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NEWSLETTER

An Entertainment Industry Organization

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The President's Corner

Hello Friends –

My goal this year was to build upon the great traditions of the CCC, and offer some new ideas & perspectives. This month's meeting is an example of that – a truly interactive presentation that should be both fun and informative. In addition, we will be sending you an email next week with a survey – please take the time to complete the survey, and let us know of your suggestions.

Next month we'll have our Annual Holiday Party at Vitello's Restaurant in Studio City – we'll send the details shortly, and in the meantime please reserve Monday December 17th in your calendars – look forward to seeing you there!!

All the best,

Eric

Eric Palmquist
President, California Copyright Conference.

§ 4.03 The Six Exclusive Rights Under Copyright

There are six exclusive rights accorded by the Copyright Act to copyright owners, and these rights correspond to specific licensing procedures and organizations in the music industry. All of these rights can be negotiated, licensed, bought and sold in virtually unlimited ways, because copyright is "infinitely divisible" with respect to exclusive rights, time, and territory.[1] However, the music industry is a special case because there are categories of exclusive rights where the license rates and fees are not freely negotiated by the owner, but are instead set by Congress, the Copyright Office, or collective licensing organizations that handle licensing on behalf of copyright owners.

Those collective licensing organizations closely track the different exclusive rights. For example, the performing rights organizations ASCAP, BMI, and SESAC were established by the music publishing industry to administer the licensing for public performance. Likewise, many music publishers use the Harry Fox Agency, a collective that administers mechanical licensing. SoundExchange is a collective organized by the recording industry and authorized under the Copyright Act to administer digital performance rights in sound recordings for the Internet and satellite radio.

The following chart summarizes the six rights, and the leading music industry organizations that administer those rights:

Exclusive Rights under 17 U.S.C. § 106	Collective Licensing Organization Involved	Situations where copyright owner licenses without using a collective
Reproduction § 106(1)	For phonorecords and "mechanical" licensing: Harry Fox Agency	Where publisher is not a member of Harry Fox and issues their own mechanical licenses, and situations other than phonorecords (e.g. sync and master licenses for film/tv)
Derivative Works § 106(2)	For phonorecords and "mechanical" licensing: Harry Fox Agency	Other than phonorecords: copyright owner (e.g. an arrangement of a musical work or a change in the lyrics).
Distribution § 106(3)	For phonorecords and "mechanical" licensing: Harry Fox Agency	Other than phonorecords: copyright owner
Public Performance § 106(4)	For nondramatic musical works - performing rights organizations: ASCAP, BMI, SESAC	For dramatic musical works: copyright owner (or where copyright owner chooses to license public performance themselves)
Display § 106(5)	Copyright owner	Copyright owner
Digital Performance of Sound Recordings § 106(6)	SoundExchange for streamed performances	Copyright owner for downloads.

It is *how* music is *used* that determines which of the six exclusive rights are in play; the key to understanding what type of licensing regime and organization will be involved.

[1]—Reproduction

The first exclusive right given copyright owners is the right to reproduce a work. The "how" of the reproduction right is the physical act of making copies.[2] This right applies to the reproduction of even a portion of the copyrighted work, and may apply to the creation of only one copy.[3]

[2]—Derivative Works

[a]—Derivative Works in the Music Industry

Copyright owners are also granted the right to control the creation of derivative works.[4] To illustrate: a musical composition exists prior to any sound recording of that composition. The sound recording is a derivative work based on the composition.[5]

Similarly, an arrangement of a musical composition is a derivative work based on the original underlying musical composition. The creator of the derivative work will be entitled to copyright ownership, but only with respect to the new material added, so long as the work meets originality thresholds in the form of some "substantial" variation from the underlying work, and has a license from the owner of the underlying work.[6]

With respect to song lyrics, altering the lyrics in any substantive way creates a derivative work that requires the permission of the copyright owner. Note that altering song lyrics for purposes of legitimate criticism or commentary may rise to the level of a "transformative" fair use.[7] Courts ultimately make such determinations, however, on a *sui generis* basis.

[b]—Creating Derivative Work Musical Arrangements in Connection with Sound Recordings

Mechanical licensing accords the recording artists a special privilege—the right to create derivative works in the form of arrangements of the underlying musical composition, subject to the following limitations:

- the musical arrangement may be made "to the extent necessary to conform it to the style or manner of interpretation of the performance involved; but
- the arrangement shall not change the basic melody or fundamental character of the work; and
- shall not be subject to protection as a derivative work, except with the express consent of the copyright owner. This means that, for example, the privilege would allow an arranger to score a song for full orchestra for the purposes of making a recording, but the arranger would not then have any further copyright ownership of that arrangement, and could not, for example, sell copies of the arrangement without a license from the copyright owner of the underlying musical composition.[8]

[3]—Distribution

The Act also gives copyright owners the exclusive right to distribute copies of their works.[9] The distribution right is tied to the concept of publication, as

"the distribution of copies or phonorecords of a work to the public by sale or other transfer of ownership, or by rental, lease, or lending. The offering to distribute copies or phonorecords to a group of persons for purposes of further distribution, public performance, or public display, constitutes publication. A public performance or display of a work does not of itself constitute publication."[10]

Under copyright law, a business that seeks to reproduce and distribute copies of a work must be certain to obtain *both* reproduction and distribution rights. The mechanical license paid by a record company to a music publisher for the right to include a musical composition on a phonorecord encompasses all three of the rights considered so far: the right to reproduce copies of the phonorecord; the right to create a derivative work (a sound recording) based on the musical composition; and the right to distribute the phonorecord.

