



March 13, 2018

What's In Your Wallet....Show Me The Money

NEWSLETTER

An Entertainment Industry Organization

The President's Corner

"You can never be too rich or too thin."

Wallis Simpson, Duchess of Windsor; and wife of King Edward VIII (later Duke of Windsor)

I don't know anyone who, generally, doesn't appreciate Wallis Simpson's famous quote; especially when it comes to finances. And, for tonight's panel focusing on finances, we will delve into various revenue streams that some of you may not know much about.

That said, the music industry, after many years of declining revenues, is now experiencing tremendous growth in revenues via different digital service providers such as Spotify, Apple, and Amazon, as well as an increase in revenues from the use of music in different platforms such as Pandora, SiriusXM, Netflix, and Hulu. However, this growth in revenue now requires an understanding of complex calculations for the collection of micro-pennies. This panel seeks to demystify the collection and distribution of these revenue streams to the copyright owners of musical compositions and sound recording masters.

We hope you enjoy tonight's panel. Special thanks to Rene, Maria, Reggie, Richard, Bill and Michael for their time and insights.

Best,

J. Charley Londoño, Esq.

President, California Copyright Conference



Sound Royalties proud sponsor of :

What's In Your Wallet.....Show Me The Money

STREAMING REVENUE

By Bill Collier

After 15 years of decline, the business of recorded music is arguably in its healthiest state since 1995. (See “Recorded Music Developments 1995–Present” on page 23). The Recording Industry Association of America recently reported that overall revenues grew a robust 11.4 percent in 2016—a welcome return to significant growth for the industry.¹ The primary business model of recorded music is now one of access to licensed services based on sponsor or subscription revenue rather than one of physical goods sold by units. As this new positive economic cycle for recorded music begins, it is worth surveying the legal structures that frame the primary revenue sources involved.

Currently, rights owners and their agents are experiencing unprecedented speed, transparency, and efficiency in accounting and revenue recognition. As examples, digital service providers (DSPs) like Pandora² and Spotify³ make geographic music consumption statistics available to artists on their platforms daily, record companies receive reports of consumption from their on-demand streaming partners weekly,⁴ and publishers receive reporting on the interactive streaming of their compositions monthly, within 20 days after the close of the month.⁵

These reports are based on extremely granular per-listen data (as opposed to “per spin,” as is traditional for broadcast radio). Because the Internet is based on one-to-one connectivity, it is now possible to know very quickly not only that an album has sold or that the promoted single from the album has been broadcast but also that the third track on the album has unexpected heat and should be considered for secondary promotion. For music publishers, mechanical rights payments typically are now received 45 days after the close of the applicable quarter, whereas in the days of physical distribution, these royalties were received several quarters in arrears, after complex and obscure reserves calculations had been made to accommodate retailers’ right to return physical goods held on consignment.⁶ Perhaps most importantly, each “listen” on a streaming service is individually logged under the eyes of third-party auditors,⁷ creating a certified, high-resolution data set documenting music listening behavior and narrowing to a historical low the number of opportunities for nefarious accounting practices. Independent organizations like BuzzAngle⁸ and Nielsen⁹ are now able to report with extreme granularity many hundreds of billions of streams by type (audio, video, on-demand, noninteractive, ad-supported, subscription) in nearly real time.

There are numerous fronts along which the business and law of the recorded music industry are still rapidly evolving. Two audio streaming segments are of particular interest, as they are now the largest parts of the recorded music business: on-demand streaming and noninteractive webcasting.

One cautionary note on downloading: sales from the downloading of singles and albums remain significant— together still comprising \$2.3 billion in 2015¹⁰—even as they are now declining faster than CD sales (perhaps because the “possession” of a downloaded file does not serve the same desire for artifacts that CDs do).¹¹ The decline in these significant segments will create a stiff headwind against revenue growth until their cycles have fully tapered off, so the streaming segments of the business will have to demonstrate a great deal of growth in order to maintain the pace of total industry growth set in 2016. Prevailing predictions still expect relatively flat revenue growth for recorded music through 2020.¹²

On-Demand Audio Streaming

Between its launch in October of 2008 and June of 2016, 100 million people worldwide had come to know on-demand streaming through the Spotify service¹³ based in Stockholm, Sweden. Approximately 50 million of these users are paying subscribers,¹⁴ while the rest receive the service with advertising inserted throughout the experience. Spotify’s nearest competitor, Apple Music, launched June 30, 2015, and has already exceeded 20 million paying subscribers;¹⁵ Apple Music does not have an advertising supported tier. At \$10 per month per subscriber, these two services alone

represent well in excess of \$500 million a month in gross subscription revenue globally.¹⁶ It is difficult to find clear comparative statistics, but various indicators suggest that ad-supported on-demand streaming produces significantly less revenue, though the ad-supported segment still contributes a material incremental amount on top of subscription revenue.¹⁷

The rights underpinning this business are primarily the rights to use the sound recordings (which the services obtain from recording distributors) and the musical compositions embodied in those sound recordings (which they obtain from music publishing administrators). Specifically, the single most valuable right in the “bundle of rights” afforded by the Copyright Act and implicated by these services is the right to publicly perform the sound recording via digital audio transmission.¹⁸ This right must be licensed from the owner of the sound recording copyright (typically a record label), usually through a sound recording distributor. Approximately 80 percent of this market is controlled by the label conglomerates known as the “majors,” of which there are three: Universal Music Group, Sony Music Entertainment, and Warner Music Group.¹⁹ Because the transmission of a sound recording must begin with a copy reproduced on a server, however, the reproduction right—and arguably the distribution right—is also implicated. Streaming services must therefore privately bargain with recording distributors to license these two primary rights, as well as related rights such as the rights to exploit the artwork and the trademarks, names, and likenesses associated with the music.

