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OUT OF TUNE: HOW PUBLIC PERFORMANCE RIGHTS ARE FAILING TO HIT THE RIGHT NOTES

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Average music consumers are unlikely to fathom the licensing and compensation systems that underlie their ability to stream a single song on Spotify or Pandora. This is not the fault of uninformed consumers. It is the result of the licensing system's complex and fragmented structure. Since the early twentieth century, Congress has dealt with music industry developments by enacting piecemeal reforms. Consequently, music licensing takes place in a disjointed system created primarily before the Internet Age. Statutory provisions that have attempted to catch up with innovation fail to harmonize copyright law with the realities of the music industry, technology, and consumers. As a result, licensing processes differ based on type of copyrightable work, who the licensee is, and how the work is used.

Unsurprisingly, there are numerous criticisms of the present music licensing system and, in some cases, corresponding proposals to resolve those issues. These proposed solutions should be evaluated based on how they actually further an important goal of music copyright: bringing content owners and users together in the marketplace. Copyright law incentivizes creation and distribution of works by granting the owners of those works rights that enable them to make a profit from selling copies or licenses.[1] Therefore, the licensing system that sets the rules of the marketplace for music should facilitate music owners' opportunities to make a profit. In order for this theory to work in the context of musical public performance, the licensing process needs to be functional, efficient, and fair. This Note approaches the discussion of reforming music licensing from this perspective.

The following discussion explores the past, present, and potential futures for licensing the public performance rights. It subsequently argues that the most prominent proposals to alter the music licensing system continue down the historical path of piecemeal changes and fragmentation

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1. *See* JULIE E. COHEN, LYDIA PALLAS LOREN, RUTH L. OKEDIJI & MAUREEN A. O'ROURKE, COPYRIGHT IN A GLOBAL INFORMATION ECONOMY 7 (4th ed. 2015).

rather than create a cohesive structure that enhances participation in the music marketplace. First, Part I traces the development of the U.S. music industry and music copyright to show how the past has shaped what music licensing looks like today. Part II then surveys common criticisms of the licensing system's current features. Part III discusses proposed solutions to alleged failings of the current system based on how each proposal further incentivizes users and owners to meet in the marketplace. Part IV concludes that the most prominent proposals are insufficient because music copyright requires broader, overarching reform in order to truly improve music licensing.

I. BACKGROUND

Today, what is generally thought of as a "song" contains two separate copyrightable works: the underlying "musical work" and the "sound recording."[2] The musical work, protected by federal copyright law since 1831,[3] consists of the musical composition and lyrics.[4] Songwriters, the natural copyright owners of musical works,[5] often assign licensing rights and a portion of their copyrights to publishers.[6] Publishers have the business resources to turn rights into revenue through promotion and administration.[7] Sound recordings, on the other hand, consist of recorded musical and spoken sounds.[8] It is most common for record labels, rather than recording artists, to claim copyright ownership in a sound recording.[9]

2. *See* U.S. COPYRIGHT OFF., COPYRIGHT AND THE MUSIC MARKETPLACE 18 (2015) [hereinafter MUSIC MARKETPLACE].

3. *See* Act of Feb. 3, 1831, ch. 16, § 1, 4 Stat. 436 (repealed 1909).

4. MUSIC MARKETPLACE, *supra* note 2, at 18.

5. *See* 17 U.S.C. § 201(a) (2012) ("Initial Ownership.—Copyright in a work protected under this title vests initially in the author or authors of the work.").

6. MUSIC MARKETPLACE, *supra* note 2, at 19. Usually, songwriters assign about fifty percent of their copyright. *Id.*

7. *See id.*

8. U.S. COPYRIGHT OFF., 56A.0121, COPYRIGHT REGISTRATION OF MUSICAL COMPOSITIONS AND SOUND RECORDINGS 1 (2012). U.S. copyright law defines "sound recordings" as "works that result from the fixation of a series of musical, spoken, or other sounds, but not including the sounds accompanying a motion picture or other audiovisual work, regardless of the nature of the material objects, such as disks, tapes, or other phonorecords, in which they are embodied." 17 U.S.C. § 101.

9. Most recording contracts identify sound recordings as works made for hire, in which case the hirer (here, the record label) owns the copyright from the time the recording is made. *See* Randy S. Frisch & Matthew J. Fortnow, *Termination of Copyrights in Sound Recordings: Is There a Leak in the Record Company Vaults?*, 17 COLUM.-VLA J.L. & ARTS 211, 217 (1992–1993). Labels maintain that they can own the rights to albums even though their artists are not "employees" because albums are collective works. *See* DAVID PASSMAN, ALL YOU NEED TO KNOW ABOUT THE MUSIC BUSINESS 359 (6th ed. 2008).

Digital music services must license each of the two works from their respective owners in order to make a song available on their service.[10]

Take the song "Single Ladies (Put a Ring on It)" as an example. The musical work copyright for that song would initially vest with Terius "The-Dream" Nash, one of the contributing writers.[11] However, Nash assigned a share of his copyright to publisher Warner/Chappell Music.[12] On the other hand, the song was recorded and made famous by pop-singer Beyoncé Knowles.[13] Because the sound recording is considered a work-for-hire, the sound recording copyright is owned by Sony Music Entertainment.[14] Therefore, a service such as Spotify[15] must license the public performance rights from Warner and Sony in order for a Spotify user to stream the song.[16] Even though the two works exist simultaneously, the systems under which those licenses are acquired differ from one another significantly.[17]

Three major music industry developments create identifiable phases in copyright law development. First, the advent of radio changed the music industry so significantly that it took approximately twenty years for the

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10. *See* MUSIC MARKETPLACE, *supra* note 2, at 73–74.

11. *Single Ladies (Put A Ring On It)*, WARNER/CHAPPELL MUSIC, http://www.warnerchappell.com/song-details/WW008909118000 [https://perma.cc/F62R-DXFZ]. Nash and his co-writers would actually own the musical work as a "joint work," meaning that they created the composition together and as a result each has the ability to exercise the exclusive rights copyright law provides to owners (as long as they pay the other owners their appropriate share of any collected revenue). *See* PASSMAN, *supra* note 9, at 353.

12. *See* U.S. Copyright No. PA0001630370 (issued Feb. 18, 2009); *see also Terius "The-Dream" Nash and Warner/Chappell Music Extend Worldwide Publishing Agreement*, WARNER MUSIC GROUP OFFICIAL BLOG (Aug. 5, 2014), http://www.wmg.com/news/terius-dream-nash-and-warnerchappell-music-extend-worldwide-publishing-agreement-20131 [https://perma.cc/PFJ8-TXNV] (explaining that Warner/Chappell has an agreement with Nash for global publishing rights).

13. *See* Jessica Herndon, *Inside Story: The Making of Beyoncé's 'Single Ladies*,' PEOPLE.COM (Jan. 1, 2010), http://www.people.com/people/article/0,,20333961,00.html [https://perma.cc/4WX5-WBBS].

14. *See* U.S. Copyright No. SR0000723765 (issued Mar. 8, 2013). Works made for hire are created by employees where "the employer or other person for whom the work was prepared is considered the author . . . and . . . owns all of the rights comprised in the copyright." 17 U.S.C. § 201(b) (2012).

15. Spotify is an on-demand music streaming service that grants users total control over what they listen to. *See In re* Pandora Media, Inc. (*Pandora II*), 6 F. Supp. 3d 317, 325 (S.D.N.Y. 2014). Spotify, which originated in Sweden, made its United States debut in 2011. *Hello America. Spotify Here.*, Spotify Press (July 14, 2011), https://press.spotify.com/us/2011/07/14/hello-america-spotify-here [https://perma.cc/M9B4-WKPF].

16. *See* MUSIC MARKETPLACE, *supra* note 2, at 73–74.

17. *See id.* at 16 (explaining that licensing transactions "represent a series of statutory and judicial mandates that came into effect at various points during the last century to address particular concerns of the day").

licensing system to adjust.[18] Second, prior to 1972, there was only one copyrightable work in music: the composition.[19] Lastly, the Internet made access to music easier than ever before, enabling both piracy and innovative music services.[20] It is in this last phase that music industry participants are currently struggling to find stable footing.

The following overview of music licensing's evolution provides an understanding of how music use became so untenably complex.

A. SHEET MUSIC IN ITS PRIME

Although musical work copyright owners had several exclusive rights at the turn of the nineteenth century, the reproduction right was the most significant because it encompassed the making of sheet music.[21] Sheet music was publishers' and composers' main source of revenue until the early 1920s.[22] At the peak of sheet music sales, in 1919, a popular composition would commonly sell two or three million copies.[23]

During this period, publishers advertised their musical works by directly paying performers in vaudeville and variety shows to use their songs.[24] Publishers compensated performers with cash, gifts, and even a share of the publishers' revenue attributable to the musical work the artist performed.[25] This practice, at the time, was known as the "payment system."[26] It is now known as "payola."[27]

The Copyright Act Congress passed in 1909 reflected a changed dynamic in music, partially created by new technologies.[28] It extended to musical work owners two new exclusive rights that would become increasingly valuable.[29] The "mechanical reproduction" right[30] was a response to the invention of piano rolls, used by a machine to play

18. *See* AL KOHN & BOB KOHN, KOHN ON MUSIC LICENSING 7–20 (4th ed. 2010).

19. *See* PASSMAN, *supra* note 9, at 382–83.

20. *See* KOHN & KOHN, *supra* note 18, at 20, 35–36.

21. *See id.* at 5.

22. *See id.* at 5–6.

23. *See id.* at 6.

24. *See* RUSSELL SANJEK & DAVID SANJEK, AMERICAN POPULAR MUSIC BUSINESS IN THE 20TH CENTURY 7–8 (1991); *see also* R. H. Coase, *Payola in Radio and Television Broadcasting*, 22 J.L. & ECON. 269, 270–71 (1979).

25. *See* Coase, *supra* note 24, at 273–74. In this way, performers were tied to particular publishers. *See id.* at 277.

26. *See id.* at 277.

27. *See id.* at 269.

28. *See* Act of March 4, 1909, ch. 320, 35 Stat. 1075 (amended 1976).

29. *See id.* at § 1(e), 35 Stat. at 1075.