[4]—Public Performance

The public performance of a musical composition (for profit) is the right most closely allied with the musical experience itself, because it is based on the performance of a musical composition for an audience. It is different from rights such as reproduction and distribution that depend on tangible physical or digital "manifestations."

The Copyright Act defines a public performance as follows:

To perform or display a work "publicly" means—

1. to perform or display it at a place open to the public or at any place where a substantial number of persons outside of a normal circle of a family and its social acquaintances is gathered; or
2. to transmit or otherwise communicate a performance or display of the work to a place specified by clause (1) or to the public, by means of any device or process, whether the members of the public capable of receiving the performance or display receive it in the same place or in separate places and at the same time or at different times.[11]

The public performances and transmissions referred to cover a very broad range of means by which that music can be heard, including radio and television broadcasts, live performances in concert halls and clubs, "on hold" music for phone systems, background music in shopping malls and music on the Internet.[12]

[a]—Performing Rights Societies

The genesis of the nondramatic performance right was recognized in the courts in the case involving Victor Herbert, the American composer and one of the founders of the American Society of Composers, Authors and Publishers ("ASCAP"). In the early years of the twentieth century, Herbert enjoyed the exclusive "grand right" to present staged productions of his works. However, the right to publicly perform nondramatic excerpts, such as individual songs, was not clearly protected.[13] While Herbert was out to dinner one evening, he heard one of his compositions being performed for the clientele. Realizing that the restaurant was profiting from music that attracted customers, and that he, the composer of the work, was not being compensated, Herbert and his publisher brought suit against the restaurant.

The lower courts held that although Herbert had exclusive dramatic performance rights with respect to the staged "grand rights," there was no exclusive right of public performance with respect to song excerpts sold as sheet music and performed in a nondramatic setting, without any admission charge. Supreme Court Justice Oliver Wendell Holmes reversed, and memorably explained how the public performance of nondramatic works had value, and contributed to profits, in a commercial setting such as a restaurant, where music provided "a luxurious pleasure not to be had from eating a silent meal."[14]

At this point, music publishers and songwriters recognized that no single composer or music publisher had the resources to monitor music performances in every venue and in every available medium. Herbert helped to create a "performing rights society" ("PRS") that could represent all music publishers and songwriters, and through strength in numbers, have the business, accounting, and administrative resources to monitor public performances, issue licenses, collect license fees, and distribute those license fees to its publisher and songwriter members.[15]

ASCAP is an unincorporated membership association, formed in 1914 by and for the benefit of its composer, lyricist, and music publisher members, who also comprise the board of directors. ASCAP licenses public performing rights to users wherever and via the myriad technological methods by which music is publicly performed.[16]

In 1939, a second performing rights society, Broadcast Music, Inc. ("BMI"), was founded. BMI is a New York corporation formed by broadcasters, whose shareholders and board of directors are comprised of current or former broadcasters.[17]

ASCAP and BMI initially held an exclusive monopoly over the licensing of performing rights, which was challenged in the courts. As a result of antitrust litigation brought by the government against both ASCAP and BMI, ASCAP now operates under a consent decree.[18] Anyone requesting a blanket license for public performances will be granted the license subject to payment of a fee. Should the user object to the license fee, they have the right to petition the district court for a ruling. The court issues a determination of fees after a bench trial.[19] Moreover, ASCAP's rights are non-exclusive; ASCAP members retain the right to license performing rights directly to users.[20] BMI is also subject to consent decrees, and licenses non-exclusively.[21]

While ASCAP and BMI are the leading performing rights societies with respect to the number of songwriters, songs, and publishers they represent, a third, smaller performing rights society exists. SESAC, which was originally the "Society of European State Authors and Composers," is now a purely United States-based entity.

Composers and songwriters can belong to only one performing rights society at a time, but their music publishers typically join each society to which their composers belong. Publishers must use different business names for each society to avoid confusion, but need not actually form separate corporations for their membership in each PRS.

Performing rights societies operate on a non-exclusive basis, meaning that publisher members can choose to license performing rights directly to a user for a specific usage, which is known as "source" or "program" licensing.[22]

[b]—Blanket Licensing

Most of the licenses issued by PRS's are "blanket" licenses, because payment of the fee results in a license to all the copyrighted works in the repertoire of that PRS.[23] In order to be completely licensed for all copyrighted nondramatic songs, and be free to perform any music it

chooses, a radio station, for example, will enter into blanket licenses with all three PRS's. By virtue of agreements with similar performing rights societies in other countries, licenses with the three American PRS's ultimately cover most of the copyrighted music in the world today.

[c]—Direct Royalty Payments: Author Share and Publisher Share

Performing rights societies distribute the royalties in two halves, or "shares." One half goes to the music publishers and copyright owners of the compositions (the "publisher share"), and the other half goes directly to the composers and songwriters (the "author share"). This is an important distinction to bear in mind. All categories of music publishing income, other than performing rights royalties, are "filtered" through the publisher, who then remits to the author the contractual share of the revenue in the form of author's royalties.

[d]—Exceptions for Grand Rights

Performing rights societies license only "small rights" non-dramatic works such as typical popular songs. Dramatic and staged works, such as operas, musical theatre, and ballet are licensed directly by the music publisher, not by ASCAP, BMI, or SESAC. This holds true with respect to, for example, radio broadcasts of operas, which would not be licensed by any of the PRS's. Instead, a radio station wishing to broadcast the copyrighted opera would have to obtain a grand rights performance license directly from the music publisher.[24]

[e]—Registration of Works with Performing Rights Societies

The PRS can only pay royalties if the work is registered with its database.[25] In order to participate in the PRS's licensing efforts and receive income from performances, the music publisher must first apply to the PRS to become a publisher member or affiliate. After establishing membership or affiliation, the publisher must then register with the PRS every work the publisher represents, and every new work the publisher acquires.