Because these agreements are generally protected from outside inspection by confidentiality clauses, and because they have evolved to be notoriously complex,²⁰ some of the most significant issues surrounding them involve the questions of transparency and equitable remuneration for artists.²¹ An example of one such license, between Spotify and Sony, emerged in 2015.²² Examination of that agreement shows a complex set of royalty formulas with a core structure based on the label receiving its pro rata share (or usage percentage) of a pool of revenue equal to 60 percent of the service’s defined gross revenues, with certain per-stream and per-subscriber floors. This structure is overshadowed, however, by substantial advance royalty payments that are often tied to “most favored nations” clauses that cause them to ratchet upwards under certain circumstances. To the extent not recouped by royalty earnings during a given contract period, these advance payments constitute a form of “breakage” in favor of the label, and for a long time it was not clear whether the labels intended to share this revenue with artists. However, following the leak of the agreement between Sony and Spotify, all three of the major labels felt compelled to release public statements describing their policies on this topic.²³ It has been observed, in particular by artists’ managers, that labels also sometimes secure equity stakes in their digital music service licensees, leading to the more complex question of how profits from such stakes might also be shared with artists.²⁴

Musical Compositions

With respect to the musical compositions used in these streaming services, the identical consumer activity (on-demand streaming) implicates a remarkably different legal framework. Again, the primary activity involved is the transmission of an audio file from a server to a listener, suggesting the right of public performance (which, in the case of musical compositions, is not restricted to digital audio transmission).²⁵ While the public performance right is common to interactive and noninteractive services, more emphasis in connection with on-demand streaming is arguably placed on the rights of reproduction and distribution. During the 2000s, a debate emerged as to whether the rights of reproduction and distribution are implicated at all by the mere transmission of an on-demand stream through a service not designed to retain a copy of the song at the receiving end.²⁶ Numerous structural features of the music business as it evolved over the twentieth century helped shape that debate, including the fact that early in the century music publishers in the United States had evolved separate collective management organizations around the public performance right and the so-called “mechanical” right, each of which has differing flows of revenue as between music publishers and songwriters.²⁷ It was apparent early on that a business built on access would inevitably erode a business built on unit sales, which would

consequently shift the relative economics of the performance societies vis-à-vis mechanical rights administrators. Moreover, the mechanical right in the United States is the subject of a statutory license,²⁸ the fees for which are set by Copyright Royalty Board (CRB) arbitration proceedings every five years.²⁹ The debate was settled in the context of the proceeding known as “Phonorecords I,”³⁰ during which the parties—including the labels, publishers, and digital music services—agreed that the mechanical right would apply, agreed that it would be licensable pursuant to the Section 115 compulsory mechanical license,³¹ and established a royalty rate formula for this use that persists to the present time.³² As of this writing, the successor to that proceeding, Phonorecords III, is before the CRB, its trial phase having just been completed, and a final determination expected by December 2017.³³ This proceeding will set rates and terms for the period 2018 through 2022.³⁴

In the traditional physical record business, mechanical license royalties flow to publishers from record retailers through the record labels. For example, a label may obtain a mechanical license for a song from a music publisher and have one of its contracted artists interpret that song into a recording, which would then be sold wholesale to retailers. The statutory royalty rate operates effectively as a ceiling, because if the publisher does not agree to terms, the label can avail itself of the Section 115 license for making and distributing phonorecords.³⁵ These royalties then flow back to publishers through the same chain, via the labels. This arrangement is fraught with data and accounting challenges that have led to historical underpayment problems, culminating most recently in a \$264 million late fee settlement in 2009 referred to as the “Memorandum of Understanding” between the labels and publishers.³⁶ As the on-demand streaming services emerged in the early 2000s, however, this structure shifted. Because the services are actually producing and distributing copies of compositions in this new “access” business, it falls to them to obtain the required mechanical licenses. Therefore, the labels must obtain mechanical licenses to make (and sell any physical or downloaded copies of) the recordings, and the DSPs must obtain separate mechanical licenses to operate their on-demand streaming businesses. Consequently, the publishers are now in direct privity of license with the parties exploiting their songs at the retail level for the first time in the history of the recorded music business.

The services have a range of options in obtaining these licenses. They can contract directly with publishing administrators, collectively license via, for example, the Harry Fox Agency, which represents a group of affiliated publishing administrators, or avail themselves of the statutory license by sending each publishing administrator a Notice of Intention to Obtain a Compulsory License.³⁷ In practice, most DSPs license their services using some combination of these approaches. The primary challenge, however, is that sound recordings are largely controlled by a relatively manageable group of distributors and each tends to be owned by a single party, whereas there are at least 57,000 publishing administrators who tend to own compositions in fractional shares. This creates an enormous transactional challenge in terms of licensing, license administration, and royalty accounting. This challenge, and the consequences of imperfection in meeting it, were laid bare in late 2015 and early 2016 when two class action lawsuits were filed against Spotify,³⁸ and a separate \$30 million settlement was announced with the National Music Publishers Association.³⁹ The issues raised in these disputes bear a striking resemblance to those raised in the labels’ late fee settlement.