30. The mechanical license is currently found at 17 U.S.C. § 115 (2012).

compositions on pianos.[31] With the mechanical reproduction right, publishers were able to collect statutory royalties for the piano rolls that played their works instead of losing revenue for displaced sheet music sales.[32] The mechanical reproduction right extended to phonograph records as well, which became increasingly popular throughout the first half of the 1900s.[33] As sheet music prices decreased, mechanical royalties made up for lost revenue.[34]

The second right the 1909 Copyright Act granted to musical work owners, the right of public performance, required performers to license a musical work from its owner in order to lawfully perform it in public.[35] However, copyright owners seeking to enforce the public performance right and police the performance of their works found it impossible to do so independently.[36] Infringing activity could not be detected; performances were ephemeral, and musical work owners had no way of knowing if someone was performing their work down the street, much less on the opposite side of the country.[37]

To address this issue, the American Society of Composers, Authors and Publishers (ASCAP) was established in 1914.[38] ASCAP, still active and serving the same functions today, is known as a performing rights organization (PRO).[39] The organization pools together resources to detect infringement on behalf of its members.[40] ASCAP also supports its members by acting as an intermediary in the licensing process.[41] Agents, originally

31. KOHN & KOHN, *supra* note 18, at 7.

32. *See id.* Piano rolls made sheet music unnecessary for performance of the work. *See id.*

33. KOHN & KOHN, *supra* note 18, at 7, 18–19. Even now, music publishers give record companies a mechanical reproduction license and subsequently collect royalties based on record sales. *See id.* at 7. Although they are not "mechanical" per se, this right applies to compact discs and digital music files. *Id.*

34. *See* RUSSEL SANJEK, PENNIES FROM HEAVEN 42 (1996) [hereinafter PENNIES] (updated by David Sanjek). Prices went down when economy stores like Woolworth's began selling sheet music at a discounted price. *See id.*; *see also* SANJEK & SANJEK, *supra* note 24, at 16.

35. *See* Act of March 4, 1909, ch. 320, § 1(e), 35 Stat. 1075, 1075 (amended 1976).

36. *See* Broad. Music, Inc. v. Columbia Broad. Sys., Inc. (*BMI v. CBS*), 441 U.S. 1, 4–5 (1979).

37. *See id.* at 4.

38. Robert P. Merges, *Contracting Into Liability Rules: Intellectual Property Rights and Collective Rights Organizations*, 84 CALIF. L. REV. 1293, 1328–29 (1996).

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

40. *See BMI v. CBS*, 441 U.S. at 5.

41. *See id.*; *see also About ASCAP*, ASCAP, http://www.ascap.com/about [https://perma.cc/G7SM-48R2].

focusing on entertainment venues, offer "blanket licenses" to music users.[42] Blanket licenses, issued for a discrete term, give "the music user the right to perform all of the works in ASCAP's repertory, the fee for which does not vary depending on how much of the music the user actually uses."[43] Licensees pay a single fee that ASCAP divides among its members.[44] Through collective licensing, individual copyright owners and music users overcome the prohibitive transaction costs that would otherwise accompany direct licensing.[45]

B. RADIO OVERTURNS AN INDUSTRY

As the 1900s moved on, radio became a powerful force in the music industry, determinatively changing the landscape for publishers.

1. *Enforcing the Musical Work Public Performance Right*

Although ASCAP initially allowed broadcasters free use of its repertory, when radio became widely popular in the 1920s and sheet music sales fell off, compensation became a growing concern.[46] Many blamed radio for worsening already rapidly declining sheet music demand by providing an alternative way to listen to music.[47] Consequently, ASCAP sought to begin collecting public performance royalties for over-the-air play.[48] When broadcasters declined to negotiate,[49] ASCAP brought suit against a radio station operator.[50] The district court held that the station required a license to legally perform musical works.[51] Broadcasters began applying to ASCAP for blanket licenses, and in 1932 broadcasters agreed for the first time to

42. *See* SANJEK & SANJEK, *supra* note 24, at 28–29; *see also* KOHN & KOHN, *supra* note 18, at 1249.

43. *Pandora II*, 6 F. Supp. 3d 317, 322 (S.D.N.Y. 2014).

44. *See* Merges, *supra* note 38, at 1329.

45. *See id*. at 1328–29.

46. *See* SANJEK & SANJEK, *supra* note 24, at 26.

47. *See* KOHN & KOHN, *supra* note 18, at 10–11, 18.

48. *See* SANJEK & SANJEK, *supra* note 24, at 26. Although publishers and composers were concerned with collecting royalties for the performance of their works, they maintained the practice of paying musicians to perform their songs. *See* Coase, *supra* note 24, at 273–74.

49. *See* SANJEK & SANJEK, *supra* note 24, at 26.

50. *See* M. Witmark & Sons v. L. Bamberger & Co., 291 F. 776, 776–77 (D.N.J. 1923); *see also* KOHN & KOHN, *supra* note 18, at 10.

51. *See M. Witmark & Sons*, 291 F. at 780.

fees calculated as a percentage of their revenue.[52] Publisher revenue came to depend heavily on public performance royalties.[53]

2. *Radio Begins Using Phonograph Records On-Air*

The structure of radio programming itself was also undergoing a major shift between the 1930s and 1950s. In the 1930s, radio programs transmitted live, big band performances over the air.[54] However, over time, phonograph records selected by disk jockeys began displacing live music.[55] Two decades later, the transition was complete.[56]

Corresponding to broadcasters' increased use of records on-air, record sales also increased during the 1930s.[57] However, musicians and record companies were not entitled to the same public performance royalties that music publishers were because, despite the ever-growing popularity of phonograph records, sound recordings still lacked federal copyright protection.[58] Record companies relied on radio solely as a form of advertisement.[59] Despite an increase in sales, they were concerned that radio would cause their product to go the way of sheet music.[60]

Record companies attempted to create quasi-copyright restrictions on the use of their works, but the legal effect of such efforts was inconsistent across jurisdictions.[61] The Pennsylvania Supreme Court found that common law property principles gave sound recording owners similar protections as federal law gave the owners of copyrightable musical works, including a public performance right.[62] In 1940, however, the Second Circuit found that labeling records for "home use only" could not extend a record manufacturer's common-law property interest in its product.[63] The

52. SANJEK & SANJEK, *supra* note 24, at 26. By the middle of the decade, the rate was set at five percent of revenue. KOHN & KOHN, *supra* note 18, at 18.

53. KOHN & KOHN, *supra* note 18, at 20.

54. Coase, *supra* note 24, at 270.

55. *See id*. at 286.

56. *Id*.; KOHN & KOHN, *supra* note 18, at 18–20.

57. *See* KOHN & KOHN, *supra* note 18, at 18.

58. *See id.* at 18–19.

59. *See id*. at 19.

60. *See* SANJEK & SANJEK, *supra* note 24, at 49–53.

61. *See id*. at 49. Some record companies began labeling their records as for "home use only" in an effort to avoid unrestricted use of their records on the radio. Waring v. WDAS Broad. Station, Inc., 194 A. 631, 635, 633 (1937).

62. *See id*. at 638.

63. *See* RCA Mfg. Co. v. Whiteman, 114 F.2d 86, 88–89 (2d Cir. 1940). More specifically, RCA Manufacturing Company printed language such as "Not Licensed for Radio Broadcast" and "Only For Non-Commercial Use on Phonographs in Homes" on its records and packaging. *Id.* at 87. The New York high court reached a contrary holding ten

company's interest in a particular record terminated after its first sale, and therefore, the record company could not limit the legal purchaser's use of that record, including on radio stations.[64]

Without federal copyright protection, most recording artists could only rely on their contracts with record companies for income, some only being paid for single takes.[65] However, some musicians were able to share in publishers' public performance royalties through payola.[66] Although there were three separate attempts to ban payola in the 1930s, under the rationale that music should be chosen for its quality or popularity rather than because the record company was paying the performer,[67] ultimately none were successful and payola grew alongside the popularity of big bands.[68] The practice of publishers paying musicians carried over to radio when big bands became integral to broadcasts.[69]

When radio programs began using records rather than live big band performances, the actors participating in payola changed as well; record companies rather than publishers made payments and disk jockeys rather than bandleaders received payments.[70] During this new era of payola, illegalization efforts were finally successful.[71] Responding to widespread complaints about the use of payola, Congress amended the Communications Act in 1960.[72] New statutory provisions required disk

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years later in *Metro. Opera Ass'n v. Wagner-Nichols Recorder Corp.*, where it found that broadcasting a performance on the air "did not abandon the plaintiffs' right to this performance." 101 N.Y.S.2d 483, 493–94 (1950).

64. *RCA Mfg*., 114 F.2d at 88–89. The Second Circuit reversed *RCA Mfg.* in 1950, holding that the creator of a record maintained an exclusive right to reproduce and sell its record even after initial distribution to the public. Capitol Records v. Mercury Records Corp., 221 F.2d 657, 663 (2d Cir. 1955).

65. *See* SANJEK & SANJEK, *supra* note 24, at 49.

66. *See id*.

67. Or, later, the disk jockey. *See* Coase, *supra* note 24, at 279–86. First, the National Recovery Administration created a prohibitory regulation, but it became moot when the Supreme Court found the legislation creating the NRA unconstitutional. *See* A.L.A. Schechter Poultry Corp. v. United States, 295 U.S. 495, 537 (1935); Coase, *supra* note 24, at 279–81. The Federal Trade Commission considered and rejected adopting a similar regulation. *See* Coase, *supra* note 24, at 281–85. Lastly, publishers made an agreement with a publishers' employees union to stop payola practice, but failed to abide by the agreement. *Id*. at 285–86.

68. Coase, *supra* note 24, at 273–74, 279–85.

69. *See id*. at 273–74, 286.

70. *Id*. at 286–87. Payment still took a variety of forms, including royalties. *Id*. at 294.

71. *Id*. at 292, 296–99.

72. *See* Communications Act Amendments, P.L. 86–752 § 8, 74 Stat. 89 (1960).

jockeys or other employees to disclose to their producer when they were paid to play, and stations had to announce such payments on air.[73]

3. DOJ Antitrust Actions Against ASCAP and BMI

As public performance licensing grew in importance and the PRO's repertory grew in size, ASCAP was able to exercise monopolistic power, increasing rates by over four hundred percent during the 1930s.[74] At the time, ASCAP held exclusive licenses from its members, meaning that only ASCAP could administer their public performance right, and all music users and broadcasters had to go through ASCAP.[75]

ASCAP's anti-competitive exercises catalyzed broadcasters, who were realizing little profit in the face of ASCAP's increasing licensing fees, to form a second PRO in 1939: Broadcast Music, Inc. (BMI).[76] BMI was an ASCAP alternative with more broadcaster-friendly terms.[77] The new PRO served as an immediately successful protest to ASCAP, whose music was virtually nonexistent on radio stations for a period in 1941.[78]

However, BMI was not the only consequence of ASCAP's behavior. The U.S. Department of Justice (DOJ) simultaneously brought an antitrust action against ASCAP, claiming that ASCAP's monopolistic practices unlawfully restrained trade.[79] ASCAP and the DOJ settled, entering into a consent decree that imposed new obligations on ASCAP to curb its anticompetitive practices.[80] The new limits on ASCAP's behavior led broadcasters to begin licensing from ASCAP again in late 1941, although BMI continued to operate.[81] Despite the great number and importance of developments in the music industry since 1941, the consent decree has only been amended twice.[82]

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73. *See* Coase, *supra* note 24, at 299.

74. *See* Lawrence Lessig, *Laws that Choke Creativity*, TED.COM (Nov. 2007), http://www.ted.com/talks/larry_lessig_says_the_law_is_strangling_creativity/transcript?language=en#t-324722 [https://perma.cc/4NH8-63BM].

75. *See BMI v. CBS*, 441 U.S. 1, 10–11 (1979).

76. *See* KOHN & KOHN, *supra* note 18, at 1250.