The registration of the "title" must indicate the names of all authors of the work, and their percentage of the "writer's" share. For example, if there are two songwriters, the title registration will indicate both as authors, and will indicate they each receive 50% of the author's share of royalties. As for the other half of royalties, the "publisher share," that also can be divided between more than one publisher.

Total royalty	$200
Composer (entire author share)	$100
Publisher share	$100

Two authors, a composer and lyricist, split the author share:

Total royalty	$200
Composer (half of author share)	$50
Lyricist (half of author share)	$50
Publisher	$100

Two authors, each with a different publisher, split royalties:

Total royalty	$200
Composer (half of author share)	$50
Lyricist (half of author share)	$50
Composer's publisher (half of publisher share)	$50
Lyricist's publisher (half of publisher share)	$50

[f]—Limitations to the Public Performance Right

The exclusive rights of a copyright owner under Section 106 of the Copyright Act are subject to limitations set forth in Sections 107 through 122, which contain the Act's fair use guidelines, the first sale doctrine, and various exemptions and compulsory licensing schemes in which Congress sets license rates.[26]

The limitations on the right of public performance are concentrated in Section 110, which contains an extensive list of situations where no performance licenses are required.[27] The exemptions must be reviewed closely, however, to confirm if a given performance meets exemption requirements.

Places of worship are exempt from obtaining performance licenses for music performed in the course of religious services, provided that the music is either non-dramatic, or a dramatic work of a religious nature.[28] That exemption does not apply to commercial performances held in a place of worship.[29]

Section 110 also exempts performances of non-dramatic works in the course of face-to-face teaching at nonprofit educational institutions, including some related television transmissions.[30] There are also exemptions for nonprofit and fundraising performances at any location, provided that none of the presenters or participants receive compensation, and provided that any proceeds, after deduction of reasonable production costs, are used exclusively for educational, religious, or charitable purposes.[31]

Other notable exemptions include performance of music at retail music establishments where the performances are meant to promote the sale of the recordings,[32] and performances of non-dramatic musical works by a governmental body or nonprofit agricultural or horticultural

organization in connection with an agricultural or horticultural fair. This latter exemption does not extend to for-profit performances by concessionaires or businesses at the event.[33]

[g]—Movie Theatres

In the United States, movie theatres are not licensed by the performing rights societies.[34] Movie producers obtain the performing rights for movies when they obtain synchronization licenses from the copyright owners.[35]

[h]—Foreign Performances

Performing rights societies exist in most countries, and have cooperative agreements to remit royalties from their respective territory to their fellow societies. ASCAP, BMI, and SESAC will receive and forward to their members foreign accountings. Many publishers have "sub-publishers" in foreign territories whose job is to collect monies from all sources in that territory. The sub-publisher will belong to the local PRS in its territory. It collects and forwards to the U.S. publisher any publisher-share royalties earned in the foreign territories. The author's share, however, will usually be transferred from the foreign PRS to the PRS in the United States, and then to the authors, without going through the publishing company.[36]

[5]—The Display Right

Another exclusive right given copyright owners is the right to publicly display a work. In the pre-Internet era, the display right had less relevance to the music industry. However, in the digital age, the display of song lyrics on the Internet and via technology such as karaoke machines has greatly enhanced the importance of the display right.[37]

[6]—Digital Performance Rights in Sound Recordings

The first five rights in Section 106 of the Copyright Act apply "across the board" in all technologies and distribution channels. The sixth right—the "digital performance right in sound recordings"—is more limited in scope.[38] It is a public performance right that is enjoyed not by songwriters and music publishers, but by performing artists and their record companies. Instead of being broadly applicable across all media such as television, terrestrial radio broadcasts (the traditional technology of through-the-air broadcast of radio signals), and the Internet, it is limited to so-called "digital performance" that takes place on the Internet, such as on Web sites that stream sound recordings, and on satellite radio

Sound recordings were not protected under the Copyright Act until 1972.[39] Thus, when sound recordings first achieved statutory protection in 1972, it was limited and did not include public performance. When new digital technologies, including the Internet, emerged in the 1990s, Congress granted copyright owners of sound recordings a limited public performance right limited to the new digital media of the Internet and satellite broadcasting with the Digital Performance Right in Sound Recordings Act of 1995,[40] and the closely related Digital Millennium Copyright Act of 1998 (DMCA).[41] The tradeoff for the new right is that under certain conditions, in particular where a recording is streamed on the Internet, the license fees are compulsory, not subject to negotiation by the copyright owners, and set by the Copyright Royalty Judges at the Copyright Office. Although most other countries have a performance right for sound recording copyright owners on terrestrial radio, the United States limits the right to digital, online and satellite technology.[42]

[a]—Types of Webcasters

[i]—Commercial Webcaster/Broadcast Simulcaster

A "commercial webcaster/broadcast simulcaster" is a "radio station that provides pure streams of musical works in a noninteractive, nonsubscription digital audio transmission service, including retransmissions on the Internet of terrestrial radio broadcast transmissions."[43] The primary purpose of the service must be to provide audio or other entertainment programming and not to sell, advertise, or promote particular products or services other than sound recordings, live concerts, or other music-related events.[44]

To be "noninteractive," a service may not offer "on-demand" access to individual sound recordings or offer programs that are "specially created for the recipient." Playing requests does not make a service interactive, provided that the service does not substantially consist of sound recordings that are performed within one hour of the time they are requested or at a designated time.[45]

[ii]—Noncommercial Webcaster

A "noncommercial webcaster/broadcast simulcaster" is any webcaster/simulcaster that (1) is exempt from taxation under Section 501 of the Internal Revenue Code of 1986;[46] (2) has applied in good faith to the Internal Revenue Service for exemption from taxation under Section 501 of the Internal Revenue Code and has a commercially reasonable expectation that such exemption shall be granted; or (3) is operated by a State or possession or any governmental entity or subordinate thereof, or by the United States or District of Columbia, for exclusively public purposes.

