require specific permission to play recordings that have yet to be released publicly;

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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." 17 U.S.C. § 114(j)(7). The statutory definition goes on to carve out the type of requests that are made of radio stations that broadcast to the public. *Id.* The Copyright Act does not expressly define the term "noninteractive." 4 WILLIAM F. PATRY, PATRY ON COPYRIGHT § 14:92 (2014).

231. 17 U.S.C. § 114(f)(2)(B).

232. *Id.*

233. *Id.*

(6) require compliance with technological protection measures embedded in the digital files containing sound recordings; and (7) require the transmission of identifying information about the recording, regardless of whether there is copyright status information.[234]

Despite eligibility for a statutory license, for the first decade of this new structure, achieving a viable license rate was a nightmare. The rates ultimately set by the CRJs, known as Webcaster III,[235] were unworkable, leading to privately negotiated arrangements, known as the PurePlay settlement.[236] Those settlement agreements were then published by the Copyright Office, as dictated by statute.[237]

The Webcaster III rates were set at \$0.0021 per play for 2012 with a per station minimum annual fee of \$500.[238] For services that permit individuals to establish their own "stations," the minimum fee is unworkable.[239] The PurePlay settlement agreement permits webcasters with significant advertising revenue to avoid the Webcaster III rates set by the CRJs and pay a minimum of \$25,000 and a maximum of: (a) 25% of their gross revenue or (b) a per-play rate, calculated in 2013 at \$0.0012 for plays by nonsubscription users and \$0.0022 for plays by subscription users.[240] The PurePlay rates, while more favorable for some new media business models and more favorable than the Webcaster rates, still translate into a significant royalty burden in terms of a percent of revenue. "In 2013, Pandora's content acquisition costs were close to \$260 million, or over 60% of its revenue for that fiscal year. A very substantial portion of these costs are for the fees paid to record companies for licenses for sound recordings . . . ."[241] This royalty burden is significantly higher than the royalty obligation for the pre-existing, newer "incumbents" that fall into category 2A.[242]

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234. DiCola, *supra* note 7, at 1854–55 (summarizing the requirements found in 17 U.S.C. § 114(d)(2)(C)).

235. Digital Performance Right in Sound Recordings and Ephemeral Recordings, 76 Fed. Reg. 13,026, 13,036, 13,047–48 (Mar. 9, 2011) (to be codified at 37 C.F.R. pt. 380).

236. Notification of Agreements Under the Webcaster Settlement Act of 2009, 74 Fed. Reg. 34,796, 34,798–99 (July 17, 2009); DiCola & Sag, *supra* note 207, at 236–37.

237. DiCola & Sag, *supra* note 207, at 221–38 (reviewing the history of the webcasting rate setting process).

238. Digital Performance Right in Sound Recordings and Ephemeral Recordings, 76 Fed. Reg. at 13,036, 13,048.

239. DiCola & Sag, *supra* note 207, at 233–34.

240. Notification of Agreements Under the Webcaster Settlement Act of 2009, 74 Fed. Reg. at 34,799.

241. Pandora Media, Inc. v. Am. Soc'y of Composers, Authors, & Publishers, 6 F. Supp. 3d 317, 328 (S.D.N.Y. 2014).

242. *See supra* notes 222–26 and accompanying text.

4. Category 3: New Media Noncompliant Services and Interactive Services. Interactive services are not eligible for the statutory license.[243] Additionally, any noninteractive service that fails to comply with the detailed requirements contained in the statute, concerning everything from content to advertising, also removes itself from statutory license eligibility.[244] These entities must obtain voluntarily negotiated licenses from sound recording copyright owners.[245] The nonqualifying, noninteractive services have the benefit of a statutorily imposed most-favored nation clause that imposes a measure of discipline on record companies that license affiliated entities offering similar noninteractive services.[246]

The terms of, and rates paid pursuant to, these voluntarily negotiated agreements are not publicly available, but it is assumed that the rates are higher than the statutory license.[247]

* * *

The entire structure of the sound recording digital public performance right is statutorily geared to protect incumbents.[248] In the dual narrative that had characterized the previous evolutionary stages of music copyright law, the dominate narrative explaining the landscape is protecting incumbents and burdening newcomers. While the competing narrative of protecting revenue streams threatened by new technologies may have been the justification that finally caused Congress to grant sound recording copyright owners a public performance right, the

243. 17 U.S.C. § 114(d)(2)(A)(i) (2012).

244. *Id.* § 114(d)(2)(C).