The royalty rates currently applicable to on-demand streaming services vary according to the type of offering a service provides.⁴⁰ The rate that generally applies is roughly 10.5 percent of defined service revenue after application of several greater-of and lesser-of comparatives involving, among other things, a penny-rate per subscriber and a metric designed to maintain a rate that is roughly 21 percent of what the service pays to the labels for the corresponding sound recording rights. From this amount, moneys paid by the applicable licensee for public performance rights are deducted, because they also flow back to publishers and songwriters. Each month, licensees are required to perform this calculation to arrive at a total royalty pool, which is then divided by the number of plays on the service to arrive at a per-play rate.

The per-play rate is then applied to each play of a song on the licensee’s service, with adjustments for songs greater than five minutes in duration.⁴¹ According to the moving papers of the parties available at press time, a primary debate in the current Phonorecords III proceeding is whether this formula should continue, perhaps with adjustments, or be replaced by a simpler penny-rate per play or a pool based on a penny-rate per subscriber.⁴²

Noninteractive Audio Streaming

More people are likely familiar with non-interactive, advertising-supported webcasting services—for example, Pandora⁴³ and iHeart Radio⁴⁴—which collectively have hundreds of million users in the United States alone. Pandora is the clear category leader in this segment: across all music streaming services, it held 25 percent of time spent listening, edged out only by YouTube.⁴⁵ Some of these services are simply simulcasts or near simulcasts of traditional over-the-air broadcast radio stations,⁴⁶ while others are programmed by computer algorithms designed to conform to individual listeners’ tastes and afford a limited number of “skips” forward.⁴⁷

As with on-demand streaming, the primary right type implicated by these services is the public performance of sound recordings via digital audio transmission. However, when these transmissions are not interactive, they are eligible for a compulsory license to publicly perform sound recordings by means of digital audio transmission,⁴⁸ as well as a corresponding right of ephemeral reproduction, which addresses the server copies from which such streams emanate and any incidental reproductions made during the course of the transmission across the Internet.⁴⁹ As with the Section 115 statutory mechanical license, these two statutory licenses are the subject of Copyright Royalty Board proceedings every five years.⁵⁰ The most recent proceeding, governing rates and terms for the period 2016-2020, was styled “Web IV” and concluded in December 2015.⁵¹

The Web IV proceeding considered a wide range of issues in determining the rates and terms for the applicable period. Among them was whether the penny-rate per-performance royalty structure that has prevailed since the first proceeding to determine such rates and terms should continue or be replaced with a greater-of formulation taking into consideration a percentage of the licensees’ revenues. In the end, the per-performance model was retained, at a rate of \$.0017 per stream in 2016, indexed to inflation for the years 2017-20.⁵²

If less than two-tenths of a penny sounds small, all those streams add up. All royalties generated by the Sections 112 and 114 statutory licenses are collected and dispersed by SoundExchange, an agency deemed the sole “Collective” by the judges of the Copyright Royalty Board in the context of the second proceeding to set rates and terms for webcasters.⁵³ SoundExchange distributed a record \$883.9 million in royalties in 2016,⁵⁴ although it is not clear exactly how much of that sum was attributable to advertising-supported webcasting because the figure includes other business models eligible for the Sections 112 and 114 licenses that are not broken out (such as Sirius XM satellite radio and residential digital music services like Music Choice). It has been speculated that the majority of that figure is from webcasting and that more than half was paid in by Pandora alone.⁵⁵ Whether Pandora’s payments to SoundExchange will remain as high is uncertain, given reports that Pandora has shifted its licensing strategy in connection with its move into subscription interactive streaming, which would require at least some licensing direct from the labels, and not pursuant to the statutory licenses.⁵⁶

Licensing Compositions

Virtually all of those streaming sound recordings (excepting, for example, comedy sketches) embody musical compositions that also must be licensed. Whereas on-demand streaming by industry-wide agreement implicates the mechanical right, the noninteractive streaming market is entirely focused on the public performance right.

Musical composition public performance rights licensing is traditionally managed in the United States by performing rights organizations (PROs). Although most territories have only one such organization, the United States

traditionally has three: the American Society of Composers, Authors and Publishers (ASCAP), Broadcast Music, Inc. (BMI), and the smaller Society of European Stage Authors and Composers (SESAC).⁵⁷ Recently, however, the notable artist manager Irving Azoff founded a new PRO called Global Music Rights (GMR),⁵⁸ and there are signs that other entities may be planning to begin administering U.S. public performance rights on a collective basis as well.⁵⁹

Because they constitute collective bargaining units with significant market power, ASCAP and BMI were sued by the U.S. Department of Justice (DOJ) during the middle of the last century (ASCAP in 1941; BMI in 1966) under the Sherman Act and have labored ever since under consent decrees administered by the U.S. District Court for the Southern District of New York.⁶⁰ In recent years, antitrust scrutiny of the PROs has led to major shifts in the performance rights landscape that had been relatively stable for several decades prior.