[iii]—Preexisting Subscription Service

A "preexisting subscription service" offers sound recordings by means of non-interactive, audio-only subscription digital transmissions that existed and offered such transmissions to the public for a fee on or prior to July 31, 1998.[47]

[iv]—Preexisting Satellite Digital Radio Service

A "preexisting satellite digital audio radio service" ("SDAR") is a subscription satellite digital audio radio service provided pursuant to a license issued by the FCC on or before July 31, 1998, and any renewal of such license to the extent of the scope of the original license.[48] The rates and terms applicable to the SDARS are the subject of a license agreement entered into between SoundExchange and the two SDAR services.[49]

[v]—Business Establishment Service

A "business establishment service" is a background music service that digitally delivers music to businesses to be played in stores, restaurants, offices, or retail locations.[50] The services are exempt from sound recording performance royalties under section 114(d)(1)(C)(iv) of the Copyright Act, providing they do not exceed the sound recording performance complement. However, business establishment services must obtain a compulsory license under section 112(e) to make ephemeral recordings for the sole purpose of facilitating its exempt transmissions.[51]

[b]—Types of Uses for Digital Performing Rights for Sound Recordings

[i]—Non-Interactive Streaming

"Streaming" means that listeners can access and hear music on their computers without the storage of data files on the users' hard drives. It is similar to the terrestrial radio experience.[52] A terrestrial radio station that streams its signal on the Web falls into this category, for example. If a Web site or satellite station streams music, and the user is passive, i.e., cannot "interact" by selecting specific musical selections, a compulsory license scheme allows the Web site to obtain a statutory license for performing the sound recordings at a rate set by the Copyright Royalty Board.[53]

Streaming is subject to the Sound Recording Performance Complement, which is a set of restrictions aimed at keeping the streamed music random enough so that listeners do not have advance notice of particular songs to be played.[54] Non-interactive streaming of sound recordings is subject to compulsory licensing under § 114(d)(2), administered by SoundExchange, with license fees determined by the Copyright Royalty Board, and published in the Federal Register.[55]

Pure streams constitute a public performance and must be licensed by ASCAP, BMI, and SESAC. Because pure streams do not involve a download other than the ephemeral copies made to facilitate transmission under Section 112(e), pure non-interactive streams are not currently subject to mechanical licensing of the underlying musical composition.

A Web site that streams sound recordings for listeners on a non-interactive basis needs two types of "blanket" licenses: (1) the traditional ASCAP/BMI/SESAC blanket licenses for the public performance of the underlying musical compositions on the Web site; and (2) a statutory license administered by SoundExchange for the digital performance of the sound recordings themselves.

[ii]—Interactive or On-Demand Streaming

To the extent a Web site offering streamed music allows the user to select specific musical works, the experience is deemed to be "interactive" or "on-demand." On-demand streams of sound recordings fall outside the statutory licensing scheme of section 114(d)(2) which is limited to noninteractive "pure" streaming. Web sites offering interactive or on-demand streams are subject to negotiated licenses with the sound recording copyright owners[56] and must be licensed by ASCAP, BMI, and SESAC in order to obtain the performance rights for the underlying musical composition.

With respect to the reproduction and distribution licensing of the underlying musical compositions embodied in the sound recordings, on-demand streams and so-called "limited" or "tethered" downloads (downloads that are for limited periods of time, then expire, sometimes called "conditional downloads") are licensed pursuant to a ruling by the Copyright Office's Copyright Royalty Board, which set the royalty rate per each stream via a complex formula based on 10.5% of the online service's revenues.[57]

[iii]—Digital Phonorecord Deliveries

Where the user can download and retain a file, through, for example, iTunes and other online digital music retailers, a digital phonorecord delivery occurs, and no compulsory licensing scheme applies.[58] The license is discretionary with the copyright owner and not represented by any collective licensing organization.

As for the underlying musical composition, the mechanical royalty is a Digital Phonorecord Download mechanical royalty that must be paid by the record company to the music publisher with respect to each recording digitally delivered. The DPD rate is the same as the rate for "physical" recordings.[59]

As regards the performance rights, courts have held that a digital download of a musical work is not a performance of that work and therefore does not invoke the performance right.[60]

[7]—Licensing Procedures

[a]—Filing of Notice

An online service that intends to offer non-interactive streamed Webcasts pursuant to the statutory licensing under Section 114 must first file a Notice of Use of Sound Recordings Under Statutory License.[61] The notice requests the Web site to identify the type of service they are: either a new subscription service or one of the preexisting services under the Copyright Act.

[b]—Reporting Requirements

The online service may report usage of sound recordings on either a per-performance basis, or an aggregate tuning hour basis.[62] The online service must file regular reports of use in the form of electronic data files. The reports must include specific identifying information that will enable SoundExchange to distribute royalties to those copyright owners and performers entitled to such royalties:

- name of the service making transmissions;
- identification of the transmission category from one of eleven choices;
- name of the featured artist;
- sound recording title;
- album title and marketing label OR International Standard Recording Code ("ISRC"); and
- aggregate tuning hours, channel or program name, and play frequency OR actual total performances.