77. *BMI v. CBS*, 441 U.S. at 10; *see* SANJEK & SANJEK, *supra* note 24, at 63–65. Not only were terms more favorable to broadcasters, but BMI's goal was to ultimately charge fees that would total only forty percent of what people paid to ASCAP. *See* SANJEK & SANJEK, *supra* note 24, at 63–65.

78. SANJEK & SANJEK, *supra* note 24, at 91.

79. *See* United States v. Am. Soc'y of Composers, Authors & Publishers, Civil No. 13-95, 1941 U.S. Dist. LEXIS 3944, at *2 (S.D.N.Y. 1941).

80. *See* PENNIES, *supra* note 34, at 255–56.

81. SANJEK & SANJEK, *supra* note 24, at 95–96.

82. *See* United States v. Am. Soc'y of Composers, Authors & Publishers, Civil Action No. 13-95, 1950 U.S. Dist. LEXIS 1900 (S.D.N.Y. 1950); United States v. Am. Soc'y of

In its current form, the decree includes requirements that ASCAP (1) only hold non-exclusive licenses,[83] (2) offer licenses other than the blanket license,[84] (3) issue a license to any applicant meeting listed requirements,[85] and (4) allow any composer with a copyrightable musical work to join ASCAP.[86] Furthermore, the decree requires ASCAP and a license applicant to attempt to negotiate voluntary rates and terms.[87] If negotiations break down, the decree designates a court in the Southern District of New York (S.D.N.Y.) as a rate court.[88] The ASCAP rate court, with attention to the monopolistic power of ASCAP, sets a rate reflecting the "fair market value of a license—what a license applicant would pay in an arm's length transaction."[89]

Although a 1941 DOJ action against BMI also resulted in a consent decree,[90] BMI now operates under a new 1966 consent decree.[91] BMI's consent decree contains many of the same key terms as the ASCAP consent decree, including designating a BMI rate court in S.D.N.Y.[92]

C. SOUND RECORDINGS EXTENDED FEDERAL COPYRIGHT PROTECTION

As the music licensing process adapted to radio, beginning in 1925, there were numerous efforts to bring sound recordings under federal

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Composers, Authors & Publishers (*ASCAP Consent Decree*), No. 41-1395 (WCC), 2001 WL 1589999 (S.D.N.Y. 2001).

83. *ASCAP Consent Decree*, 2001 WL 1589999, § IV(A) (June 11, 2001). This means that copyright owners themselves can still directly negotiate with licensees. *See BMI v. CBS*, 441 U.S. 1, 12 (1979).

84. *ASCAP Consent Decree*, 2001 WL 1589999, § VII(A). This includes a per-program license and a per-segment license. *Id.*

85. *Id.* at § VI.

86. *See id.* at §§ XI(A)(1)–(2).

87. *See id.* at § IX(A).

88. *See id.* at § IX(F). In a rate court proceeding, each party can submit evidence supporting what they argue is a reasonable rate, but in most cases ASCAP bears the burden of proof. *See id.* at §§ IX(A)–(D).

89. *Pandora II*, 6 F. Supp. 3d 317, 353 (S.D.N.Y. 2014) (quoting Am. Soc'y of Composers, Authors & Publishers v. MobiTV, Inc., 681 F.3d 76, 82 (2d Cir. 2012)) (internal quotation marks omitted).

90. *See BMI v. CBS*, 441 U.S. 1, 11 n.20 (1979).

91. Most recently amended on November 18, 1994. *See* United States v. Broad. Music, Inc. (*BMI Consent Decree*), No. 64 CIV. 3787, 1994 WL 901652 (S.D.N.Y. 1994).

92. *See* MUSIC MARKETPLACE, *supra* note 2, at 36; *BMI Consent Decree*, 1994 WL 901652, § XIII.

copyright protection.[93] Those efforts remained fruitless until the 1950s, when Congress began to contemplate overhauling the Copyright Act of 1909 and gave sound recordings new consideration.[94] When work on the new statute slowed, Congress instead passed the narrower Sound Recordings Amendment.[95] The amendment granted a new "limited copyright" in sound recordings made on or after February 15, 1972; protection was not retroactive.[96] The copyright was limited because the amendment did not grant sound recording owners the full slate of exclusive rights that owners of other copyrightable works have.[97] Congress rejected granting a public performance right on the grounds that (1) enforcement of the right would be too difficult, and (2) the publicity of unrestricted airplay actually benefitted rights holders.[98]

D. INTERNET AGE DEVELOPMENTS

Toward the end of the twentieth century, the pace of innovation rapidly increased. The compact disc surpassed vinyl records in sales only four years after its 1983 U.S. introduction.[99] The 1990s saw two new forms of radio: satellite and cable.[100] Important advancements in computer technology

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93. U.S. COPYRIGHT OFF., FEDERAL COPYRIGHT PROTECTION FOR PRE-1972 SOUND RECORDINGS 9 (2011). These efforts included over thirty bills proposing various levels of copyright protection for sound recordings. *See id*.

94. *Id*. at 9–10.

95. *Id*. at 10; Act of Oct. 15, 1971, Pub. L. No. 92-140, 85 Stat. 391 (1971).

96. *See* Act of Oct. 15, 1971, sec. 3, 85 Stat. 391, 392. Legal protection for sound recordings made prior to 1972 is now the basis of substantial litigation. *See* Bill Donahue, *Pandora Pays Labels $90M To Settle Pre-1972 Fight*, LAW360 (Oct. 22, 2015), http://www.law360.com/ip/articles/717696?nl_pk=e2af0c44-9331-4173-aad0-b95de28f0b7a&utm_source=newsletter&utm_medium=email&utm_campaign=ip [https://perma.cc/KZN5-TGF7]. The central question in this litigation is whether pre-1972 sound recordings are entitled to public performance royalties under respective state laws, since they have yet to be brought under federal copyright protection. *See id*. In California and New York, courts have ruled that state law does protect pre-1972 sound recordings and in Florida, a court ruled it does not. *See* Flo & Eddie Inc. v. Sirius XM Radio Inc., No. CV 13-5693 PSG RZX, 2014 WL 4725382, at *11 (C.D. Cal. Sept. 22, 2014); Flo & Eddie, Inc. v. Sirius XM Radio, Inc., 62 F. Supp. 3d 325, 339 (S.D.N.Y. 2014), *appeal granted*, No. 15-497, 2015 WL 3478159 (2d Cir. May 27, 2015); Flo & Eddie, Inc. v. Sirius XM Radio, Inc., No. 13-23182-CIV, 2015 WL 3852692, at *5 (S.D. Fla. June 22, 2015). In other similar lawsuits, there have been large settlement payments rather than judicial decisions. *See* Donahue, *supra*. For a more in-depth discussion on pre-1972 sound recordings, see Christopher J. Norton, Note, *Turtle Power: The Case for Common Law Protection for Pre-1972 Sound Recordings*, 31 BERKELEY TECH. L.J. 759 (2016).

97. *See* Act of Oct. 15, 1971, sec. 1(a), § 1, 85 Stat. 391, 391.

98. Arista Records, LLC v. Launch Media, Inc., 578 F.3d 148, 152 (2d Cir. 2009).

99. KOHN & KOHN, *supra* note 18, at 21.

100. *See Pandora II*, 6 F. Supp. 3d 317, 324 (S.D.N.Y. 2014).

threatened to disrupt the copyright system, creating tension between content owners and the technology industry.[101] The Internet in particular would capsize the music industry, transforming it in a way that the music licensing world still has not resolved.[102]

1. A Crippled Industry

The Internet fundamentally changed the music industry by making access to music easier and cheaper than ever before. While the Internet enabled new sources of revenue for copyright owners, those sources have not compensated for the revenue lost to Internet-enabled piracy.[103] Consequently, the industry is still struggling to adjust.

Since the mid-1990s, digital music piracy has posed the biggest threat to the music industry.[104] Napster, introduced in 1999, was thought of as the "pioneer[] file-sharing service" and was widely embraced in the U.S.[105] Napster enabled users to easily share digital files that could be stored on computers, including mp3s.[106] Record companies brought suit against Napster, claiming Napster's facilitation of copyright infringement via peer-to-peer sharing constituted contributory and vicarious copyright infringement.[107] Napster claimed it was protected by the Digital Millennium Copyright Act's (DMCA) safe harbor provisions for online service providers.[108] However, the Ninth Circuit upheld a preliminary injunction setting a high policing standard for Napster, and Napster shut down.[109] Despite the company's short life, Napster is representative of other file sharing programs that still burden copyright owners today.[110]

101. *See* Peter S. Menell, *This American Copyright Life: Reflections on Re-Equilibrating Copyright for the Internet Age*, 61 J. COPYRIGHT SOC'Y U.S.A. 235, 248–50 (2013–2014).

102. KOHN & KOHN, *supra* note 18, at 24–26.

103. *See* MUSIC MARKETPLACE, *supra* note 2, at 74.

104. *See* Menell, *supra* note 101, at 252–54. However, industry players (services and content owners) now seem to accept music piracy as an unavoidable component of the music industry. *See* MUSIC MARKETPLACE, *supra* note 2, at 78.

105. *See* DANA SCHERER, CONG. RESEARCH SERV., R43984, MONEY FOR SOMETHING: MUSIC LICENSING IN THE 21ST CENTURY 25 (2015) (also noting that Napster's introduction marked the beginning of the decline in music sales); *see also* Menell, *supra* note 101, at 252.

106. Menell, *supra* note 101, at 252.

107. A&M Records, Inc. v. Napster, Inc., 284 F.3d 1091, 1095 (9th Cir. 2002).

108. *See* Menell, *supra* note 101, at 252.

109. *See id.* at 218; *see also Napster, Inc.*, 284 F.3d at 1095.

110. *See* SCHERER, *supra* note 105, at 25. The Napster phenomenon also convinced record companies, originally hesitant to adapt to new methods of music distribution and performance, to develop new business models. *See* Menell, *supra* note 101, at 292–93. Once

In spite of increasing digital purchases and a seeming decrease in illegal file sharing in the post-Napster world,[111] the total revenue artists and record companies make from music sales continues to decline.[112] By 2008, album sales had dropped by forty-five percent from their historical high of $785 million in 2000, and they continued to drop another forty percent by 2015.[113]

2. *Statutory Structure for Digital Public Performance Licensing*

Although streaming services have not made up for lost album sales in the digital age, they represent a substantial portion of the music industry and are so favored by consumers that they are unlikely to go away any time soon.

When it became clear that public performance over the Internet would be used as a substitute for music sales,[114] Congress finally extended sound recordings a public performance right through the Digital Performance Right in Sound Recordings Act of 1995 (DPRSRA).[115] The public performance right for sound recordings is much more limited than that for musical works because it only applies to *digital* audio transmissions.[116]

The DPRSRA classified music services into two categories: (1) "noninteractive services," including satellite radio and subscription services[117] and (2) "interactive services," or services with an on-demand model that gives users more control.[118] Licensing by interactive services,

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they recognized that ease of access was crucial for consumers, they decided to sign on with Apple's iTunes store. *See id.*; *see also* KOHN & KOHN, *supra* note 18, at 44–45.

