Background
Music Copyright Timeline

1790: Musical compositions protected as "books"

1831: Rights granted for reproduction and distribution of musical works

1897: Rights granted for the public performance of musical works

1908: Supreme Court decides *White-Smith v. Apollo*, holding mechanical reproductions are not copies
1909: Congress grants rights for mechanical reproductions in phonorecords and enacts compulsory license with a 2 cent rate

1941: ASCAP and BMI enter into consent decrees with the DOJ

1972: Congress grants protection for sound recordings, but no right of public performance

1976: Mechanical compulsory license recodified in section 115; increased statutory rate to 2.75 cents
1995: DPRSRA enacted; granting digital sound recording performance right codified in section 114

1998: DMCA amends section 114 license to include internet radio; also amends section 112 to allow temporary server copies

2006: SIRA introduced to modernize 115 license for digital uses, but does not become law
2013: Federal rate courts rule that publishers cannot withdraw digital rights from ASCAP and BMI consent decrees

2014: California and N.Y. courts hold public performance of pre-1972 sound recordings protected under applicable state law

2015: U.S. Copyright Office releases report, “Copyright and the Music Marketplace”
From Physical Albums to Digital Singles

**US Music Industry Revenues 2004**
- Physical: 98.4%
- Digital Downloads: 1.5%
- SoundExchange Distributions: 0.1%

**Source: RIAA**

**US Music Industry Revenues 2013**
- Digital Downloads: 40%
- Physical: 35%
- Subscription & Streaming: 21%
- Synchronization: 3%
- Ringtones & Ringbacks: 1%

**Source: RIAA**
Rise of Streaming

Proportion of US Recorded Music Revenues from Streaming

Source: RIAA
“This is the complication of the legislation that we have, and those involved. Look at the subcategories underneath the subcategories underneath the subcategories.”

– Rep. Tom Marino

“It’s a PowerPoint you don’t ever want to spend that much time on.”

– Rep. Darryl Issa
“From a copyright perspective, we are trying to deliver bits and bytes through a Victrola.”
Music Study Process

- Request for public comments (Mar. 17, 2014)
- Public roundtables in Nashville, Los Angeles and NYC (June 2014)
- Request for additional comments (July 23, 2014)
- Report released (Feb. 5, 2015)
“This horribly dull government report could change music forever.”
– VOX

“[The report contains] some bold proposals. It’s not beach reading season, though, so it’s understandable why the tome hasn’t triggered a mass frenzy just yet.”
– Billboard
Issues
Key Concerns

- Fair compensation for creators
  - Market trends
  - Disparate treatment of rights and uses
- Licensing parity
  - Regulated vs. nonregulated
  - Ratesetting standards
- Musical works
  - PRO consent decrees
  - Section 115 license
- Sound recordings
  - Section 112/114 license
  - Terrestrial performance right
  - Pre-72 sound recordings
- Data issues
- Reporting transparency
“Avicii’s release ‘Wake Me Up!’ that I co-wrote and sing ... [is] the 13th most played song on Pandora since its release in 2013, with more than 168 million streams in the US. ... In return for co-writing a major hit song, I’ve earned less than $4,000 domestically from the largest digital music service.”

– Aloe Blacc
## Role of Government Regulation

<table>
<thead>
<tr>
<th></th>
<th>Sound recording</th>
<th>Musical work</th>
</tr>
</thead>
<tbody>
<tr>
<td>Reproduction/distribution</td>
<td>Freely negotiated</td>
<td>Regulated – CRB</td>
</tr>
<tr>
<td>Digital interactive performance</td>
<td>Freely negotiated</td>
<td>Regulated – rate courts (ASCAP &amp; BMI)</td>
</tr>
<tr>
<td></td>
<td></td>
<td>Freely negotiated (other PROs)</td>
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<tr>
<td>Digital noninteractive performance</td>
<td>Regulated – CRB</td>
<td>Regulated – rate courts (ASCAP &amp; BMI)</td>
</tr>
<tr>
<td></td>
<td></td>
<td>Freely negotiated (other PROs)</td>
</tr>
<tr>
<td>Terrestrial performance (e.g., AM/FM radio)</td>
<td>No right</td>
<td>Regulated – rate courts (ASCAP &amp; BMI)</td>
</tr>
<tr>
<td></td>
<td></td>
<td>Freely negotiated (other PROs)</td>
</tr>
<tr>
<td>Synch</td>
<td>Freely negotiated</td>
<td>Freely negotiated</td>
</tr>
</tbody>
</table>
## Ratesetting Standards