1 17 U.S.C. § 201(d)(2). "Any of the exclusive rights comprised in a copyright, including any sub-division of any of the rights specified by section 106, may be transferred as provided by clause (1) and owned separately. The owner of any particular exclusive right is entitled, to the extent of that right, to all of the protection and remedies accorded to the copyright owner by this title."

2 Whether the copies are physical or digital copies also comes into play. The Copyright Act defines "copies" as "material objects, other than phonorecords, in which a work is fixed by any method now known or later developed, and from which the work can be perceived, reproduced, or otherwise communicated, either directly or with the aid of a machine or device. The term "copies" includes the material object, other than a phonorecord, in which the work is first fixed." 17 U.S.C. § 101

3 Typical examples in the music industry would include the act of making copies of a sound recording and the musical composition it contains on a compact disc, or as a digital file, or as part of an audiovisual work on a DVD or other digital media or transmission. There are other types as well: copies made as part of printed music editions; copies of song lyrics that might be made as part of CD packaging or on merchandise; and copies of works for ring tones on mobile phone devices.

4 A derivative work is defined in the Copyright Act as "a work based upon one or more preexisting works, such as a translation, musical arrangement, dramatization, fictionalization, motion picture version, sound recording, art reproduction, abridgment, condensation, or any other form in which a work may be recast, transformed, or adapted. A work consisting of editorial revisions, annotations, elaborations, or other modifications, which, as a whole, represent an original work of authorship, is a "derivative work". 17 U.S.C. § 101. See also, Woods v. Bourne, 60 F.3d 978, 989 (2d Cir. 1995) "[S]ound recordings are clearly derivative works." 60 F.3d at 989.

5 The sound recording will typically have a different copyright owner (the record company) as compared to the underlying musical composition (owned by the music publisher).

6 See L. Batlin & Son, Inc. v. Snyder, 536 F.2d 486, 491 (2d Cir.) (*en banc*), *cert. denied* 429 U.S. 857 (1976).

7 See Campbell v. Acuff-Rose Music, Inc., 510 U.S. 569, 114 S.Ct. 1164, 127 L.Ed.2d 500 (1994) (rap group's parody of song "Pretty Woman" may be a transformative fair use within the meaning of § 107 of the Copyright Act). See also, 17 U.S.C. § 107, the fair use provisions of the Copyright Act, discussed in greater detail in Chapter 1, *supra*.

8 17 U.S.C. § 114(a)(2). In the event a recording artist wanted to perform their orchestral arrangement live in concert, there would not typically be any objection from the copyright owner of the underlying musical composition, although technically, and perhaps only theoretically, the copyright owner could insist that the arrangement, as used outside the context of a sound recording, be licensed. The public performance licenses that would cover any live performances do not include any right to make arrangements, they only address the performance right. Under *Woods v. Bourne*, 60 F.3d 978 (2d Cir. 1995), at least one court has doubted whether so-called "standard" arrangements of popular songs rise to the level of copyrightability. However, to the extent a performing artist wishes to further exploit their arrangement, this would be an infringement unless duly licensed by the copyright owner of the underlying composition. Note that musical arrangements are one of the types of works that can be works made for hire under the definition of a commissioned work made for hire in section 101 of the Copyright Act. It is common for the owner of the underlying composition to allow arrangements to be exploited only on the basis of the copyright owner becoming the work made for hire author and owner of the arrangement. It may still be possible for the arranger to receive some sort of royalty in that case, depending on the approach favored by the copyright owner.

With respect to musical arrangements, remember that in order for a work to qualify as a derivative work, it must be independently copyrightable. See Woods v. Bourne, *supra* at 990. To be copyrightable, a derivative arrangement must contain sufficient originality of expression, such that there is "at least some substantial variation from the underlying work, not merely a trivial variation." See L. Batlin & Son, Inc. v. Snyder, 536 F.2d 486, 491 (2d Cir.) (*en banc*), *cert. denied* 429 U.S. 857 (1976). While many musical arrangements may indeed meet that standard, in at least one case, courts have held that even a well executed, but standard, piano/vocal arrangement of a popular song such as those provided with sheet music, did not contain sufficient originality under copyright law to rise to the level of an independently copyrightable arrangement. See *Woods*, *supra*, at 992-993.

9 See e.g., A&M Records v. Napster, 239 F.3d 1004, 1014 (1991) (stating the distinction between reproduction and distribution rights as follows: "plaintiffs have shown that Napster users infringe at least two of the copyright holders' exclusive rights: the rights of reproduction, § 106(1); and distribution, § 106(3). Napster users who upload file names to the search index for others to copy violate plaintiffs' distribution rights. Napster users who download files containing copyrighted music violate plaintiffs' reproduction rights.").

10 17 U.S.C. § 101.

11 17 U.S.C. § 101.

12 See generally, www.ascap.com; www.bmi.com; www.sesac.com (last visited May 16, 2011). The Web sites for each PRS detail the many difference types of licenses available for different public performance scenarios.

13 Herbert v. Shanley Co., 229 F. 340 (2d Cir. 1916), *rev'd* Herbert v. Shanley Co., 242 U.S. 591, 593, 37 S.Ct. 232, 61 L.Ed. 511 (1917). Among the rationales was that there was no admission charge for the music, it was presented "for free" for the enjoyment of diners. The lower courts held that the hotel did not infringe Herbert's public performance rights.