245. *See* Peter DiCola & David Touve, *Licensing in the Shadow of Copyright*, 17 STAN. TECH. L. REV. 397, 416 (2014) (noting that services that fail to qualify for section 114 statutory licensing must directly negotiate voluntary licenses with sound recording copyright owners).

246. This requirement obligates sound recording copyright owners who license affiliated entities to make the licensed sound recording available

> on no less favorable terms and conditions to all bona fide entities that offer similar services, except that, if there are material differences in the scope of the requested license with respect to the type of service, the particular sound recordings licensed, the frequency of use, the number of subscribers served, or the duration, then the copyright owner may establish different terms and conditions for such other services.

17 U.S.C. § 114(h)(1). An "affiliated entity" is defined as an entity "in which the licensor has any direct or indirect partnership or any ownership interest amounting to 5 percent or more of the outstanding voting or non-voting stock." *Id.* § 114(j)(1).

247. *See* DiCola & Touve, *supra* note 245, at 443–52.

248. *Cf.* DiCola, *supra* note 7, at 1864–65, 1902–03 ("The influence of lobbying for special treatment is unmistakable in provisions like § 114, which explicitly protects incumbent firms like Sirius XM from competition from both inside and outside of their specific industry.").

limitations on that right were designed to protect incumbents.[249] The legislative burdening of new business models for incumbents creates a disincentive for those established industries players to innovate and experiment with new business models.[250]

V. FULL CIRCLE: BLURRING THE LINE BETWEEN COPYRIGHT OWNERS

The spectrum of rates paid new media music services detailed in Part IV concerns royalties to the sound recording copyright owners. That spectrum demonstrates congressional willingness to protect incumbent industries and burden new music services as they develop with increased licensing and royalty obligations. In addition to protecting the business model of the incumbent terrestrial broadcaster, Congress also indicated that protecting the music publishers' revenue streams was also important. When expanding the digital performance right beyond subscription services, Congress expressed that intention in the statute.[251] This congressional intent to not affect the revenue streams of music publishers would later play a role in the rate-setting procedures that would follow, but not in the way that the music publishers had intended.

Once the rates for sound recording performance royalties settled, at least somewhat, the music industry was in for another shift. This time the shift came from the major labels, who increasingly also own many music publishing companies.[252] Looking at the rates paid for sound recording public performance rates, large music publishers believed they could do better outside the strictures of the PROs. As recently noted by Judge Cote, "[T]he largest

249. *See supra* text accompanying notes 195–97.

250. This disincentive to innovate created by the regulatory structure may contribute to an already present risk from which some incumbent industry players suffer. *See generally* CLAYTON M. CHRISTENSEN, THE INNOVATORS DILEMMA: WHEN NEW TECHNOLOGIES CAUSE GREAT FIRMS TO FAIL (1997).

251. Digital Millennium Copyright Act, Pub. L. No. 105-304, § 405, 112 Stat. 2860, 2890–91 (1998) (codified as amended at 17 U.S.C. § 114).

252. *See* Daniel Gervais, *Collective Management of Copyright: Theory and Practice in the Digital Age*, *in* COLLECTIVE MANAGEMENT OF COPYRIGHT AND RELATED RIGHTS, *supra* note 105, at 18 (noting the "high concentration of the music market among major labels and the decreasing daylight between music publishers and producers"). When explaining why EMI wanted to withdraw musical work public performance rights from ASCAP's licensing catalog, EMI Chief Executive Roger Faxon explained that "EMI wanted to withdraw because it believed that it was inefficient to license each right in the musical works and recordings it administered through different institutions." Faxon wanted to be able to "unify the rights in the compositions that we represented so that a single negotiation with . . . a customer who wanted the rights could encompass all rights . . . necessary to empower their business." Pandora Media, Inc. v. Am. Soc'y of Composers, Authors, & Publishers, 6 F. Supp. 3d 317, 333 (S.D.N.Y. 2014).

publishers were fixated on the higher rates that record companies—often their corporate affiliates—were receiving from internet music providers . . . for sound recording rights . . . when compared to the rates . . . for public performance rights."[253] Seeking a modification of the public performance rates for musical works through the Rate Court proceedings would likely not result in significantly higher fees because the Copyright Act expressly prohibits the Rate Court from considering the significant discrepancy between rates.[254] Specifically, when Congress added the digital public performance right for sound recordings, it expressly provided that "[l]icense fees payable for the public performance of sound recordings . . . shall not be taken into account in any . . . proceeding to set or adjust the royalties payable to copyright owners of musical works for the public performance of their works."[255]