111. Zack O'Malley Greenburg, *Revenge of the Record Labels: How the Majors Renewed Their Grip on Music*, FORBES (Apr. 15, 2015), http://www.forbes.com/sites/zackomalleygreenburg/2015/04/15/revenge-of-the-record-labels-how-the-majors-renewed-their-grip-on-music/2 [https://perma.cc/N256-C9KF].

112. KOHN & KOHN, *supra* note 18, at 44–45.

113. *See* Greenburg, *supra* note 111.

114. S. REP. No. 104–128, at 15 (1995); *see also* Arista Records, LLC v. Launch Media, Inc., 578 F.3d 148, 153 (2d Cir. 2009).

115. *See* Digital Performance Right in Sound Recordings Act of 1995, Pub. L. No. 104-39, 109 Stat 336.

116. *Compare* 17 U.S.C. § 106(4) (2012) (providing musical work owners the right "to perform the copyrighted work publicly"), *with* 17 U.S.C. § 106(6) (providing sound recording owners the right "to perform the copyrighted work publicly be means of a digital audio transmission").

117. *See* MUSIC MARKETPLACE, *supra* note 2, at 49.

118. *See* Digital Performance Right in Sound Recordings Act of 1995, sec. 3, § 114(j)(4).

which is completely voluntary and negotiated without government regulation,[119] has not changed since the DPRSRA.[120]

However, since the DPRSRA, noninteractive services are subject to a statutory licensing scheme.[121] Originally under the DPRSRA, the Copyright Arbitration Royalty Panel (CARP) resolved conflicts over royalty fees on an ad hoc basis.[122] Noninteractive services and copyright owners first had the chance to negotiate voluntarily, but if they were unable to reach an agreement, the CARP would set the sound recording public performance royalty rate.[123] The CARP considered four statutorily listed factors[124] and used freely negotiated transactions between comparable

119. MUSIC MARKETPLACE, *supra* note 2, at 52.

120. *See id.*; 17 U.S.C. §§ 114(d)(2)–(3). Congress's rationale for distinguishing between noninteractive and interactive services was that interactive services are more likely to be used as a substitute for record sales and, therefore, the industry should have more power over the rates set. *See* Mary LaFrance, *From Whether to How: The Challenge of Implementing a Full Public Performance Right in Sound Recordings*, 2 HARV. J. SPORTS & ENT. L. 221, 230–31 (Spring 2011). This distinction reflects Congressional consideration of the balance between efficiency and the ability of a service to disturb other markets in the Internet Age. 141 Cong. Rec. H10098-02 (1995). By only subjecting noninteractive services to the compulsory rates, Congress suggests that enabling rights holders to set their price plays a bigger role in the market for licenses by interactive services, whereas noninteractive services present less of a threat to sales, and there is more to gain from a compulsory licensing scheme. *See id*.

121. *See* Digital Performance Right in Sound Recordings Act of 1995, sec. 3, § 114(f).

122. *See id*. at sec. 3, § 114(f)(2).

123. *See id*. The DPRSRA also provided that the rates set by the CARP would be divided up a certain way—fifty percent to the copyright owner and forty-five percent to the recording artist or artists—that is still the same today. *See id.* sec. 3, (codified as amended at 17 U.S.C. § 114(g)(2)).

124. 17 U.S.C. § 801(b)(1). Section 801(b)(1) uses a four-element test that creates lower rates. The elements are:

> (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.

17 U.S.C. § 801(b)(1).

services as benchmarks.[125] The CARP's decision bound "all copyright owners of sound recordings and entities performing sound recordings."[126]

The Digital Millennium Copyright Act of 1998 (DMCA) expanded the noninteractive category and divided it into two sub-categories[127] to create the three-category structure for sound recordings (including interactive) still in place today.[128] The first noninteractive category is "preexisting" satellite and music subscription services[129] and the second is "webcasters."[130]

While both noninteractive categories generally fall under the same statutory rate-setting process, the distinction between the two is significant because each is subject to a different statutory rate.[131] Preexisting services were essentially grandfathered into the four-factor standard set forth in the DPRSRA,[132] while webcaster services are subject to a new "willing

125. *See* Digital Performance Right in Sound Recordings Act of 1995, sec. 3, § 114(f)(2).

126. *Id.*

127. *See* Digital Millennium Copyright Act, Pub. L. No. 105–304, 112 Stat 2860 sec. 405 (1998). The DMCA also expanded the definition of "interactive" services to include services "that enable[] a member of the public to receive a transmission of a program specially created for the recipient, or on request, a transmission of a particular sound recording, whether or not as part of a program, which is selected by or on behalf of the recipient." *See id.* at sec. 405(a)(4)(D) (codified as amended at 17 U.S.C. § 114(j)(7)).

128. *See* 17 U.S.C. § 114.

129. These services are referred to as such because they included the services that existed on July 31, 1998, when the DMCA was enacted. *See* Digital Performance Right in Sound Recordings Act of 1995, sec. 405(a)(4)(E), §§§ 114(j)(10)–(11). The preexisting services category now includes Sirius and Music Choice. *See* MUSIC MARKETPLACE, *supra* note 2, at 49.

130. Because in reality the category of eligible noninteractive, nonsubscription services and new subscription services consists of online radio services, they are more commonly referred to as "webcasters." *See* Terry Hart, *A Brief History of Webcaster Royalties*, COPYHYPE (Nov. 28, 2012) http://www.copyhype.com/2012/11/a-brief-history-of-webcaster-royalties [https://perma.cc/R3T8-BBVP]. The webcaster category contains both "eligible noninteractive nonsubscription services" and "new subscription services" (subscription services that did not exist as of July 31, 1998 and therefore do not fall into the preexisting category). *See* Digital Performance Right in Sound Recordings Act of 1995, sec. 405 (codified as amended at § 114(j)(8)). Services providing "individualized internet radio stations—the content of which can be affected by users' ratings of songs, artists, and albums," like Pandora, qualify as noninteractive services; they are not interactive because they do give users enough control "such that playlists are so predictable that users will choose to listen to the webcast in lieu of purchasing music . . . ." *See* Arista Records, LLC v. Launch Media, Inc., 578 F.3d 148, 149, 162 (2d Cir. 2009).

131. *See* 17 U.S.C. § 114(f).

132. *See id.* at § 114(f)(1)(B).

buyer/willing seller" standard.[133] The four-factor § 801(b)(1) standard produces lower rates than does the willing buyer/willing seller standard.[134]

The Copyright Royalty and Distribution Reform Act of 2004 further amended the § 114 noninteractive licensing scheme by shifting rate-setting proceedings from the CARP to a new Copyright Royalty Board (CRB) that sets rates every five years rather than on an ad hoc basis.[135] Licensing of sound recording public performance rights to interactive services remains strictly voluntary.[136]

3. *Webcaster Licensing for Sound Recordings*

The CRB sets statutory rates for both preexisting services and webcasters; however, the webcaster decisions are the most significant because only three services still qualify as preexisting services.[137] There have been four major webcaster rate decisions. Webcaster I, decided by the CARP, set two important precedents: (1) setting royalties as a per-performance fee and (2) concluding that the markets for sound recording rights and musical works "are distinct based upon the differences in cost and demand characteristics."[138] Based on these two findings and a free-market benchmark,[139] the CARP set a rate that made sound recording royalties effectively much higher than those for musical works.[140] The CRB used the

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133. "[T]he rates and terms that would have been negotiated in the marketplace between a willing buyer and a willing seller." *Id*. at § 114(f)(2).

134. *See* MUSIC MARKETPLACE, *supra* note 2, at 142.

135. *See* 17 U.S.C. § 114(f)(1)(A)–(B). The CRB is composed of three appointed judges, each with statutory experiential requirements. The chief judge must have experience in administrative law proceedings. Each of the other two judges must have expertise, one in economics and the other in copyright. *See id*. at § 801.

136. *See id*. at § 114(d)(2)(A)(i); *see also* MUSIC MARKETPLACE, *supra* note 2, at 52.

137. *See* MUSIC MARKETPLACE, *supra* note 2, at 49.

138. Determination of Reasonable Rates and Terms for the Digital Performance of Sound Recordings and Ephemeral Recordings, 67 Fed. Reg. 45,240, 45,246 (July 8, 2002) [hereinafter Webcaster I] (codified at 37 C.F.R. pt. 261 (2002)). The CARP reasoned that percentage-of-revenue fees could not be applied universally to music users since the nature and extent of their use varied widely. *See id*. Furthermore, sound recordings owners should not be paid less because music users fail to generate more revenue. *See id*. A per-performance fee was superior because it provided royalties "directly tied to the right being licensed." *See id*.

139. The CARP used an agreement directly negotiated between an eligible non-subscription service, Yahoo!, and a collective licensor representing five major record labels as a benchmark. *See id.* at 45,248. After review by the Librarian of Congress, the rate was set at $0.0007 per performance. *See id*. at 45,273.

140. *See* Broad. Music, Inc. v. Pandora Media, Inc. (*BMI v. Pandora*), Nos. 13 Civ. 4037(LLS), 64 Civ. 3787(LLS), 2015 WL 3526105, at *7 (S.D.N.Y. 2015).

per-performance approach in the following two Webcaster decisions.[141] Although in each of these cases the CRB lacked examples of freely negotiated rates for noninteractive services, the CRB used rates negotiated by interactive services as benchmarks and then adjusted them downward for webcasters.[142] Webcaster II and Webcaster III continued to set rates that were significantly higher than the rates ASCAP and BMI were able to negotiate with webcasters for musical works.[143]

When webcasters were unsatisfied with the CRB rates, they lobbied Congress to pass the Webcaster Settlement Act of 2008.[144] The webcasters argued that their services could not afford the compulsory rate.[145] The act permitted webcasters to pay rates lower than those set by the CRB pursuant to independent negotiations with SoundExchange.[146] Therefore, before 2016, services like Pandora[147] did not actually pay sound recording royalties under the § 114 licensing scheme.[148]

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141. Digital Performance Right in Sound Recordings and Ephemeral Recordings, 72 Fed. Reg. 24,084 (May 1, 2007) [hereinafter Webcaster II] (codified at 37 C.F.R. pt. 380 (2007)); Digital Performance Right in Sound Recordings and Ephemeral Recordings, 76 Fed. Reg. 12,026 (Mar. 9, 2011) [hereinafter Webcaster III] (codified at 37 C.F.R. pt. 380 (2011)).

142. *See* Webcaster II, 72 Fed. Reg. at 24,092; *see also* Webcaster III, 76 Fed. Reg. at 13,031.

143. *See BMI v. Pandora*, 2015 WL 3526105, at *7–8.

144. The first act of this type was actually passed in 2002, but only applied to smaller-scale webcasters. *See* MUSIC MARKETPLACE, *supra* note 2, at 115.

145. *See* MUSIC MARKETPLACE, *supra* note 2, at 51.