14 Herbert v. Shanley Co., 242 U.S. 591, 37 S.Ct. 232, 61 L.Ed. 511 (1917).

"If the rights under the copyright are infringed only by a performance where money is taken at the door, they are very imperfectly protected. Performances not different in kind from those of the defendants could be given that might compete with and even destroy the success of the monopoly that the law intends the plaintiffs to have. It is enough to say that there is no need to construe the statute so narrowly. The defendants' performances are not eleemosynary. They are part of a total for which the public pays, and the fact that the price of the whole is attributed to a particular item which those present are expected to order is not important. It is true that the music is not the sole object, but neither is the food, which probably could be got cheaper elsewhere. The object is a repast in surroundings that to people having limited powers of conversation, or disliking the rival noise, give a luxurious pleasure not to be had from eating a silent meal. If music did not pay, it would be given up. If it pays, it pays out of the public's pocket. Whether it pays or not, the purpose of employing it is profit, and that is enough."

Id. at 593.

15 The Copyright Act defines a performing rights society "an association, corporation, or other entity that licenses the public performance of nondramatic musical works on behalf of copyright owners of such works, such as the American Society of Composers, Authors and Publishers (ASCAP), Broadcast Music, Inc. (BMI), and SESAC, Inc." 17 U.S.C. § 101. The PRS's retain a small percentage of the gross licensing revenue to cover their administrative costs.

16 Venues include local television and radio stations, broadcast and cable/satellite television networks, Internet service providers, cable systems operators and direct broadcast satellite services, restaurants, night clubs, universities and colleges, hotels, concert promoters, sports arenas, roller skating rinks and other businesses. See United States v. ASCAP, 2008 WL 1967722 at *5 (S.D.N.Y. April 30, 2008), determining license fees for performances of music online, and also describing the activities of ASCAP.

17 See www.bmi.com. See also, United States v. ASCAP, 2008 WL 1967722 at *10 (S.D.N.Y. April 30, 2008) (describing BMI and noting the differences between BMI and ASCAP).

18 See: United States v. ASCAP, 1940-43 Trade Cas. (CCH) ¶ 56,104 (S.D.N.Y. 1941); United States v. BMI, 1940-43 Trade Cas. (CCH) ¶ 56,098 (S.D.N.Y. 1941). In 1941, the United States brought a civil actions against ASCAP and BMI for alleged violations of the Sherman Antitrust Act. The actions were settled by the entry of a consent decree. The 1941 ASCAP consent decree was amended on March 14, 1950 to form the Amended Final Judgment, and again on January 7, 1960. The terms of those orders regulated the manner in which ASCAP could operate within the music industry and gave the Southern District of New York exclusive oversight jurisdiction. The Amended Final Judgment was again amended on June 11, 2001. See United States v. ASCAP, 2001 WL158999 (S.D.N.Y. June 11, 2001).

19 Thus, there is continual "rate court" litigation in the Southern District of New York. See *United States v. ASCAP*, N. 18 *supra*.

20 *Id.* at 14.

21 See United States v. BMI, 1940-43 Trade Cas. (CCH) ¶ 56,098 (S.D.N.Y. 1941).

22 See Buffalo Broadcasting Co., Inc. v. ASCAP, 744 F.2d 917 (2d Cir. 1984) (blanket licensing of local television stations was not an unreasonable restraint of trade where, because ASCAP's rights to license music are non-exclusive, stations also had opportunity to acquire the necessary broadcast performance rights directly from copyright owners via "program" license, "direct" license, or "source" license was realistically available to the local stations).

23 See *Buffalo Broadcasting*, 744 F.2d at 920-923 (discussing performance licensing including blanket licensing, source licensing, and direct licensing in the context of local television broadcasts, also noting that usage of music on television programming is categorized as "theme," "background," or "feature.").

24 Music publishers may sometimes differ with presenting organizations as to whether a "revue" or "cabaret" with a story line is a dramatic or non-dramatic use of the musical compositions, and thus whether it would be covered by a license from a PRS.

25 Registration can be accomplished via written forms or online.

26 17 U.S.C. § § 107-122. One example of licensing schemes is the compulsory mechanical royalty for sound recordings.

27 17 U.S.C. § 110(5). The exemptions that affect the largest portions of society include performance of non-dramatic music and literary works (including song lyrics) in schools, in places of worship in the course of religious services, and radio and television transmissions in restaurants of limited size. The exemptions for smaller eating establishments were enacted as part of the hotly contested "Fairness in Music Licensing Act of 1998" sought by the restaurant lobby. Pub. L. No. 106-44, 113 Stat. 221.

28 17 U.S.C. § 110(3).

29 If a concert promoter presents a concert that is not part of a church service and charges admission, then the usual performance licenses would be required in the event the concert included nondramatic copyrighted works.

30 17 U.S.C. § 110(1-2).

31 17 U.S.C.§ 110(4).

32 17. U.S.C. § 110(7).

33 17 U.S.C. § 110(6). Exemptions also are included for transmissions intended for the blind and other handicapped persons, see 17 U.S.C. § 110(8), and for social events organized by veterans' groups to which the general public is not invited. 17 U.S.C. § 110(10).

34 See Alden-Rochelle, Inc. v. ASCAP, 80 F. Supp. 900 (S.D.N.Y. 1948). However, outside the United States, performing rights societies do license movie theatres.