Since its inception in 1927, SESAC has managed to avoid coming under DOJ scrutiny, perhaps because its repertoire was small enough, relative to that of ASCAP and BMI, that its impact on the market evaded government review. Recently, however, the Television Music License Committee and the Radio Music License Committee (RMLC) that negotiate collectively with the PROs on behalf of their respective industries, have challenged SESAC in private antitrust actions. Notably, in 2014, the RMLC won a ruling against SESAC in the Eastern District of Pennsylvania that may also impact GMR and any future PROs that may emerge in the United States. SESAC sought a motion to dismiss the claim by RMLC that SESAC violated Section 2 of the Sherman Antitrust Act because it monopolized the relevant market, i.e., the market for SESAC's repertoire, through anticompetitive conduct. In denying SESAC's motion to dismiss, the court found that the RMLC's complaint "cogently portrays how SESAC allegedly obtained and preserves its monopoly power through exclusionary conduct...by obtaining a critical mass of must-have works, selling them exclusively in the blanket license format, discouraging direct licensing by refusing to offer carve-out rights and obscuring the works in its repertory."⁶¹ The case subsequently settled, and SESAC agreed to become subject to a binding arbitration regime with the RMLC, roughly echoing the rate-setting procedure set forth in the consent decrees for ASCAP and BMI.⁶²

DOJ Review

In 2014, ASCAP and BMI requested that the DOJ review the consent decrees, hoping to have them limited or eliminated.⁶³ During the process, however, it emerged that the PROs had differing views from the DOJ on how the PROs' blanket licenses operate with respect to compositions fractionally owned by multiple parties in which one or more of those parties are affiliated with different PROs.⁶⁴ Thus, rather than substantially reducing or eliminating the decrees, the DOJ interpreted the existing consent decree as prohibiting ASCAP and BMI from issuing licenses solely to their controlled share of a work. They effectively interpreted all existing ASCAP or BMI grants of license as extending to the whole of the work, regardless of the PRO's controlled share. In reaction, BMI filed suit with the U.S. District Court of the Southern District of New York on the "fractional licensing" issue, and the court ruled in favor of BMI.⁶⁵ The DOJ then appealed that ruling to the Second Circuit, where it currently resides.⁶⁶ ASCAP, meanwhile, has elected to take a legislative approach to the matter.⁶⁷

Against this background, a licensee must seek licenses from each of ASCAP, BMI, SESAC, and GMR, each of which controls separate repertoire. The rates and terms of such licenses with ASCAP and BMI are well known, as they have typically been set through the public process dictated by the consent decrees. The most recent precedent for noninteractive audio streaming was effectively 1.85 percent of revenue for ASCAP⁶⁸ and 2.5 percent for BMI.⁶⁹ Not subject to consent decrees, SESAC and GMR are free to negotiate their rates through private free-market negotiations; therefore, comparative figures are not readily available.

Thus, at this stage of the business cycle, a set of relatively stable business models and new legal frameworks have emerged, edging out the traditional physical records business. This evolution has replaced a "unit sales" business model

with a range of services based around access to streaming music, whether on a noninteractive or on-demand basis and whether advertising-supported or subscription-based. While the business is certainly no less complex than it has ever been, this new paradigm has come with enormous benefits for consumers in terms of access, as well as for rights owners in terms of direct, rapid, and transparent accounting. Looking to the future, however, the lack of profitability among the leading streaming music services constitutes a dark cloud over prospects for long-term stability in the business.⁷⁰ It remains to be seen whether there is sufficient market demand for these emergent models to scale to profitability, or whether further drama lurks in the offing.

SIDEBAR: RECORDED MUSIC BUSINESS DEVELOPMENTS 1995-PRESENT

1995: CD ROM drives become standard on computers, and Columbia House adds CD ROMS to marketing program.¹ MP3 released.² allowing “ripping” of Red Book format audio CDs into individual track files small enough to fit an artist’s entire discography on one CD; audio files shared in Internet chatrooms.

1999: Napster triggers flood of peer-to-peer sharing of audio files.³

2000-2010: After initial unprecedented windfall rise generated by CD sales, music industry revenues fall.⁴

2005-2015: “Downloading” era (nearly synonymous with Apple’s iTunes Store) begins mainstream shift from physical goods to electronic distribution business.⁵

2010-2015

Revenues barely tread water as mix of revenue sources shifts with expanding revenue from digital formats, offsetting continuing decline of CD revenue.⁶

2015: Streaming revenue emerges as the largest segment of recorded music revenue (34.3 percent).⁷

2016: Recorded music revenues finally return to growth with strong double-digit showing (11.4 percent).⁸

¹ Marilyn A. Gillen, CD-ROMs Join the Mail-Order Clubs, *Billboard*, Apr. 15, 1995, at 50. Eileen Fitzpatrick, Music Chains Drawn to CD-ROM, *Billboard*, Apr. 15, 1995, at 4.

² See ISO/IEC 13818-3:1995: Information technology—Generic coding of moving pictures and associated audio information—Part 3: Audio, International Organization for Standardization, <https://www.iso.org/home.html> (last visited Feb. 21, 2017).

³ Richard Nieva, Ashes to Ashes, Peer to Peer: An Oral History of Napster, *Forbes* (Sept. 3, 2013), available at <http://fortune.com>. See, e.g., Stephen Witt, *How Music Got Free: A Story of Obsession and Invention* (2015).

⁴ U.S. Sales Database, RIAA.COM, <http://www.riaa.com/u-s-sales-database> (last visited Feb. 21, 2017).

⁵ Jordan Darville, Over Half of Vinyl Owners Don’t Listen to Their Records, *Fader* (Apr. 15, 2016), <http://www.thefader.com/2016/04/15/over-half-of-vinyl-owners-dont-listen-to-their-records>.