<table>
<thead>
<tr>
<th>Use</th>
<th>Ratesetting body</th>
<th>Authority</th>
<th>Standard</th>
</tr>
</thead>
<tbody>
<tr>
<td>§115 mechanical (musical works)</td>
<td>Copyright Royalty Board</td>
<td>§801(b)(1)</td>
<td>Multifactor policy-oriented approach</td>
</tr>
<tr>
<td>§114 satellite radio (sound recordings)</td>
<td>Copyright Royalty Board</td>
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<tr>
<td>§114 internet radio (sound recordings)</td>
<td>Copyright Royalty Board</td>
<td>§114(f)</td>
<td>“Willing buyer/willing seller”</td>
</tr>
<tr>
<td>ASCAP/BMI public performance (musical works)</td>
<td>Federal “rate courts” in New York</td>
<td>Consent decrees</td>
<td>“Reasonable fee” (or “fair market value” considering antitrust concerns)</td>
</tr>
</tbody>
</table>
### Rate Disparities: Sound Recordings vs. Musical Works

<table>
<thead>
<tr>
<th></th>
<th>Sound recording</th>
<th>Musical work</th>
</tr>
</thead>
<tbody>
<tr>
<td>Downloads</td>
<td>9</td>
<td>to 1</td>
</tr>
<tr>
<td>Noninteractive streaming</td>
<td>12 (or 14)</td>
<td>to 1</td>
</tr>
<tr>
<td>Synch (e.g., television commercials)</td>
<td>1</td>
<td>to 1</td>
</tr>
</tbody>
</table>
Section 115 License

- Section 115 mechanical license originally enacted in 1909
  - Congress concerned with piano roll monopoly
- Burdensome song-by-song licensing
- 801(b)(1) standard perceived as unfair by some
- No audit right
- Record labels license these rights in free market
PRO Consent Decrees

- Consent decrees
  - Entered in 1941
  - Rates set by S.D.N.Y. “rate courts”
  - Right to perform musical works in a PRO’s repertoire upon application without immediate payment
  - Other PROs and record labels not subject to consent decrees

- Pandora decisions
  - Denied partial withdrawal of “new media” rights – publishers must be “all in” or “all out”
  - ASCAP rate set at 1.85%; BMI set at 2.5%
Section 112 and 114 Licenses

- Administered by SoundExchange
- Appear to be functioning fairly well
- Debate on royalty rates
  - Services want lower rates, creators want higher rates
  - Webcasters have gone twice to Congress for relief from CRB-set rates (2007, 2012)
- Treatment of customized services (e.g., Pandora) as noninteractive
  - In 2009, the Second Circuit held that personalization did not mean a service was “specially created for the recipient.” Arista Records, LLC v. Launch Media, Inc., 578 F.3d 148 (2d Cir. 2009)
- No license termination provision for delinquent licensees
- Technical limits of section 112 (e.g., destroy copies in 6 months)
- Only sound recordings fixed on or after Feb. 15, 1972 are protected under federal law
  - State law protection varies
- In 2011 report, Copyright Office recommended full federalization of pre-72 recordings
  - California law (Cal. Civ. Code 980(a)(2)) recognizes performance right in pre-72 recordings
  - Similar suits follow in other jurisdictions
- Other cases hold pre-72 recordings fall outside of DMCA safe harbor
Terrestrial Performance Right

- Federal law does not recognize a terrestrial performance right for sound recordings
  - Radio is a $17 billion industry
  - Artists and sound recording owners not paid
  - Curtails reciprocal international royalties
  - Unfair to competing, non-exempt internet radio and satellite providers

- Copyright Office has supported sound recording performance right since before 1976 Act
Data Issues

- Lack of authoritative centralized music database
  - 30 million+ musical works in use by digital services
  - Manual research often required
  - Challenge of matching sound recordings to musical works