146. SoundExchange is the only organization authorized to collect, distribute, and report fees for the § 114(f) statutory licenses. *See Licensing 101*, SOUNDEXCHANGE http://www.soundexchange.com/service-provider/licensing-101 [https://perma.cc/XX3J-8FC8]; *see also* 17 U.S.C. § 114(e). Since SoundExchange became an independent organization in 2003, it has paid over three billion dollars in digital royalties to artists and labels. *See Our Work*, SOUNDEXCHANGE http://www.soundexchange.com/about/our-work [https://perma.cc/ZZ5N-WTUV]. The Webcaster Settlement Act of 2009 extended the timeframe services had to reach an agreement with SoundExchange and still be exempt from the CRB-set rates. *See* Webcaster Settlement Act of 2009, Pub. L. No. 111-36, 123 Stat. 1926. Rates negotiated under the Webcaster Settlement Acts of 2008 and 2009 were insulated from CRB rates until 2016. *See* 17. U.S.C. § 114(f)(5)(A) (2012).

147. Pandora, now the most widely used customizable radio service, was introduced in 2005. *Pandora II*, 6 F. Supp. 3d 317, 327 (S.D.N.Y. 2014). Pandora's competitors include the iHeartRadio service, Spotify radio, and iTunes Radio. *Id.* at 324–25. Pandora is the most popular noninteractive webcasting service, with approximately 70 percent of the market. *Id.* at 327. Pandora's revenue, which comes from subscription services and advertisements, reached over four hundred million dollars in 2013. *Id.* at 328.

148. Under the 2009 Pureplay Agreement, Pandora paid the greater of twenty-five percent of gross revenues or per performance rates that were significantly lower than the CRB rates. *See* David Oxenford, *Final Webcasting Royalty Rates Published – A Comparison of How Much Various Services Pay*, BROADCAST LAW BLOG (Mar. 14, 2011),

The CRB's Webcaster IV decision, issued on December 16, 2015, is significant because it marks the first period under which the Webcaster Settlement Act settlements are inoperative.[149] As in prior Webcaster decisions, the CRB set per-performance royalties that are effectively much higher than the rates paid for musical works.[150] Unlike in previous decisions, however, the CRB was able to use voluntary noninteractive deals made with Pandora as benchmarks.[151] Nonetheless, the resulting rates still did not depart far from Webcaster III.[152]

On the other hand, interactive services like Spotify independently negotiate with record companies and are unrestricted by governmental regulation.[153] Rather than use a percentage-of-revenue or per-performance royalty model, Spotify has paid major record labels huge advances and issued them an equity stake in the company.[154] Smaller independent labels, who do not have the bargaining power of legacy catalogs[155] to demand such favorable terms, typically get fifty percent of the revenue Spotify gets from advertisements on a pro-rata basis.[156] Other interactive services have also

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http://www.broadcastlawblog.com/2011/03/articles/final-webcasting-royalty-rates-published-a-comparison-of-how-much-various-services-pay [https://perma.cc/U5T2-9WVX]. For example, whereas the CRB per-performance rate for 2015 was $0.0023, the Pureplay settlement rate was $0.0014. *Id*.

149. The present term is January 1, 2016 through December 31, 2020. The rates for noninteractive services was set at $0.0017 per-performance and will be increased over each of the next five years according to the measure of the Consumer Price Index. *See* Copyright Royalty Board, *Current Developments*, LIBR. OF CONGRESS (Dec. 16, 2015) http://www.loc.gov/crb [https://perma.cc/T23P-9BSA].

150. *See id*.

151. These deals were made between Pandora and Merlin and Warner Music Group. Ed Christman, *Behind Closed Doors: Where the New Webcasting Rates Actually Came From*, BILLBOARD (Dec. 18, 2015), http://www.billboard.com/articles/business/6813840/behind-closed-doors-where-the-new-webcasting-rates-actually-came-from [https://perma.cc/C42D-P3C5].

152. *See* Copyright Royalty Board, *supra* note 149.

153. *See* LaFrance, *supra* note 120, at 230–31.

154. In total, Spotify paid five hundred million dollars and eighteen percent of its equity. Helienne Lindvall, *Behind the Music: The Real Reason Why the Major Labels Love Spotify*, THE GUARDIAN (Aug. 17, 2009), http://www.theguardian.com/music/musicblog/2009/aug/17/major-labels-spotify [https://perma.cc/N4UG-CQRW]; *see* Menell, *supra* note 101, at 295.

155. *See* Menell, *supra* note 101, at 295.

156. Lindvall, *supra* note 154. Spotify estimated that in 2013 it paid between $0.006 and $0.0084 in royalties per stream. Victor Luckerson, *Here's How Much Money Top Musicians are Making on Spotify*, TIME (Dec. 3, 2013), http://business.time.com/2013/12/03/heres-how-much-money-top-musicians-are-making-on-spotify [https://perma.cc/GS6C-P85Y].

negotiated deals that give the labels equity rather than strictly royalties.[157] In 2015, Forbes estimated that, in total, the largest three record companies ("the Big Three") held about three billion dollars in equity in "digital music startups."[158]

As a whole, the Webcaster decisions are significant because they determine the rates for the public performance of sound recordings, one of the two copyrightable works the most prevalent contemporary music services must license as part of their business models. This structure, which differs significantly from the licensing processes used for musical works, creates rates that are much higher for sound recordings than for the compositions that underlie those recordings.

4. Webcaster Licensing for Musical Works

Musical works owners continue to license their works primarily through PROs; together, ASCAP and BMI "represent around over [ninety percent] of the songs available for licensing in the United States."[159]

Webcaster licensing deals with PROs largely follow the same models that have been used with terrestrial broadcasters since the 1930s.[160] Pandora, the most popular webcaster, first began licensing PRO repertories in 2005.[161] When negotiations with ASCAP and BMI for subsequent licenses broke down in 2012 and 2013, Pandora and BMI filed petitions with the ASCAP and BMI rate courts, respectively.[162] The ASCAP court ultimately

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157. In 2015, SoundCloud struck a deal with Warner in which Warner received a five percent stake in the business. *See* Greenburg, *supra* note 111. Critics argue this practice enables record labels to keep more revenue relative to their artists by getting income through equity rather than licensing fees that translate to artist royalties. *See id*.

158. In total, the Big Three are valued at fifteen billion dollars. *Id*.

159. *See* MUSIC MARKETPLACE, *supra* note 2, at 20. There are also two much smaller PROs that are not regulated by consent decrees: the Society of European Stage Authors and Composers (SESAC) and Global Music Rights. SANJEK & SANJEK, *supra* note 24, at 61; GLOBAL MUSIC RIGHTS, http://globalmusicrights.com [https://perma.cc/8QJ8-QGA4].

160. *See* MUSIC MARKETPLACE, *supra* note 2, at 33.

161. Pandora's first blanket license with BMI set a percentage-of-revenue rate at 1.75% and was effective from 2005–2012. *BMI v. Pandora*, Nos. 13 Civ. 4037(LLS), 64 Civ. 3787(LLS), 2015 WL 3526105, at *5 (S.D.N.Y. 2015). Pandora's first agreement with ASCAP, effective 2005–2010, was a blanket license with a fee that was the higher of 1.85% of its revenue, or a per-session rate. *Pandora II*, 6 F. Supp. 3d 317, 330 (S.D.N.Y. 2014).

162. *Pandora II*, 6 F. Supp. 3d at 331. Under the terms of ASCAP's consent decree, Pandora was legally permitted to continue using the music in ASCAP's repertory even before the parties had decided on the rate Pandora would pay. *See ASCAP Consent Decree*, No. 41-1395 (WCC), 2001 WL 1589999, § IX(E) (S.D.N.Y. 2001).

set a reasonable rate at 1.85%.[163] Following the model used since the 1930s, this means that Pandora paid ASCAP 1.85% of its annual revenue as a fee to license all the musical works contained in the ASCAP repertory.[164] ASCAP would then divide up this fee among its artists, using statistical sampling to approximate how often a musical work was accessed on the Pandora service.[165] Applying the same fair market standard the following year,[166] the BMI rate court set a higher rate of 2.5%.[167] The court noted that 2.5% was "indeed at the low end of the range of fees of recent licenses."[168]

When several large publishers[169] became unhappy with the rates PROs were securing from webcasters such as Pandora in 2010, they sought to withdraw new media licensing rights from the PROs.[170] Publishers wanted to continue using the collective licensing that PROs offered but not in negotiations with webcasters, which they wanted to negotiate with directly.[171] At the publishers' urging, the PROs changed their internal policies to permit withdrawal of new media rights, dividing up the right to license musical works in an unprecedented way.[172] Some publishers subsequently reached direct licensing agreements with Pandora.[173]

However, in June 2013, the ASCAP rate court found that ASCAP's consent decree does not permit rights holders to discriminate between

163. *Pandora II*, 6 F. Supp. 3d at 372. The ASCAP court ultimately used the prior ASCAP-Pandora rate and the EMI-Pandora rate, negotiated when EMI attempted to withdraw its new media rights from ASCAP, as a benchmark. *See id*. at 355–56. The court rejected using the rates between Pandora and UMPG and Sony when they tried to withdraw their new media rights (discussed below), finding Sony and UMPG displayed anti-competitive practices in securing those rates. *See id.* at 357.

164. *See id*. at 322.

165. *See* KOHN & KOHN, *supra* note 18, at 1281.

166. *BMI v. Pandora*, 2015 WL 3526105, at *1. "[T]he rates set in (or adjusted from) contemporaneous similar transactions." *Id*.

167. *Id.* at *26. The BMI court noted it had more discovery regarding "competitive market rates" available than did the ASCAP court. *See id.* at *15, *21, *24. Based on the additional discovery, the Court court found that Pandora's argument in the ASCAP proceeding, that the rates negotiated were not competitive because Pandora felt obligated "to enter into direct licenses with Sony and UMPG" or risk liability for copyright infringement, was "primarily generated by lawyers." *Id*. at *21.

168. *Id*. at *15.

169. EMI Music Publishing, Sony/ATV Music Publishing, Universal Music Publishing Group, Warner Brothers, and BMG. *In re* Pandora Media, Inc. (*Pandora I*), Nos. 12 Civ. 8035(DLC), 41 Civ. 1395(DLC), 2013 WL 5211927, at *3 (S.D.N.Y. 2013).

170. *Pandora II*, 6 F. Supp. 3d 317, 320 (S.D.N.Y. 2014).

171. *See Pandora I*, 2013 WL 5211927 at *3.

172. *See Pandora III*, 785 F.3d 73, 76 (2d Cir. 2015); *see also BMI v. Pandora*, 2015 WL 3526105 at *7.