⁶ *Id.*

⁷ *Id.*

⁸ Cary Sherman, 2016: A Year of Progress for Music, *Medium.com* (Mar. 30, 2017), available at <http://medium.com/@RIAA/2016-a-year-of-progress-for-music-4e9b77022635>.

¹ Cary Sherman, 2016: A Year of Progress for Music, *Medium.com* (Mar. 30, 2017), available at <http://medium.com/@RIAA/2016-a-year-of-progress-for-music-4e9b77022635>.

² Pandora AMP, <http://amp.pandora.com> (last visited Feb. 21, 2017).

³ Spotify Artists, <http://artists.spotify.com/features> (last visited Feb. 21, 2017).

⁴ Paul Resnikoff, F*&k It: Here’s the Entire Spotify/Sony Music Contract, *Digital Music News*, May 22, 2015, available at <http://www.digitalmusicnews.com/2015/05/22/fk-it-heres-the-entire-spotifysony-musiccontract> (last visited Feb. 21, 2017) [hereinafter Resnikoff].

⁵ See 17 U.S.C. §115(c)(5); 37 C.F.R. §210.16(g)(1).

⁶ See, e.g., 37 C.F.R. §§210.13, 210.14.

⁷ See 37 C.F.R. §210.16(f)(1)(v)(B) (monthly statement of account (MSOA) prepared by third party must be accompanied by certification that the MSAO was prepared using “processes and internal controls” subject to examination by CPA applying recognized accounting standard).

⁸ U.S. Music Industry Report: A Report on 2016 U.S. Music Industry Consumption, *BuzzAngle Music* 15, available at <http://www.buzzanglemusic.com/wp-content/uploads/BuzzAngle-Music-2016-U.S.-Report.pdf> (last visited Feb. 21, 2017).

⁹ See Year-End Report U.S. 2016, Nielsen Music, available at <http://www.nielsen.com/content/dam/corporate/us/en/reports-downloads/2017-reports/2016-year-end-music-report-us.pdf> (last visited Feb. 21, 2017).

¹⁰ Joshua P. Friedlander, News and Notes on 2015 RIAA Shipment and Revenue Statistics 3, RIAA.Com, <https://www.riaa.com/wp-content/uploads/2016/03/RIAA-2015-Year-End-shipments-memo.pdf> (last visited Feb. 21, 2017) [hereinafter Friedlander].

¹¹ Charlotte Hassan, Concrete Data Shows That Downloads are Falling Faster Than Physical Sales, *Digital Music News*, July 6, 2016, <http://www.digitalmusicnews.com/2016/07/06/digital-downloads-falling-faster-physical>.

¹² Music & Radio, *Global Entertainment & Media Outlook 2016-2020*, PricewaterhouseCoopers, <http://www.pwc.com/gx/en/entertainment-media/pdf/outlook-music-and-radio-article-2016.pdf> (last visited Feb. 21, 2017).

¹³ Spotify Monthly Active User Base Reaches 100 Million, *Reuters.com*, June 20, 2016, <http://www.reuters.com>.

¹⁴ Jon Russell, Spotify Reaches 50 Million Paying Users, *Techcrunch* (Mar. 2, 2017), <https://techcrunch.com>.

¹⁵ Marc Schneider, Apple Music ‘Well Past’ 20 Million Subscribers, *Billboard*, Feb. 14, 2017, <http://www.billboard.com>.

¹⁶ These are global subscriber numbers and many ex-U.S. subscribers pay a lower monthly fee, so this is a rough estimate for purposes of simplification. Spotify and Apple Music are only the top two such services, and they and others are adding subscribers at a very significant rate.