- Data managed by different stakeholders
  - Use of standard identifiers (e.g., ISRC, ISWC, ISNI) inconsistent
  - Industry participants view data as proprietary

- Inefficient for both users and owners
Reporting Transparency

- Hard for creators and owners to track usage and payment
  - Unreliable and missing data
  - Reporting and payment of advances unclear
- Role of equity deals (e.g., Spotify)
- Concerns about writers’ and artists’ shares under direct deals
- Lack of audit rights

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Recommendations
Guiding Principles

Stakeholders Agree:

- Music creators should be fairly compensated for their contributions
- Licensing process should be more efficient
- Market participants should have access to authoritative data to identify and license sound recordings and musical works
- Usage and payment information should be transparent and accessible to rightsowners
Guiding Principles

Copyright Office Says:

- Government licensing processes should aspire to treat like uses of music alike
- Government supervision should enable voluntary transactions while still supporting collective solutions
- Ratesetting and enforcement of antitrust laws should be separately managed and addressed
- Single, market-oriented ratesetting standard should apply to all music uses under statutory licenses
Licensing Parity

- Treat sound recordings and musical works more alike in digital realm
  - Musical work owners should be able to opt out of government-regulated licensing for interactive streaming and downloads
  - All noninteractive (including terrestrial radio) uses under section 112 and 114 licenses

- Adopt single market-oriented standard for all ratesetting
  - Repeal 114(i) prohibition

- Move PRO ratesetting to CRB
  - Antitrust oversight to remain with federal courts
Licensing Parity

- Enact complete sound recording performance right
  - Include under section 112 and 114 licenses
  - Promotional value of radio can be taken into account by CRB

- Protect pre-72 sound recordings under federal law
  - Adopt Office’s 2011 recommendations for full federalization
  - Would eliminate need for state-by-state compliance
  - Would promote licensing efficiency
Updated Licensing Framework

- Modernize section 115
  - Change to blanket license
  - Allow bundling with performance rights
  - But no expansion of section 115
    - Copyright Office declined to recommend extension of statutory licensing to consumer audiovisual products such as music and lyric videos
  - Market appears to be responding to licensing needs for these products (e.g., NDMAs, YouTube’s licensing program)
Updated Licensing Framework

- Maintain section 112 and 114 licenses with adjustments
  - Should also cover noninteractive streaming of musical works (internet radio) and terrestrial performances of sound recordings (broadcast radio)
    - Possibility of joint ratesetting for musical works and sound recordings
  - Technical aspects of license should be fine-tuned by regulation (e.g., ratesetting distinctions between custom and noncustom radio, sound recording performance complement)
- Allow SoundExchange to terminate noncompliant licensees
Music rights organizations (MROs)

- Licensing organizations would administer collective blanket licenses
  - Could bundle performance and mechanical
  - Would collect and distribute royalties
  - Disputed rates set by CRB as needed
- Musical work owners could opt out of MRO and license directly
- Would supply work and ownership data (including opt-out information) to general music rights organization (GMRO)
Updated Licensing Framework

- **General music rights organization (GMRO)**
  - Non-profit designated by government
  - Would maintain central public database of works and ownership information (including opt-outs)
    - Would populate with standard identifiers (e.g., ISRCs, ISWCs and ISNIs) and match sound recordings to musical works
  - Would collect royalties and administer claims system for unidentified works
  - Would be funded through licensee surcharge, administrative fees and unclaimed royalties
Copyright and the Music Marketplace: Proposed (G)MRO Framework
Updated Licensing Framework

- **Modify CRB procedures**
  - Ratesetting changes:
    - Move from 5-year cycle to *ad hoc* proceedings when rate can’t be agreed upon
  - Would be responsible for setting GMRO licensee surcharge

- **Procedural improvements:**
  - Eliminate separate rebuttal proceeding in favor of unified trial
  - Follow FRCP and FRE with modifications (e.g., modified hearsay rule)
  - Procedures should favor early settlements
Improve Data and Transparency

- Implement data standards through GMRO
- Adopt:
  - ISRC (sound recordings)
  - ISWC (musical works)
  - ISNI (creators)
- Phase in over time
- To be supplied by MROs and reported back by licensees
- Financial incentives for compliance
- Additional standards can be adopted in future
Improve Data and Transparency

- Creators able to collect writers’ and artists’ shares of performance royalties through chosen MRO or SoundExchange
  - Would include direct opt-out deals
  - Material financial terms of direct deals should be disclosed
- Publishers and record labels should develop best practices with creators
Related Developments
“I ask you on behalf of my family and the families of American songwriters to change the archaic government regulations that prohibit us from pursuing a fair market opportunity for the songs we create.”