173. *See Pandora III*, 785 F.3d at 76.

licensees when granting ASCAP the rights to license their works; either the musical works were in ASCAP's repertory and available to anyone who applied for them or they were not in the repertory at all.[174] In 2015, the Second Circuit affirmed this finding.[175] The BMI rate court reached the same conclusion in its own proceeding with Pandora.[176]

In spite of the publishers' strenuous effort to force Pandora into direct licenses, by the end of 2015, Pandora largely buried its ongoing conflicts with musical work owners. First, Pandora voluntarily agreed to direct licenses at higher rates with each of the three major publishers.[177] Although the agreements are confidential, it has been suggested that, under each, Pandora will pay between 8.5% and 10% of its revenue in musical work royalties, up from the approximately 4% it paid before 2016.[178] Pandora publicly announced that the deal secured greater rate certainty, which is important to its service model.[179] Furthermore, the terms will give Pandora more flexibility in how it uses music as its product continues to evolve.[180] Second, Pandora reached independently negotiated agreements with ASCAP and BMI for new licensing deals that began in 2016.[181] Again, Pandora purported to secure greater rate certainty and flexibility from these deals.[182]

In conclusion, the system for licensing the public performance of music's two copyrightable works has continually evolved over the last century. In the digital age, those changes are happening faster than ever before, and music copyright is unable, and unmalleable enough, to keep up. The result

174. *See Pandora I*, 2013 WL 5211927 at *7. In its determination, the court relied on the language in two specific provisions of the consent decree. *See id*. at *4. Section VI requires ASCAP to issue a blanket license that includes the entire ASCAP repertory to any entity which requests it. *See id*. Section IX(E) permits any applicant to begin playing the music their license would cover even before a final agreement is reached. *See id*.

175. *Pandora III*, 785 F.3d at 75.

176. *See BMI v. Pandora*, 2015 WL 3526105 at *11.

177. *See* Ed Christman, *Pandora and Warner/Chappell Sign Direct Licensing Deal*, BILLBOARD (Dec. 15, 2015), http://www.billboard.com/biz/articles/news/digital-and-mobile/6812725/pandora-and-warnerchappell-sign-direct-licensing-deal [https://perma.cc/939H-46G4].

178. *See id*.

179. *Id*.

180. *Id*.

181. Bill Donahue, *Pandora Ends Royalty Fight with ASCAP, BMI*, LAW360 (Dec. 22, 2015), http://www.law360.com/articles/740966 [https://perma.cc/7NAA-UWHA].

182. *Id*.; Ed Christman, *Pandora Signs Mutually Beneficial Licensing Deals with ASCAP, BMI*, BILLBOARD (Dec. 22, 2015), http://www.billboard.com/biz/articles/news/legal-and-management/6820730/pandora-signs-mutually-beneficial-licensing-deals [https://perma.cc/5U24-SMQG].

is not only a highly complex system, but also one that does not quite square with the music and tech landscape today.

II. CRITICISMS OF THE CURRENT SYSTEM

Any analysis of criticisms of the contemporary music licensing system, and of the proposed solutions, relies on an understanding of the purpose of copyright. It is improper to assume the issues discussed are necessarily failings of the copyright law regime.

A. GOALS OF COPYRIGHT AND THE MUSIC LICENSING SYSTEM

Copyright law aims to encourage authors to "invest in the production of new ideas and works" by granting them "control over the use and distribution of their ideas."[183] The underlying theory is utilitarian: copyright owners get rights to use their works in ways that enable them to make a profit and this ability incentivizes them to create and distribute those works in the first place.[184] The goal is not to automatically reward authors for their labor, but rather to enable them to introduce their products into the market and, if there is enough demand for the creative work, make a profit.[185]

However, granting creators rights is not the end of the story; there is more complexity in selling access to copyrightable works than a single buyer and a single seller negotiating the sale of a single work. Factors such as

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183. ROBERT P. MERGES, PETER S. MENELL & MARK A. LEMLEY, INTELLECTUAL PROPERTY IN THE NEW TECHNOLOGICAL AGE 13 (6th ed. 2012). The U.S. Constitution's intellectual property clause grants Congress the authority "[t]o promote the progress of science and useful arts, by securing for limited time to authors and inventors the exclusive right to their respective writings and discoveries." U.S. CONST., art. I, § 8, cl. 8. This power is important because the information conveyed by expressive works is a public good—nonrivalrous (one party's use does intrude upon another party's) and nonexcludable (absent legal protection, an owner cannot prevent others from enjoying the work). COHEN, ET AL., *supra* note 1, at 6–7. Therefore, in the absence of special protections, songwriters and artists would be implicitly discouraged from making expressive works because copiers could cheaply reproduce them, drive the price of the work down and effectively prevent songwriters and artists from recouping their costs. *See* MERGES ET AL., *supra*, at 12–13. The cumulative effect would be underproduction of creative works. *See id*. at 13. However, authors' rights are not actually exclusive as they cannot control the use of their works under the 17 U.S.C. § 115 or § 114(f) compulsory licenses, which entitle authors only to statutory licensing fees when their works are used.

184. COHEN ET AL., *supra* note 1, at 6–7.

185. *See* MERGES ET AL., *supra* note 183, at 13 (explaining that copyright wants to "[ensure] . . . appropriate incentives to engage in creative activities"); *see also* James Grimmelmann, *The Ethical Visions of Copyright Law*, 77 FORDHAM L. REV. 2005, 2015 (2009). Congress balanced incentivizing creation and ensuring dissemination of expressive works by limiting copyright protection's duration and scope. *See* MERGES ET AL., *supra* note 183, at 14.

efficiency, fairness, and bargaining power influence the desire of either party to participate in the marketplace for music. Copyright law's ability to incentivize music owners to create and distribute works is, at least in part, based on how well the licensing system works.

B. Criticisms of the Current Music Licensing Framework

A navigable, efficient system is crucial because it defines the rules of how owners may sell access to their works. For example, it may reduce high transaction costs and thereby enhance the system's ability to bring together content owners and users. The following analysis considers criticisms of the licensing system in light of this purpose.

1. Different Processes and Rate-Setting Standards Are Unjustified

A common criticism is that numerous licensing processes and standards are unjustifiably inefficient.[186] Rather than having one or two administratively simpler processes, the licensing process differs based on the type of copyrightable work and the type of service licensing the work. On the user side, there are different sound recording licensing schemes for cable and satellite radio, noninteractive webcasting services, and interactive webcasting services, while terrestrial radio does not require a public performance license for sound recordings at all.[187]

First, some critics argue that pre-existing radio services and webcasters should not be subject to different rate-setting standards because they are similar services.[188] Although the rate-setting process and institution for both services is generally the same, the proceedings are separate because each has its own standard. Pre-existing services were grandfathered into the § 801(b)(1) standard, which historically produces lower rates than the willing buyer/willing seller standard applied to webcasters.[189] Critics argue

186. *See* MUSIC MARKETPLACE, *supra* note 2, at 81–82.

187. *See* 17 U.S.C. § 114(d); *see also* MUSIC MARKETPLACE, *supra* note 2, at 52, 138, 142. There are over ten thousand terrestrial radio stations, many of which also stream their broadcasts online. *BMI v. Pandora*, Nos. 13 Civ. 4037(LLS), 64 Civ. 3787(LLS), 2015 WL 3526105, at *21 (S.D.N.Y. 2015). Radio in general has remained a critical player in the music industry since the first half of the twentieth century, composing about eighty percent of total music listening in the United States. *See Pandora II*, 6 F. Supp. 3d 317, 325 (S.D.N.Y. 2014).

188. *See* MUSIC MARKETPLACE, *supra* note 2, at 142–43.

189. *See* Lydia Pallas Loren, *The Dual Narratives in the Landscape of Music Copyright*, 52 HOUS. L. REV. 537, 576 (2014). Many point to the fact that pre-existing services secured a more favorable rate since they were the only services represented in Washington D.C. when Congress created the dual structure in 1998. *See* Marsha Blackburn & Jerrold Nadler, *Op-Ed: A Bipartisan Case for Fair Play Fair Pay Act*, BILLBOARD (Nov. 6, 2015),

having one standard applicable to all noninteractive services would enhance efficiency in CRB determinations.[190]

Second, the licensing process for musical works differs from the numerous processes for sound recordings. This distinction is less commonly criticized, likely because it pertains to a different work for which there is a different market.[191] The Copyright Office nonetheless sees this as an area to increase efficiency.[192] Subjecting both works to the same rate-setting institution, most likely the CRB, would condense the information and knowledge of the market in one body.[193] Furthermore, it may enable the chosen body to consider similar factors affecting the public performance rights across works and services.[194] Using a single rate-setting institution would enhance efficiency and reduce transaction costs for music owners and users that participate in rate-setting proceedings.

2. *Outdated PRO Consent Decrees*

The PRO antitrust consent decrees outline a public performance licensing system for musical works that is consistent across services, unlike the system for sound recordings.[195]

Publishers criticize the lack of differentiation among services as creating a poor fit for negotiations with platforms and technologies critical to the contemporary music industry.[196] The music business looks much different now than when the decrees were originally promulgated, before sound recordings were federally protected, and even since each was last amended—

http://www.billboard.com/biz/articles/news/legal-and-management/6753914/op-ed-a-bipartisan-case-for-fair-play-fair-pay-act [https://perma.cc/PQX2-PBSX].

190. *See* MUSIC MARKETPLACE, *supra* note 2, at 81, 142. Regardless of which rate more accurately approximates a free market rate, using a single standard would merge two proceedings into one. *See id.* at 81.

191. *See* Webcaster I, 67 Fed. Reg. 45,240, 45,249 (July 8, 2002) (codified at 37 C.F.R. pt. 261 (2002)); Webcaster II, 72 Fed. Reg. 24,084, 24,094-95 (May 1, 2007) (codified at 37 C.F.R. pt. 380 (2007)).

192. MUSIC MARKETPLACE, *supra* note 2, at 155.

193. *See id.* at 156–57.

194. *See id.*

195. In fact, the decrees prohibit musical owners from discriminating among the types of services they permit the PROs to license their music to, and the PROs are prohibited from denying a license to any qualifying applicant. *See ASCAP Consent Decree*, No. 41-1395 (WCC), 2001 WL 1589999, § VI (S.D.N.Y. 2001); *BMI Consent Decree*, No. 64 CIV. 3787, 1994 WL 901652, § XIV(A) (S.D.N.Y. 1994).

196. *See* MUSIC MARKETPLACE, *supra* note 2, at 159–60. The DOJ is currently considering amending the decrees, and already completed a public commentary period on how the decrees affect market competition. *See Antitrust Consent Decree Review – ASCAP and BMI 2014*, UNITED STATES DEP'T OF JUSTICE, http://www.justice.gov/atr/ascap-bmi-decree-review [https://perma.cc/36BH-T6Z3].

before webcasting became a big industry player.[197] Publishers want to choose the types of services PROs can license their works to because direct licensing has enabled them to secure higher rates.[198] However, because under the consent decrees neither the publishers nor the PROs can refuse to license to Pandora, Pandora cannot be forced to enter direct negotiations with publishers. Importantly, however, Pandora has voluntarily entered into direct licenses with the three largest publishers.[199]

But if direct licensing to Pandora does not continue after these expire, and the consent decrees' strict language is not amended, publishers may be encouraged to completely withdraw from PROs.[200] This would harm the goals of copyright by creating higher transaction costs that discourage owners and users from meeting in the marketplace where they once did.