- ¹⁷ See, e.g., Friedlander, *supra* note 10, at 1.
- ¹⁸ 17 U.S.C. §106(6).
- ¹⁹ Heather McDonald, Big Three Record Labels, The Balance (Aug. 10, 2016), <https://www.thebalance.com>.
- ²⁰ See, e.g., Micah Singleton, This Was Sony Music's Contract with Spotify, The Verge (May 19, 2015), <http://www.theverge.com> ("At the request of the copyright owner, the contract has been removed.").
- ²¹ See, e.g., Chris Cooke, MMF and FAC Officially Welcome Spotify Artists, CMU (Dec. 5, 2013), <http://www.completemusicupdate.com/article/mmf-and-fac-officially-welcome-spotify-artists/> (quoting artists and managers on past lack of transparency).
- ²² Resnikoff, *supra* note 4.
- ²³ Tim Ingham, Universal: Yes, We Share Digital Breakage Money with Our Artists, Music Business Worldwide (June 2, 2015), <http://www.musicbusinessworldwide.com/universal-yes-share-breakage-payments-artists>.
- ²⁴ Don Rys, IMMF Raises Concerns Over Labels' Promise to Share Potential Stock Payout from Spotify, Billboard, Feb. 11, 2016, available at <http://www.billboard.com>.
- ²⁵ See 17 U.S.C. §106(4). Cf. 17 U.S.C. §106(6).
- ²⁶ See, e.g., Promoting Investment and Protecting Commerce Online: The Art Act, the Net Act, and Illegal Streaming: Hearing Before the Subcomm. on Intellectual Property, Competition and the Internet of the H. Comm. on the Judiciary, 112th Cong. 19 (2011) (statement of Maria A. Pallante, Acting Register of Copyrights) (when streaming prerecorded material, making "server copies" without authorization constitutes infringement of the reproduction right, and streaming activity "can also implicate the distribution right"), available at http://judiciary.house.gov/_files/hearings/printers/112th/112-77_66614.PDF.
- ²⁷ The earliest examples being ASCAP, organized to administer public performance rights in 1914, and the Harry Fox Agency, organized to administer mechanical rights in 1927. See ASCAP, Happy Birthday, ASCAP!, ASCAP.COM, <http://www.ascap.com/100> (last visited Mar. 7, 2017); Harry A. Fox Agency, What does HFA do?, hfa.© Music Publishers, http://www.harryfox.com/publishers/what_does_hfa_do.html (last visited Mar. 7, 2017).
- ²⁸ 17 U.S.C. §115.
- ²⁹ See 17 U.S.C. §§801 et seq.; 17 U.S.C. §115(c)(3).
- ³⁰ See Final Determination of Rates and Terms, U.S. Copyright Royalty Judges, No. 2006-3 CRB DPRA, 74 Fed. Reg. 4510 (Jan. 26, 2009), available at <http://www.gpo.gov/fdsys/pkg/FR-2009-01-26/pdf/E9-1443.pdf>.
- ³¹ 17 U.S.C. §115 describes, as the title indicates, the "[s]cope of exclusive rights in nondramatic musical works: Compulsory license for making and distributing phonorecords."
- ³² Brian T. Yeh, Cong. Research Serv., RL 33631, Copyright Licensing in Music Distribution, Reproduction, and Public Performance 10 (2015), available at <http://fas.org/srgp/crs/misc/RL33631.pdf>.
- ³³ See Notice of Amendend Participant and Order for Further Proceedings, U.S. Copyright Royalty Judges, No. 16-CRB-0003-PR ("Phonorecords III") (June 14, 2016), available at <http://www.loc.gov/crb/rate/16-CRB-0003-PR/orders/6-15-16-order-for-further-further-proceedings-mv2.0.pdf>. See also 17 U.S.C. §803(c)(1).
- ³⁴ See Determination of Rates and Terms for Making and Distributing Phonorecords (Phonorecords III), No. 16-CRB-00030PR (2018-2022) 81 Fed. Reg. 255 (Jan. 5, 2016), available at <http://www.loc.gov/crb/fedreg/2016/81fr255-256.pdf>.
- ³⁵ See 17 U.S.C. §115.
- ³⁶ Ed Christman, NMPA, Major Labels Sign On Terms of Agreement, Billboard, Oct. 7, 2009, <http://www.billboard.com>.
- ³⁷ See 17 U.S.C. §115(b).
- ³⁸ See Tom Ingham, Spotify Hit with Second US Songwriter Lawsuit – This Time for \$200M, Music Business Worldwide (Jan. 9, 2016), <http://www.musicbusinessworldwide.com/spotify-hit-with-second-songwriter-lawsuit-in-the-us/>. The cases, later consolidated, were *Lowery, et al. v. Spotify USA, Inc.*, No. 15-9929 (C.D. Cal. Dec. 28, 2015) and *Ferrick, et al. v. Spotify USA, Inc., et al.*, No. 16-0180 (C.D. Cal. Jan. 8, 2016).
- ³⁹ Ed Christman, Spotify and Publishing Group Reach \$30 Million Settlement Agreement Over Unpaid Royalties, Billboard, Mar. 17, 2016, available at <http://www.billboard.com/articles/business/7263747/spotify-nmpa-publishing-30-million-settlement-unpaid-royalties>.
- ⁴⁰ See 37 C.F.R. §§385.10-.14.
- ⁴¹ *Id.* §385.12.
- ⁴² See Participants' Written Direct Statements, Determination of Rates and Terms for Making and Distributing Phonorecords (Phonorecords III), No. 16-CRB-00030PR (2018-2022), Rate proceedings, CRB, available at <http://www.loc.gov/crb/rate/16-CRB-0003-PR/statements>.
- ⁴³ Craig Smith, 78 Interesting Pandora Statistics and Facts (March 2017), DMR, <http://expandedramblings.com/index.php/pandora-statistics/> (last updated Mar. 10, 2017).
- ⁴⁴ Brad Hill, iHeart Radio Reaches 80-Million Registered Users, Radio & Internet News, Jan. 21, 2016, <http://rainnews.com/iheartradio-reaches-80-million-registered-users>.
- ⁴⁵ Anna Washenko, MusicWatch Time Spent Listening Data Sees Pandora in the Lead for 2016, Radio & Internet News, Jan. 19, 2017, <http://rainnews.com/musicwatch-time-spent-listening-data-sees-pandora-in-the-lead-for-2016>.
- ⁴⁶ For example, this list of simulcasts of radio stations in the vicinity of Oxnard, Cal., provided by iHeart Radio: <http://www.iheart.com/live/country/US/city/oxnard-ca-510> (last visited Mar. 8, 2017).
- ⁴⁷ See, e.g., Skips, Pandora.com, <http://help.pandora.com/customer/en/portal/articles/24601-skips> (last visited Mar. 8, 2017).
- ⁴⁸ See 17 U.S.C. §114(d)(2).
- ⁴⁹ See 17 U.S.C. §112(e).
- ⁵⁰ See 17 U.S.C. §114(f).
- ⁵¹ See Determination of Royalty Rates and Terms, U.S. Copyright Royalty Judges, No. 14-CRB-0001-WR (2016-2020) ("Web IV"), 81 Fed. Reg. 26,316 (May 2, 2016), available at <http://www.gpo.gov/fdsys/pkg/FR-2016-05-02/pdf/2016-09707.pdf>.
- ⁵² Glenn Peoples, D.C. Sets New Webcasting Rates: Free Streams Up, Paid Streams Down (With an Asterisk), Billboard, Dec. 16, 2015, available at <http://www.billboard.com/articles/business/6812915/new-webcasting-rates-free-streams-up-paid-streams-down-pandora>.
- ⁵³ See Final Determination of Rates and Terms, U.S. Copyright Royalty Judges, No. 2005-1 CRB DTRA, at 81 (Apr. 23, 2007), available at <https://www.loc.gov/crb/proceedings/2005-1/final-rates-terms2005-1.pdf>.
- ⁵⁴ Ed Christman, SoundExchange Paid Out \$884 Million in 2016, Billboard, Jan. 31, 2017, available at <http://www.billboard.com/articles/business/7676176/soundexchange-2016-royalties-884-million>.
- ⁵⁵ Angus MacDonald, Pandora Is Now Over 50% SoundExchange's Royalty Collections; Implications for Webcasting IV, Radio & Internet News, Apr. 10, 2014, <http://rainnews.com/pandora-is-now-over-50-soundexchanges-royalty-collections-implications-for-webcasting-iv/>.
- ⁵⁶ John Paul Titlow, Inside Pandora's Plan to Reinvent Itself—And Beat Back Apple and Spotify, Fast Company (Apr. 24, 2016, 8:00 AM), <http://www.fastcompany.com/3058719/most-innovative-companies>.
- ⁵⁷ See Todd Brabec & Jeff Brabec, PRO Licensing - Multiple Choices, Considerations and Results, AIMP Articles, http://www.aimp.org/aimpArticles/7/PRO_Licensing_Multiple_Choices,_Considerations_and_Results (last visited Mar. 8, 2017).
- ⁵⁸ Ben Sisario, New Venture Seeks Higher Royalties for Songwriters, N.Y. Times, Oct. 29, 2014, available at <http://www.nytimes.com/2014/10/30/business/media/new-venture-seeks-higher-royalties-for-songwriters.html>.
- ⁵⁹ Ingrid Lunden, Kobalt Quietly Acquired AMRA to Launch Its Own Global Collection Group for Digital Music, TechCrunch (Jun. 8, 2015), <http://techcrunch.com/2015/06/08/kobalt-quietly-acquired-amra-to-launch-its-own-global-collection-group-for-digital-music>.