35 See § 4.06 *infra,* for a discussion of synchronization licenses.

36 Because other countries do not have the same antitrust laws as the United States, in other countries there is usually only one performing rights society for that territory, and the PRS's in other countries may also handle mechanical licensing as well as performing rights. Some of the leading foreign performing rights societies, all of whom have reciprocal agreements with the United States based PRS's, include the following, listed by their commonly used acronyms. For more information, see the Web site of the International Confederation of Societies of Authors and Composers ("CISAC"), at www.cisac.org (last visited May 26, 2011):

Argentina: SADAIC; Australia: APRA; Austria: AKM; Belgium: SABAM; Brazil: UBC, ECAD; Canada: SOCAN; China: MCSC; Denmark: KODA; Finland: TEOSTO; Greece: AE; France: SACEM; Germany: GEMA; Hong Kong: CASH; Hungary: Artisjus; Iceland: STEF; India: IPRS; Ireland: IMRO; Israel: ACUM; Italy: SIAE; Japan: JASRAC; Lithuania: LATGA-A; Malaysia: MACP; Mexico: SACM; Netherlands: BUMA; New Zealand: APRA; Norway: TONO; Poland: ZAIKS; Portugal: SPA; Russia: RAO; Singapore: COMPASS; South Africa: SAMRO; Spain: SGAE; Sweden: STIM; Switzerland: SUISA; Turkey: MESAM; United Kingdom: PRS.

37 See Leadsinger, Inc. v. BMG Music Publishing, 512 F.3d 522 (9th Cir. 2007). The display of lyrics on a karaoke machine screen, where the lyrics move across the screen in sync with the music, must be licensed separately in the nature of a sync license, and is not covered by compulsory mechanical license for reproducing sound recordings.

38 17 U.S.C. § 106(6). Note that the works subject to performance rights in § 106(4) do not include sound recordings. Under § 106(6), the performance right for sound recordings is limited because it is granted only with respect to the right "to perform the copyrighted work publicly by means of a digital transmission."

39 Sound Recording Act of 1971, Pub. L. No. 92-140, 85 Stat. 391. Prior to 1972, their protection arose under common law copyright. See Capitol Records Inc. v. Naxos of America Inc., 4 N.Y.3d 540, 830 N.E.2d 250, 797 N.Y.S.2d 352 (2005).

40 Pub. L. No. 104-39, 109 Stat. 336.

41 Pub. L. No. 105-304, 112 Stat. 2860.

42 SoundExchange is the collective licensing organization responsible for administering the rights, including collection of payments from Webcasters and the payment of royalties to record companies and recording artists. Just as the collective licensing organizations ASCAP and the Harry Fox Agency were initially formed by music publishers, SoundExchange has its origins in the trade organization for record companies, the Recording Industry Association of America ("RIAA"). Like the performing rights societies that pay separate "publisher share" and "author share" royalties, SoundExchange makes direct payments to performing artists and to the record company copyright owners as follows: 50% to record company; 45% to featured artists on the sound recording; 2.5% to backup musicians; and 2.5% to non featured vocalists. 17 U.S.C. § 114(g). The digital performance right for sound recordings applies to commercially released audio recordings, and is codified in §114 of the Copyright Act, which sets out the statutory licensing scheme and the rates that have been established by a panel of Copyright Royalty Judges and published in the Code of Federal Regulations. See generally, 37 C.F.R. §§ 260-270 for current licensing fees. See also, www.soundexchange.com. The digital performing rights are for commercially released audio recordings, but do not extend to situations where an audio recording is included in an audiovisual work. If for example a sound recording is licensed for inclusion in a television program, and that television program is digitally streamed on the Internet, the digital performance right in sound recordings would not apply.

43 See Bonneville International Corp. v. Peters, 347 F.3d 485 (3d Cir. 2003). Web streams of terrestrial radio signals come within § 114 statutory licensing for performance of sound recordings.

44 17 U.S.C. § 114(j)(6).

45 17 U.S.C. § 114(j)(7, 13).

46 28 U.S.C. § 501.

47 17 U.S.C. § 114(j)(11). The three subscription services in this category are Music Choice, Muzak, and DMX Music, Inc.

48 The two SDARs are XM Satellite Radio, Inc. and SIRIUS.

49 17 U.S.C. § 114(j)(10).

50 "Business establishment service" is also referred to as "background" or "elevator" music.

51 17 U.S.C. § 114(d)(1)(C)(iv).

52 See United States v. ASCAP, 485 F. Supp.2d 438, 442 (S.D.N.Y. 2007). "[S]treaming . . . allows the real-time (or near real-time) playing of the song and does not result in the creation of a permanent audio file on the client computer." Note that streaming may invoke some temporary memory retention of the song file sufficient for the playing of the music, but no "permanent audio file" as noted by the court.

53 See 37 C.F.R.§ § 260-270 for fee schedules in all categories.

54 17 U.S.C. § 114(j)(13). The "sound recording performance complement" is the transmission during any three-hour period, on a particular channel used by a transmitting entity, of no more than—

(A) 3 different selections of sound recordings from any one phonorecord lawfully distributed for public performance or sale in the United States, if no more than 2 such selections are transmitted consecutively; or (B) 4 different selections of sound recordings—(i) by the same featured recording artist; or (ii) from any set or compilation of phonorecords lawfully distributed together as a unit for public performance or sale in the United States, if no more than three such selections are transmitted consecutively: Provided, That the transmission of selections in excess of the numerical limits provided for in clauses (A) and (B) from multiple phonorecords shall nonetheless qualify as a sound recording performance complement if the programming of the multiple phonorecords was not willfully intended to avoid the numerical limitations prescribed in such clauses.

55 See 37 CFR § § 260-270, setting out the current statutory licensing fees. See also, www.soundexchange.com.

56 See 17 U.S.C. § 114(d)(3).

57 See 37 CFR § 385.

58 See 17 U.S.C. § 115(d), definition of a digital phonorecord delivery:

(d) Definition. — As used in this section, the following term has the following meaning: A "digital phonorecord delivery" is each individual delivery of a phonorecord by digital transmission of a sound recording which results in a specifically identifiable reproduction by or for any transmission recipient of a phonorecord of that sound recording, regardless of whether the digital transmission is also a public performance of the sound recording or any nondramatic musical work embodied therein. A digital phonorecord delivery does not result from a real-time, non-interactive subscription transmission of a sound recording where no reproduction of the sound recording or the musical work embodied therein is made from the inception of the transmission through to its receipt by the transmission recipient in order to make the sound recording audible.