3. Sound Recordings Lack a Complete Public Performance Right

Congress originally declined to extend sound recordings a public performance right because sound recording owners benefitted from unrestricted airplay.[201] With the contemporary decline in music sales, though, radio no longer boosts revenue as it once did.[202] Instead, record companies rely more on public performance royalties.[203] The DPRSRA extended a limited right to cover digital audio transmissions, but terrestrial radio still only pays royalties for underlying musical works, not sound recordings themselves.[204]

Many find the limited public performance right unjustified, arguing that a complete right would level competition across radio services, incentivize creation by providing a new sound recordings revenue source, and enable U.S. record companies and artists to get foreign public performance royalties from reciprocal treatment.[205] The original rationale for denying a full public performance right is outdated in the Internet Age, where physical album sales comprise a smaller proportion of revenue, and public

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197. The BMI consent decree was last amended in 1994. *See BMI Consent Decree*, 1994 WL 901652. The ASCAP consent decree was last amended in 2001. *See ASCAP Consent Decree*, 2001 WL 1589999.

198. *See* MUSIC MARKETPLACE, *supra* note 2, at 151.

199. Although Pandora pays higher rates under these direct licenses, it benefits from greater rate certainty and flexibility in music use. *See* Christman, *supra* note 177.

200. *See* MUSIC MARKETPLACE, *supra* note 2, at 151–52.

201. Arista Records, LLC v. Launch Media, Inc., 578 F.3d 148, 152 (2d Cir. 2009).

202. *See* MUSIC MARKETPLACE, *supra* note 2, at 70.

203. *See id.*

204. *See* 17 U.S.C. § 106(6) (2012); *see also* MUSIC MARKETPLACE, *supra* note 2, at 87.

205. *See* LaFrance, *supra* note 120, at 232.

performance royalties are increasingly important.[206] Furthermore, noninteractive digital services pay substantial licensing fees even though they provide a similar service and can be used in the same contexts as terrestrial radio.[207] Critics argue that this is unfair and representative of special interests rather than sound copyright policy.[208]

Despite widespread support for a complete public performance right in sound recordings, the broadcaster lobby has "beaten back" the proposal because it does not want to pay royalties to a second set of rights holders.[209] Similarly, publishers oppose a full sound recording public performance right out of concern that forcing broadcasters to pay sound recording royalties would diminish the publishers' own royalties.[210] These criticisms focus more on each party's own interest rather than furthering the goals of copyright.

If sound recordings are considered copyrightable works on equal footing with musical works, denying a full public performance right is contrary to copyright's goals; it prevents owners from bringing their work to the non-digital public performance market. Giving sound recording owners a complete right would bring them in line with other copyright holders in the United States and "virtually all industrialized countries around the globe."[211]

4. *Below-Market Royalties From Webcasting for Musical Works*

In the digital context, the rates set for musical work royalties is about one-twelfth of the rates set for sound recordings.[212] Publishers and PROs

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206. *See* MUSIC MARKETPLACE, *supra* note 2, at 70–71.

207. *But see Pandora II*, 6 F. Supp. 3d 317, 371 (S.D.N.Y. 2014) (finding that Pandora's service had key differences from terrestrial radio in musical work rate-setting proceedings); *BMI v. Pandora*, Nos. 13 Civ. 4037(LLS), 64 Civ. 3787(LLS), 2015 WL 3526105, at *21 (S.D.N.Y. 2015).

208. *See* MUSIC MARKETPLACE, *supra* note 2, at 87–88.

209. Ed Christman, *'Fair Play, Fair Pay Act' Introduced, Seeks Cash From Radio Stations*, BILLBOARD (Apr. 13, 2015), http://www.billboard.com/articles/business/6531693/fair-play-fair-pay-act-performance-royalty-radio [https://perma.cc/P3B4-BVF6].

210. *See* LaFrance, *supra* note 120, at 222. Furthermore, publishers worry that their new "neighboring rights holders will act as gatekeepers," preventing publishers from lucratively exploiting licensing opportunities. *Id*. However, this argument is invalid if terrestrial radio were subject to the § 114 compulsory license, because sound recording owners would not have the ability to act as "gatekeepers." *See* 17 U.S.C. § 114(f) (2012).

211. Maria A. Pallante, *The Next Great Copyright Act*, 36 COLUM. J.L. & ARTS 315, 324 (2013).

212. MUSIC MARKETPLACE, *supra* note 2, at 92. However, in 2016 Pandora began operating under direct licenses from the three biggest music publishers under which it is estimated to pay between 8.5% and 10% of revenue. *See* Christman, *supra* note 177. Before that, Pandora paid the majority of its revenue to record companies and only about four percent total to the PROs. *Pandora II*, 6 F. Supp. 3d at 333. It is important to note that musical works owners still receive significantly more from public performance fees in total

point to this figure as evidence that the PRO rate courts produce below-market rates.[213] Although musical work owners are not obligated to use PROs, the PRO rate court determinations are important because, in practice, it is hard for musical work owners to get around the PRO process; some musical work owners rely heavily on collective licensing.[214]

There are several potential explanations for this rate discrepancy. First, PRO rate courts are statutorily prohibited from considering rates set by the CRB in setting a reasonable rate for musical works.[215] Second, the few direct licenses that are negotiated develop in the shadow of the rate courts, which may make it harder to move away from precedential rates. Third, as the CRB has found, the market for sound recordings may just be distinct from the market for musical works.[216]

While arguments have been made in favor of each set of rights holders,[217] the question of how musical work and sound recording royalties should fare relative to one another cannot be answered unless both rights holders and licensees are subject to a unitary, free-market negotiation or proceeding.

because the public performance rights for sound recordings is still limited to digital audio transmissions. *See id*. In other words, new media services are really the only services paying sound recording public performance licenses at all. *See id*.

213. *See* MUSIC MARKETPLACE, *supra* note 2, at 12, 92.

214. *See id*. at 76, 97. However, the direct licenses Pandora negotiated with the three major publishers may indicate a shift in webcasters' position, or at least the most popular noninteractive webcaster. *See* Christman, *supra* note 177.

215. *See* 17 U.S.C § 114(i).

216. *See* Webcaster I, 67 Fed. Reg. 45,240, 45,249 (July 8, 2002) (codified at 37 C.F.R. pt. 261 (2002)); Webcaster II, 72 Fed. Reg. 24,084, 24,094-95 (May 1, 2007) (codified at 37 C.F.R. pt. 380 (2007)).

217. Musical work owners argue that they should receive a higher relative share of royalties because their works are more valuable as creative expression and their creation is more difficult. LaFrance, *supra* note 120, at 247–48. Sound recording owners argue that consumer demand is focused on particular recordings rather than musical works, "[t]he costs and risks of producing and marketing a recording are higher," "[t]he sound recording royalty typically must be split among more people--i.e., the record company, the featured performers, and the nonfeatured performers," "[a] sound recording may be in demand for only a short period of time before its popularity fades," "[t]he career of a performer is typically shorter than the career of a composer," and that music services should pay for recorded music a percentage of gross revenue comparable to what cable firms pay for their movie programming. *Id*. at 248–51.

5. *Rates Set by the CRB for § 114 Compulsory Licenses Are Too High*

Noninteractive services complain that the rates set by the CRB are excessive and prevent them from making a profit.[218] Pandora has cited its inability to turn a profit despite lower rates negotiated under the Webcaster Settlement Acts, huge user numbers, and increased advertising.[219] However, the CRB had reasoned in the Webcaster decisions that sound recording owners should not be paid less based on a service's inability to generate revenue.[220]

Nonetheless, the CRB's ability to approximate free-market rates is a legitimate concern, as copyright law aims to enable creators and consumers to meet and negotiate in the marketplace. If, in the interests of efficiency and curbing anti-competitive practices, the parties are subjected to a rate-setting proceeding, those proceedings should aim to closely approximate free-market rates. Unfortunately, it is impossible to truly evaluate if the CRB is successful.

6. *Major Record Labels Wield Too Much Power in the Interactive Context*

Scholars note that record label agreements with interactive services, particularly Spotify, are structured in a way that harms smaller, independent labels.[221] Because the Big Three have legacy catalogs that any viable streaming service needs, they can secure very favorable terms with Spotify,

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218. This argument led webcasters to seek Congressional insulation from CRB rates through the Webcaster Settlement Agreements. MUSIC MARKETPLACE, *supra* note 2, at 142–43.

219. *Pandora II*, 6 F. Supp. 3d 317, 328 (S.D.N.Y. 2014).

220. Webcaster I, 67 Fed. Reg. at 45,249; Webcaster II, 72 Fed. Reg. at 24,090. Spotify, Pandora's interactive counterpart, also has yet to show a profit while most of its revenue is paid out in public performance royalties. Spotify independently negotiates its rates directly with record companies so the CRB rates are not necessarily responsible for this problem in the noninteractive context. *See* MUSIC MARKETPLACE, *supra* note 2, at 52; *20 Million Reasons to Say Thanks*, SPOTIFY (June 10, 2015), https://news.spotify.com/us/2015/06/10/20-million-reasons-to-say-thanks [https://perma.cc/XEV3-N679]. Spotify continues to report annual losses despite increased revenues and an expanding user base. *See* Stuart Dredge, *Spotify Financial Results Show Struggle to Make Streaming Music Profitable*, THE GUARDIAN (May 11, 2015), http://www.theguardian.com/technology/2015/may/11/spotify-financial-results-streaming-music-profitable [https://perma.cc/5QGM-49DJ]. It pays approximately seventy percent of its revenue out to rights holders. Greenburg, *supra* note 111.

221. *See* Menell, *supra* note 101, at 295. Independent labels are those not controlled by one of the Big Three. Some bigger independent labels have been able to secure better deals than the smaller ones. *See* Lindvall, *supra* note 154.

including advances and equity stakes in the company.[222] But independent labels do not have the legacy catalog bargaining chip and get significantly worse terms; this subsequently hurts their artists' compensation.[223]

While the minimal fees paid to independent labels is concerning, it is important to remember that they are the result of voluntary negotiations. Because major labels control so much content and the legacy catalogs, the "product" they offer to interactive services is simply more valuable. Therefore, this criticism focuses on a problem music copyright has failed to address. If there is a market failure here, it can be seen at the artist level. Individual artists on a major label may not necessarily create sound recordings that are worth more than those on independent labels, but they can indirectly get higher licensing fees by being on a major label.[224] Unfortunately, there are currently no proposed solutions to this disparity.

III. PROPOSED SOLUTIONS

Each of the solutions proposed to correct the shortcomings of the contemporary music licensing system must be evaluated against the goal of bringing content owners and creators to the marketplace.

A. MOVING MUSICAL WORK RATE-SETTING UNDER THE CRB

A 2015 Copyright Office report proposed shifting PRO rate-setting proceedings from the PRO rate courts in the S.D.N.Y. to the CRB.[225] Under this proposal, the musical works rate-setting process would remain the same, but the CRB would be the decision-making institution.[226] The proposal would maintain the same level of voluntary agreements, and therefore market rates, by remaining a last resort in the face of negotiation failures.[227]

Moving PRO rate decisions under the CRB would encourage marketplace participation by making the rate-setting process as a whole more efficient and less expensive for content owners and services. It would consolidate information, expertise, and decision making in a single institution. The CRB is particularly apt to handle these decisions because of its statutory requirements: one judge must have expertise in music and

222. *See* Lindvall, *supra* note 154.
223. *See id*.
224. *See id*.
225. *See* MUSIC MARKETPLACE, *supra* note 2, at 155.
226. *See id*. at 156. Antitrust issues would be addressed on an "as-needed basis" by the Department of Justice. *See id*.
227. *See* MUSIC MARKETPLACE, *supra* note 2, at 156.

another must have expertise in economics.[228] Also, using one institution for all proceedings would facilitate the application of consistent reasoning across decisions, producing more predictable results.[229] These benefits overall would make it easier for owners and users to meet in the marketplace and license works.