⁶⁰ See *United States v. Broadcast Music, Inc.*, 275 F.3d 168 (2d Cir. 2001) (reviewing history of ASCAP and BMI consent decrees and collecting cases).

⁶¹ See *Radio Music License Committee, Inc. v. SESAC, Inc.*, et al., No. 2:12-cv-05807-CDJ, at 20 (E.D. Pa. June 26, 2014).

⁶² See *Radio Industry and SESAC Reach Settlement*, SESAC, Radio Music License Committee, available at <http://www.radiomlc.org/pages/6282116.php> (last viewed Mar. 30, 2017).

⁶³ See Statement of the Department of Justice on the Closing of the Antitrust Division's Review of the ASCAP and BMI Consent Decrees, at 2 (Aug. 4, 2016), available at <http://www.justice.gov/atr/file/882101/download>.

⁶⁴ *Id.* at 3.

⁶⁵ See *United States v. Broadcast Music, Inc.*, No. 64 5iv. 3787, 2016 WL 4989938, at *3 (S.D. N.Y. Sept. 16, 2016).

⁶⁶ Ed Christman, Dept. of Justice Appeals BMI Consent Decree Decision, *Billboard* (Nov. 11, 2016), available at <http://www.billboard.com/articles/business/7573537/doj-appeal-bmi-consent-decree-decision-fractional-licensing>. The Second Circuit case number is 16-3830.

⁶⁷ See Press Release, ASCAP & BMI, ASCAP and BMI Join Forces to Fight the Department of Justice's Interpretation of Their Consent Decrees (Aug. 4, 2016), available at <http://www.ascap.com/press/2016/08-04-ascap-bmi-join-forces-to-fight-doj>.

⁶⁸ See *What ASCAP Members Need to Know About the Pandora Rate Court Decision*, ASCAP, <http://www.ascap.com> (last visited Mar. 20, 2017).

⁶⁹ See Ben Sisario, *Ruling in Royalty Case Gives BMI a Victory Against Pandora*, *N.Y. Times*, May 14, 2015, available at <http://www.nytimes.com>.

⁷⁰ See Robert Cookson, *Losses Point to Bleak Future for Music Streaming Services*, *Financial Times* (Dec. 3, 2015), available at <http://www.ft.com>.

Copyright 2017 Los Angeles Lawyer. Reprinted with permission.

About the Panelists:

Richard Conlon, Chief External Affairs Officer, SoundExchange

Richard Conlon manages SoundExchange's relationships with the company's wide array of constituents. He oversees the company's corporate communications, industry relations and public policy efforts, helping to shape the company's vision and then put that vision into action. Richard also sits on the SXWorks Board of Directors.

Prior to joining SoundExchange, Richard was a Principal at Rights Management Holdings LLC, where he was a senior strategic advisor to major music publishers, collective rights management organizations, record labels and financial institutions involved in the entertainment space. Previously, he was Senior Vice President Corporate Strategy, Communications & New Media. Richard launched BMI's digital rights licensing division.