59 See 37 C.F.R. § 385.

60 See United States v. ASCAP, 627 F.3d 64 (2d Cir. 2010) (digital downloads of musical works do not constitute a public performance of that work).

61 37 C.F.R. § 270.1. For a copy of the notice, see http://www.copyright.gov/forms/form112-114nou.pdf.

62 See generally, www.soundexchange.com.

Panelist Bios

COREY FEILD

Corey Field is Of Counsel in the Los Angeles office of Ballard Spahr LLP where he represents clients worldwide in transactional and litigation matters involving all areas of the entertainment industry. He is a former President of the Copyright Society of the U.S.A. (New York), and the principal author of the recently published treatise "Entertainment Law: Forms and Analysis" (Law Journal Press, New York). Corey is a Los Angeles native who holds music degrees from UC Santa Barbara (BA) and the University of York, England (Ph.D.). Before he became a lawyer, he worked in the international classical music publishing business in New York and Philadelphia for over 15 years, as Vice President of European American Music Distributors Corp., the United States office of the European Publishers Schott (Germany, UK, Japan) and Universal Edition (Vienna and London), where he was responsible for all facets of the company's international music publishing activities, including both business and artistic matters. Corey attended law school while working full time in the music industry, and has been honored by inclusion in The Best Lawyers in America in the areas of copyright and entertainment law, as well as serving on several national boards in the arts, including the BMI Foundation Advisory Committee; the Grammy Foundation Entertainment Law Initiative Advisory Committee; the Marlboro Music School and Festival; and the Kurt Weill Foundation for Music. In addition to his many published legal writings, he is the author and editor of several published musical works and articles on music, including the Schott Music Corporation book "The Musicians Guide to Symphonic Music." Corey teaches a class in the UCLA Extension Entertainment Studies Division titled "Copyright Law in the Entertainment Industry."

CHERYL HODGSON

Attorney Cheryl Hodgson creatively guides clients in protecting and profiting value artistic and intellectual property rights. She began her career as a talent agent, and artist manager in the music industry working with artists such as Steve Martin and Jimmy Buffett and managing artists for the legendary Bill Graham in San Francisco. Cheryl serves as legal counsel in corporate, new media, and entertainment related matters, and has litigated numerous cases in the fields of trademark, copyright, rights of publicity and entertainment contracts.

These days, Cheryl is passionate about advising clients as well as other trusted advisors on issues important to protecting and exploiting valuable trademarks and copyrights, to create business value through intellectual property, brand strategy and protection. She represents a wide spectrum of clients in the music industry, entertainment, and consumer products, overseeing royalty income collection, global registration, licensing and enforcement of trademarks; domain protection; brand management and brand licensing. Cheryl has served as President of the California Copyright Conference, a member of the Arbitration and Mediation Panel of the World Intellectual Property Association. Cheryl is founder Canto Novo Music a music publishing company, and www.brandaide.com featuring expert insights into brand building.

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MICHAEL PERLSTEIN

Michael Perlstein has practiced law for over forty years with the focus of his practice on music publishing and recording industry transactions. He represents leading artists, writers, music publishers and the estates of deceased artists and songwriters. A significant element of his practice is analysis and resolution of complex copyright issues involved in: purchase and sale of music publishing companies and record labels and individual copyrighted works, estate planning and separation agreements and divorce settlement agreements. He is the author of the following articles and program presentations: In Re Marriage of Worth – Copyright as Community Property: Questions about Worth are More than Merely Trivial, April 1988 Entertainment Law Reporter; Contracts with Kids: A Limited Discussion of Entertainment Industry Contracts Involving Minors, Under California Law, 1992-1993 Entertainment Publishing and the Arts Handbook; the chapter entitled Music Publishing in Entertainment Law, Editions 1, 2 and 3, New York State Bar Association (1989, 1996 and 2004); A Cue Sheet Primer, March 2000 edition of The Score, the Journal of the Society of Composers and Lyricists; Some Aspects of United States Music Publishing Agreements: The Exclusive Term Copublishing Agreement and the Minimum Delivery Commitment, January 2001 Journal of the International Association of Entertainment Lawyers, Fundamentals of Termination Rights, 2007 and 2008 syllabi of the Entertainment Law Institute of the Texas State Bar, She Got the Gold Mine, I Got the Shaft: When Copyright Collides with Community Property, 2008 syllabus of the Entertainment Law Institute of the Texas State Bar and the chapter entitled International Copyright Basics, in Copyright Practice, 2008, HalfMoon, LLC, Termination Rights in Sound Recordings syllabus of the 2012 the Copyright Society of the USA winter symposium, Fundamentals of Termination Rights 2012 syllabus of the California CPA Entertainment Law symposium and Confronting Confounding Issues in Termination Rights: Analysis and Guidance for the Practitioner, 2012 syllabus of the Entertainment Law Institute of the Texas State Bar. He is a former adjunct associate professor of law at Southwestern Law School in Los Angeles, teaching the course on the law and business of music publishing for which he created the case book. He is frequent lecturer and panelist on music industry and copyright topics. Mr. Perlstein holds an LLB degree from the University of California School of Law at Berkeley (Boalt Hall). He currently serves as a trustee and was president (2011-2012) of the Los Angeles Copyright Society and is a member of the California Copyright Conference. He is a member of the Bar of California, New York and Illinois.