Instead, in 2010 the major music publishers began discussing the possibility of withdrawing from the PROs as a viable option.[256] Presented publicly as a way to consolidate rights and allow for efficient licensing transactions, EMI was the first to talk of withdrawal.[257] Of course, as required by the antitrust decrees, the PROs' licenses from the music publishers are nonexclusive,[258] thus the rights EMI sought to efficiently license were already within EMI and its affiliated companies' control. The ability of businesses to seek a blanket license from the PROs was merely an alternative.[259]

Nonetheless, under pressure from the major music publishing companies, both ASCAP and BMI proposed amendments to their licensing programs which would allow members to withdraw only

253. *Id.* The court reviewed statements from both Sony and EMI executives. *Id.* at 333–34.

254. *See id.* at 332–33.

255. 17 U.S.C. § 114(i). It is ironic that it was the music publishers that lobbied Congress for this provision, fearing "that sound recording rates would be set below the public performance rates for compositions and drag down the latter." *Pandora Media, Inc.*, 6 F. Supp. 3d at 333 n.30.

256. *Pandora Media, Inc.*, 6 F. Supp. 3d at 333–34.

257. EMI Chief Executive Roger Faxon explained that EMI wanted to be able to "unify the rights in the compositions that we represented so that a single negotiation with . . . a customer who wanted the rights could encompass all rights . . . necessary to empower their business." *Id.* at 333.

258. *See supra* text accompanying note 139.

259. Of course, this option, and the requirement that the PROs must license anyone who seeks a license from them, reduces the market leverage that the music publishers have to negotiate a private license. *Pandora Media, Inc.*, 6 F. Supp. 3d at 334. Only if the efficiency of one-stop shopping had significant benefits would the music publishers have the ability to increase the rate significantly. At the same time, to the extent a user negotiates licenses independent of the PROs, the user is eligible to pay a reduced rate to the relevant PRO. *See* Broad. Music, Inc. v. DMX Inc., 683 F.3d 32, 44 (2d Cir. 2012) (discussing "carve outs" from PRO license fees).

the right to license works to "new media users."[260] It was these "new media users" that needed licenses from both the musical work copyright owner and the sound recording copyright owner, so the consolidation justification only made sense for that segment of the market.[261] One hope was that if the major publishers were able to negotiate higher rates outside of the PROs, those higher rates could be used to justify higher rates in subsequent Rate Court proceedings.[262]

Following ASCAP and BMI's adoption of procedures allowing for withdrawal of licensing rights for "New Media Transmissions,"[263] Sony, EMI, and Universal Music Publishing Group withdrew.[264] Less than two years later, in December, 2012, ASCAP modified the New Media withdrawal program to permit music publishers to effect withdrawals of licensing rights from ASCAP only with respect to large[265] new media entities that the music publishers were targeting for private and higher license rates.[266]

Backed into a corner, Pandora, the largest new media user that did not have affiliation connections with the major music publishers, privately negotiated public performance royalty rates.[267] Those rates ranged from 1.85% to 2.28% of gross revenue.[268] Pandora also filed a Rate Court proceeding against both ASCAP and BMI, challenging the legality of the limited withdrawals under the relevant antitrust consent decrees and also seeking a license rate set by the Rate Court.[269]

260. *See Pandora Media, Inc.*, 6 F. Supp. 3d at 333; Broad. Music, Inc. v. Pandora Media, Inc., Nos. 13 Civ. 4037(LLS), 64 Civ. 3787(LLS), 2013 WL 6697788, at *2–3 (S.D.N.Y. Dec. 19, 2013).

261. *See Pandora Media, Inc.*, 6 F. Supp. 3d at 333.

262. *Id.* at 336.

263. ASCAP's Compendium defines a New Media Transmission as a transmission "of musical compositions . . . made available or accessible (i) exclusively by means of the Internet, a wireless mobile telecommunications network, and/or a computer network and (ii) to the public, whether or not, in exchange for a subscription fee, other fee or charge." THE AMERICAN SOCIETY OF COMPOSERS, AUTHORS AND PUBLISHERS, COMPENDIUM OF ASCAP RULES AND REGULATIONS, AND POLICIES SUPPLEMENTAL TO THE ARTICLES OF ASSOCIATION § 1.12.9 (2014). It does not cover digital downloads. *Pandora Media, Inc.*, 6 F. Supp. 3d at 337 n.35.

264. *Pandora Media, Inc.*, 6 F. Supp. 3d at 331.