Richard holds a B.A. in English from Boston College and earned his Master's Degree in Communications Management from the Annenberg School of Communications at the University of Southern California.

Maria Gonzales, Yardnoise, Co-Partner

Maria is a leader in the world of e-commerce and merchandising as displayed through her groundbreaking and innovative campaigns for the likes of HIM, The Jabbawoockeez, Kreyashawn, Madonna, Michael Bubl  and T. Mills. Many of her e-commerce and merchandising campaigns sold out or became well sought-out collectibles. She has worked at Roadrunner Records, Bravado, BandMerch, Warner Bros. Records, T. Mills Records, and owns her management and music production company, Yardnoise.

Throughout her career in the music industry Maria has worn several hats: Artist and Media Relations, A&R, Artist Manager, Marketing and Merchandiser, while working with an eclectic roster of talents.

Michael Crepezzi, BMI, Executive Director, Distribution and Administration Services

Michael Crepezzi is based in BMI's Los Angeles office. In his role, he works closely with the Operations and Information Technology departments and is an integral part of the team responsible for the ongoing development of royalty payment policies and procedures with regards to the use of music in audio-visual productions performed on the Internet and in other new media outlets. Crepezzi also continues to execute his responsibilities regarding BMI's music use reporting and television performance related initiatives. In addition, he maintains and develops relationships within the music publishing, composer and music production communities by answering inquiries and educating key constituents on BMI policies and procedures on a daily basis.

Crepezzi joined BMI in 1993 as Associate Director, Performing Rights. Since joining BMI, he has continued to elevate throughout the company receiving several promotions including his current title as Executive Director. Prior to joining BMI, he was Royalty and Accounting Manager at both Disney Music Publishing and Capitol Records' publishing divisions, Screen Gems/Colgems Music.

Bill Colitre, Music Reports, Inc., Vice President and General Counsel

In his role, Colitre serves as counsel to Music Reports, strategic consultant to its clients, and head of the company's Licensing and Royalty Services divisions, as well as its Business Development lead.

Bill began his legal career in the Entertainment Department of Loeb & Loeb, LLP, where he was a founding member of the iLaw Group and later served as counsel to the firm of Altschul & Olin, LLP, the Roll International Corporation (parent company of Fiji Water LLC, Teleflora LLC and other enterprises), and CBS Paramount Network Television Home Entertainment.

About the Moderators:

Reggie Calloway, Sound Royalties, Director of Music Royalty Funding

Reggie Calloway has received five Grammy nominations including the R&B Songwriter of the Year for the hit song "Casanova," in 1987.

In 2011, he began providing financing for artists and publishers who needed a way to monetize their royalty assets. Reggie directed a sales team that was instrumental in bringing to the market thousands of song titles including the music of artists Whitney Houston, 50 Cent, John Legend, Will Smith, 3 Doors Down, J Lo, Lil Wayne, Justin Timberlake, Timbaland, Earth Wind and Fire, Travis Tritt, and more.

Best known as the founder of the popular techno-funk band, Midnight Star, Reggie led the group to international success writing, producing, and arranging a string of top mega #1 hits including "Operator," "No Parking on the Dance Floor," and "Freak-a-zoid." He has penned songs for LeVert, Teddy Pendergrass, Gladys Knight and Natalie Cole. One of Reggie's original compositions "I'll Be Good for You," was featured on *NSYNC's 10x's-platinum CD, *No Strings Attached*—the best-selling album of the last decade.

Rene Merideth, Exploration, Co-founder and COO

Rene Merideth is the co-founder and COO of Exploration, a comprehensive multi-platform digital rights administration company servicing songwriters, publishers, labels, and other new media companies around the globe. Prior, she was the VP of Operations at AdShare.tv, Director of Licensing/Head of West Coast Licensing for BMG Chrysalis and Bug Music, and Manager, Mechanical Licensing for Windswept Holdings.

Rene began her career in the country churches of Southern Missouri as a roadie for her Grandfather's gospel band. She worked with various acts of all genres in the St. Louis area, until she headed off to college, receiving a BA in Music Business from Belmont University in Nashville. While working across many aspects of the industry, she found her niche in artist management and music publishing.

Moving to Los Angeles, she started working for Windswept Publishing and survived two high-profile mergers to become Head of West Coast licensing for BMG. Over the years, she has worked on music by artists including Alison Krauss, Vince Gill, Kings of Leon, KISS, Bruno Mars, Beyonce, Eminem, Pink and Pete Townshend, among others.

In 2012, she founded her consulting firm, Red Dragon Management, with the goal of educating creators and helping the little guys have a voice in their industry.

Exploration

Exploration proud supporter of :
What's In Your Wallet.....Show Me The Money

SAVE THE DATE:

Tuesday, April 10th, 2018

“Latin Music Panel”

Moderated by Tomas Cookman/CEO of Industria Works
Panelists: TBA

Tuesday, May 15th, 2018

“Film & Television Music Panel”

Moderated by Jonathan David Neal and Eric Palmquist
Panelists: Deborah Lurie, Wendy & Lisa, and Kathryn Bostic

Join us at the Sportsmen's Lodge Event Center 12833 Ventura Blvd., Studio City, CA 91604

6:15 PM Check-In | 6:30 PM Cocktails 7:00 PM Dinner

Please visit our website, theccc.org, for more information soon!