– Lee Thomas Miller, NSAI
June 10, 2014
"I mean this is why we’re here – [it’s] what’s going on in the digital space. … In the digital space it’s nothing, practically nothing, I mean it adds up after billions of plays to a little something but this ain’t no way to earn a living."

– Senator Al Franken
Recent Legislative Proposals

“Allocation for Music Producers Act” (H.R. 1457) introduced by Rep. Crowley (21 cosponsors)
“Songwriter Equity Act” (H.R. 1283, S. 662) introduced by Rep. Collins (36 cosponsors) and Sen. Hatch (5 cosponsors)
“Protecting the Rights of Musicians Act” (H.R. 1999) introduced by Rep. Blackburn (1 cosponsor)
In June 2014, DOJ’s Antitrust Division announced review of consent decrees through public process and solicited public comment.

Key modifications requested by ASCAP and BMI:

- Permit PROs to accept partial grants of rights (i.e., allow partial withdrawal)
- Allow PROs to license multiple rights (mechanical, synch, and lyric) rather than just public performance
- Replace federal court ratesetting with arbitration system
- Payment of interim rate upon license request
DOJ Initial Review

Based on public reports, as of April 2015, DOJ proposed to recommend:

- Partial withdrawal of rights
- Licensing of multiple rights
- Continued ratesetting by federal court
- Requirement to pay interim rate
- Modifications subject to certain conditions, e.g., PRO must provide machine-readable song data with associated sound recordings
Fractional Licensing Issue

- In September 2015, DOJ solicits additional comments on question of PROs’ “fractional” (less than 100%) licensing of jointly owned works.
- DOJ’s apparent concerns:
  - Consent decrees require 100% licensing of all “works” in a PRO’s repertory – not partial interests.
  - But, recognizes fractional payment systems of PROs.
  - If publishers are allowed to withdraw digital rights, fractional licensing could cause “hold-ups”.
- Issue remains under review at DOJ.
In January 2016, Copyright Office responded to congressional request to provide its views:

- Divisibility of copyright ownership important principle under 1976 Copyright Act
- Consistent with overall industry practice, ASCAP and BMI administer fractional interests
- Under Act, co-owner of a joint work can grant nonexclusive license, but:
  - Co-owners can contract to separately manage shares
  - Not all co-owned works are subject to joint works rule (e.g., derivative works, foreign works)
- 100% licensing rule would:
  - Violate core copyright principles and contracts, and/or
  - Exclude fractionally owned works from ASCAP and BMI
Dec. 2015: CRB sets webcaster rates for 2016-2020:

- $.0017 per performance for non-subscription (ad-supported) services
  - Increase from WSA “Pureplay” rate of $.0014
- $.0022 per performance for subscription services
  - Decrease from WSA “Pureplay” rate of $.0025
- Minimum annual per-channel fee of $500
- CPI adjustments

Existing CRB-set rates were $.0023 for webcasters, $.0025 for broadcasters

SoundExchange had sought greater of $.0025 per performance (increasing to $.0029 in 2020) and 55% of revenue

Determination not yet final; rehearing pending
Spotify Lawsuits

  - Proposed class action seeking injunction and damages
- **Ferrick v. Spotify USA Inc.** (C.D. Cal. Jan. 1, 2016)
  - Same
- Spotify also reportedly in settlement negotiations with NMPA for same acts

“[T]he data necessary to confirm the appropriate rightsholders is often missing, wrong, or incomplete. When rightsholders are not immediately clear, we set aside the royalties we owe until we are able to confirm their identities.”  

– Spotify
“The United States has the most innovative and influential music culture in the world. But music creators and users are struggling with outmoded licensing practices—many of them government-mandated—that have not kept step with the digital age. As is recognized by industry participants on all sides, we need to fix this broken system.”

Maria A. Pallante
U.S. Register of Copyrights