265. The definition of "large" was those entities that paid more than $5,000 in license fees to ASCAP. *Id.* at 338–39.

266. *Id.*

267. *Id.* at 339–50.

268. The headline rate with EMI was 1.85%, with EMI's pro-rata share agreed to be 20%, reflecting EMI's market share. *Id.* at 339. The headline rate negotiated with Sony was 2.28%, reflecting an ASCAP pro-rata share of an industry-wide 5% rate, Sony having 25%–30% of the market. *Id.* at 342, 358.

269. *Id.* at 331.

On September 17, 2013, the district court in the ASCAP proceeding granted Pandora's motion for partial summary judgment holding that the consent decrees prohibited ASCAP from allowing partial withdrawals of licensing rights.[270] The court found that the consent decree required that if ASCAP retained any licensing rights for a musical work, that work was part of ASCAP's catalog that it could license.[271] Thus, the publishers' purported withdrawals of a limited range of "new media rights" were held inoperative.[272] The court held that the consent decree required each work that was in the ASCAP repertoire to be available to any user who requested a blanket license.[273] The publishers, of course, remained free to withhold works from ASCAP entirely, but they could not withhold their works selectively from only certain types of businesses.[274] In a subsequent ruling, the court set the rate for the ASCAP license at 1.85% of revenue.[275]

The BMI Rate Court took a slightly different tack, permitting the withdrawals by the music publishers, but finding that such attempted limited withdrawals effected a complete withdrawal from BMI membership.[276] The court held that "the BMI Consent Decree (and the antitrust law) . . . restrict BMI from carrying in its repertory compositions which it can no longer offer to the New Media Services."[277] In effect, the BMI Rate Court concluded that if music publishers withdrew the authority for BMI to license new media uses, then BMI could no longer license those compositions for any purpose.[278] "When portions of [the public performance] right are withdrawn, the affected compositions are no longer eligible for membership in BMI's repertory, and it cannot include them in a blanket license or license them at all."[279]

While these two courts took different approaches to the relief Pandora sought, both courts see the antitrust decrees as providing an important check on the potential abuse of market

270. Pandora Media, Inc. v. Am. Soc'y of Composers, Authors & Publishers, Nos. 12 Civ. 8035(DLC), 41 Civ. 1395(DLC), 2013 WL 5211927, at *1, *7 (S.D.N.Y. Sept. 17, 2013).

271. *Id.* at *7.

272. *Id.* at *9.

273. *Id.* at *5.

274. *Id.* at *9.

275. Pandora Media, Inc. v. Am. Soc'y of Composers, Authors, & Publishers, 6 F. Supp. 3d 317, 372 (S.D.N.Y. 2014).

276. Broad. Music, Inc. v. Pandora Media, Inc., Nos. 13 Civ. 4037(LLS), 64 Civ. 3787(LLS), 2013 WL 6697788, at *4 (S.D.N.Y. Dec. 19, 2013).

277. *Id.*

278. *Id.*

279. *Id.*

power. The consent decrees prevent music publishers from collectively licensing some music services but withdrawing from the cartel when it suits their business interests. As noted by Judge Stanton:

> Nothing in the Consent Decree settling this antitrust case can be read to allow one with BMI's market power to refuse to deal with certain of its applicants. The copyright law necessarily gives that privilege to the [musical work copyright owners], but BMI cannot combine with them by holding in its repertory compositions that come with an invitation to a boycott attached.[280]

* * *

This battle over the rate to be paid by Pandora, and other customizable but noninteractive internet music services, illustrates an industry that is continuing to struggle with the changes wrought by the digital age. The new media business models already face increased licensing obligations both in terms of royalty payments and content restrictions as a result of congressional action.[281] The consent decrees, first formulated in the 1940s, have provided the district courts with the necessary tools to reject attempts to use collective licensing in a way that could put new market participants at an even greater disadvantage over incumbent broadcasting entities.[282]

VI. CONCLUSION

The epic struggles for the right approach to copyright licensing in new media are by no means over. What Congress has been trying to achieve in setting the boundaries of copyright owner rights and limitations, however, can be seen through the lens of two different narratives. One narrative explains the accretion of rights and the complexity of law in this area as a way to ensure an adequate revenue stream for copyright owners as technologies change and business models shift. Another narrative explains the changes, particularly those changes put in place by Congress in the last twenty years, as protecting incumbent businesses from the full-throttle competition of the digital age.

280. *Id.* at *5.
281. *See supra* Part IV.C.3–4.
282. *See supra* Part III.B.3.