However, this proposal is also relatively narrow in what it intends to resolve. A more comprehensive solution would also apply one free-market standard to all rate-setting proceedings, and thereby increase the likelihood of consistent reasoning across rate-setting proceedings. Additionally, the system could be more efficient if rate proceedings were consolidated. This approach is discussed separately in alternative proposals.

B. SONGWRITER EQUITY ACT

The Songwriter Equity Act was originally introduced in both houses of Congress in 2014,[230] and was re-introduced in 2015.[231] The heart of the act amends 17 U.S.C. § 114(i), the provision which currently prohibits PRO rate courts from considering the rates services paid for sound recording public performance royalties when setting a "reasonable rate" for musical works.[232] The new § 114(i) would eliminate the prohibitory language and provide that "[i]t is the intent of Congress that royalties payable to copyright owners of musical works for the public performance of their works shall not be diminished in any respect as a result of the rights granted in section 106(6)."[233]

Supporters of this legislation argue that musical work owners are currently receiving below-market rates for the public performance of their works.[234] They believe that if PRO rate courts can consider sound recording

228. *See* 17 U.S.C. § 802(a)(1) (2012).

229. Not to suggest that this would necessarily make the rates paid for sound recordings and musical works more even, but the rates would be based on the same market standard.

230. Songwriter Equity Act of 2014, H.R. 4079, 113th Cong. (2014); Songwriter Equity Act of 2014, S. 2321, 113th Cong. (2014).

231. Songwriter Equity Act of 2015, H.R. 1283, 114th Cong. (2015); Songwriter Equity Act of 2015, S. 662, 114th Cong. (2015).

232. *See* H.R. 1283; S. 662; 17 U.S.C. § 114(i). The original intent behind § 114(i) was to protect publishers, because legislators thought that sound recordings would get much lower rates. *See* MUSIC MARKETPLACE, *supra* note 2, at 157. However, the provision has seemingly done the exact opposite because sound recordings have received much higher rates. *See id.* at 92, 157. The Songwriter Equity Act also would amend § 115(c)(3)(D), applicable to mechanical reproductions, to change the standard applied by the CRB in rate proceedings to a willing buyer/willing seller standard. *See* H.R. 1283 § 5; S. 662 § 5.

233. *See* H.R. 1283; S. 662.

234. *See* MUSIC MARKETPLACE, *supra* note 2, at 93.

royalties, those courts will increase the rates paid to the PROs to close the gap between the two.[235]

While digital services are generally ambivalent about how the royalties they pay are divided among rights holders, they do care about what they pay in royalties as the bottom line.[236] Digital services oppose this bill for the same reason publishers support it; it may lead rate courts to find higher fees "reasonable" for musical works.[237] Whether or not the rate courts would take the change in § 114(i) as a signal to adjust rates upward for musical works remains to be seen.

Eliminating § 114(i)'s prohibitory language might be seen as moving musical work licensing closer to a true free-market, and fairer, standard because in a free market musical work owners and users would consider the price of sound recordings in their negotiations. However, the PRO rate courts already implicitly consider this externality because they rely on freely negotiated rates as benchmarks and are only used after voluntary negotiations fail. Enabling the PRO rate courts to consider the higher rates paid for sound recordings might encourage them to impose their own ideas of what a fair rate is rather than emulate free market rates. Doing so may deter music services from participating in the musical public performance realm.

Alternatively, if this bill passed in conjunction with the designation of the CRB as the decision maker for both musical works and sound recordings, the CRB may be able to balance the interest of all three parties—publishers, record labels, and services—to reach a reasonable bottom line. This outcome would be more efficient and representative of a free market where buyers and sellers would not be prohibited from considering externalities that affect their negotiations. Therefore, combining solutions may provide a broader reform that incentivizes more overall marketplace activity.

C. FAIR PLAY FAIR PAY ACT

A second piece of legislation that would result in more extensive changes to the music licensing system is the Fair Play Fair Pay Act (FPFP).[238] The FPFP contains three main proposals.

235. The gap is currently approximately twelve-to-one. *See id.* at 92 n.461, 104.

236. *See id*. at 76–77.

237. *See id*. at 104.

238. Fair Play Fair Pay Act of 2015, H.R. 1733, 114th Cong. (2015). The FPFP was introduced in the House of Representatives in 2015. *See id*.

First, the FPFP extends a full public performance right to sound recordings based on the ideas that copyright law should subject similar services to the same royalty requirements and that sound recording owners should have a complete public performance right.[239] The FPFP requires terrestrial radio to pay sound recording royalties as webcasters, cable radio, and satellite radio currently do, enabling sound recording owners to exploit their copyrights in a new market.[240]

Second, like the Songwriter Equity Act, the FPFP amends the language of § 114(i) to permit the PRO rate courts to consider sound recording royalties in musical work proceedings.[241] However, the language of the FPFP limits the rate courts' ability to consider sound recording royalties and still prohibits such considerations if they are used to reduce musical work fees.[242]

Third, the FPFP brings pre-existing satellite and subscription services, as well as terrestrial radio, under the same licensing schema that now covers webcasters, making all noninteractive radio services subject to the same CRB willing buyer/willing seller standard.[243] The willing buyer/willing seller standard is perceived to produce higher rates than the § 801(b)(1) standard.[244] This proposal would end the distinct and less efficient licensing schemes that exist for similar services, enhancing competition by putting those comparable services on a level playing field.

The FPFP offers the most comprehensive reforms to the current music licensing system. It promotes efficiency by consolidating rate-setting proceedings and applying more consistent standards. In addition, by granting sound recordings a full public performance right, it invites sound recording owners to participate in a market that is currently limited to musical works.

However, like the Songwriter Equity Act, the FPFP leaves open the possibility that PRO rate courts will adjust upward the rates they set for

239. *See* H.R. 1733, § 2(b). The bill would amend 17 U.S.C. § 106(6) to eliminate the word "digital" such that the right "to perform the copyrighted work publicly" extends to all audio transmissions. *See id.*

240. *See* Blackburn, *supra* note 189. The act looks out for smaller and public broadcasters by putting a relatively low cap on their licensing fees. *See* H.R. 1733, § 5.

241. *See* H.R 1733, § 8(a)(1).

242. *See id.*

243. H.R 1733, § 4(a)(1).

244. *See* Loren, *supra* note 189, at 576. The Act would also aim to give some protection to music producers, who are only brought into the copyright licensing scheme via private contract. H.R 1733, § 9. The bill would also end the pre-1972 sound recordings controversy by extending copyright right protection to these works. *See* H.R 1733, § 7; MUSIC MARKETPLACE, *supra* note 2, at 82.

musical works based on the fact that sound recordings receive much higher royalties. The licensing system should instead ensure a fair rate for each class of rights owners in light of how services might actually negotiate with copyright owners in a completely free market.

D. REVISING THE PRO CONSENT DECREES

In response to the recent ASCAP and BMI cases, there has been a push to amend the PRO antitrust consent decrees and permit publishers to withdraw new media rights.[245] Enabling musical work owners to withdraw particular licensing rights from the PROs would enable these owners to force music services into direct negotiations.[246] Publishers argue this would enable music owners to negotiate in a way better suited to the modern music industry.[247]

Although large music publishers would be the real beneficiaries of revising the consent decrees because they have the catalogs that would lead services into direct negotiations, the smaller publishers and individual artists that license to new media services through ASCAP may still benefit from the large publishers' withdrawals.[248] ASCAP and BMI could use the higher rates agreed to in the direct licenses as benchmarks of free-market rates in subsequent rate court proceedings.[249]

This solution is complicated because the consent decrees were imposed in response to antitrust concerns. Aside from that, how these decree amendments might affect the incentives of owners and users to meet in the marketplace is unclear. As Pandora's ultimate independent negotiations with publishers in late 2015 demonstrate, rights owners and webcasters are willing and able to reach independent licensing agreements. And, if the transaction costs of direct licensing become prohibitive in the future, publishers could still return to the PROs. In conclusion, enabling publishers

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245. *See* MUSIC MARKETPLACE, *supra* note 2, at 96–100. It is unclear if support subsided after the three major publishers negotiated direct deals with Pandora and secured higher rates despite the court decisions. *See* Christman, *supra* note 177.

246. *See BMI v. Pandora*, Nos. 13 Civ. 4037(LLS), 64 Civ. 3787(LLS), 2015 WL 3526105, at *7 (S.D.N.Y. 2015).

247. *See* MUSIC MARKETPLACE, *supra* note 2, at 99.

248. *See id*.

249. *See id*. On the other hand, many songwriters with large publisher contracts actually prefer licensing through PROs because the PROs have organizational terms that clearly indicate how collected royalties are divided among writers, publishers, and the PRO. *See* MUSIC MARKETPLACE, *supra* note 2, at 99–100. For example, ASCAP rules indicate that all royalties paid out fifty-fifty to the writers and the publishers. *See* PASSMAN, *supra* note 9, at 1261–62. Songwriters argue that they will not get the same level of transparency in how royalties are divided up if their publishers license directly. *See* MUSIC MARKETPLACE, *supra* note 2, at 99–100.

to divide up the right to license may actually enhance participation in the market. Unfortunately, this solution only addresses the interests of musical work owners and fails to offer a comprehensive approach that improves efficiency and rate-setting standards across services and works.

Although several of the proposed solutions provide a step in the right direction, they are under-inclusive. These solutions fail to consider issues such as the anticompetitive behavior of major record labels. They also fall short of providing a way for webcasters to use their bargaining power as major industry players in a unitary proceeding that simultaneously considers service revenue, musical work royalties, and sound recording royalties. Such clear fragmentation of the licensing system broadly underlies the criticisms discussed in Part II and, consequently, should also be addressed by more comprehensive reforms.

Congress should implement a broader music copyright reform that adequately addresses copyright policy's major goals, thereby benefitting all music industry players. The reform should focus on setting royalties that reflect market demand, increasing efficiency, and, most importantly, supporting copyright owners' ability to bring their works to the marketplace.

IV. CONCLUSION

The history of music licensing is as complex and nuanced as the resulting system that exists today. Licensing by webcasting services serves as a prominent example of how disconnected music copyright can be from the realities of the contemporary music industry. Although many agree the music copyright system is unnecessarily complicated, most proposed solutions only continue down the historical path of piecemeal changes to narrow issues. However, as demonstrated in Part I, it is such incremental amendments to copyright law that led to the present fragmented licensing structure. It will take extensive reform to create a system that makes sense and reduces the transaction costs of participating in the music licensing.

This can only be accomplished by evaluating solutions from the perspective that copyright law aims to bring owners and potential licensees together in the marketplace. If this goal drives the development of new legislation, the resulting licensing system will encourage owners of creative works to bring their works to the marketplace.