PRIMER ON MUSIC LICENSING FOR BROADCASTERS

oab
ohio association
of broadcasters

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INTRODUCTION

Music is an integral part of broadcast programming. Copyright law, and in particular, music licensing, can be very confusing. This primer provides an overview of the copyright laws applicable to the use of music by broadcasters and explains common music licenses and licensing issues for television and radio stations, including (i) licenses required to broadcast music over the air, (ii) licenses required to stream music on the Internet, and (iii) licenses required to reproduce music in connection with broadcast operations.

It is our hope that this primer will assist you in compliance with music copyright law. As a reminder, Brooks Pierce staffs an FCC hotline exclusively for OAB members at 888.705.0678. The OAB's Ohio counsel Vorys, Sater, Seymour and Pease, L.L.P., also offers an Ohio-specific hotline at 866.622.5785. We hope you will call on the OAB, Brooks Pierce and Vorys if we may be of assistance.

If you have any questions regarding the information discussed in this primer, please feel free to contact any of the attorneys listed below.

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I. COPYRIGHT 101 FOR BROADCASTERS

Recorded Music Has Two Copyrights

The most important concept to understand regarding music copyright law is that each recorded song involves two distinct copyright interests:

- The first copyright interest protects the underlying musical composition—that is, the specific arrangement and combination of musical notes, chords, rhythm, harmonies, and song lyrics. The law refers to this first type of copyright as a ***"musical work."*** This interest is also sometimes referred to as the "musical composition" or the "song."

- The second copyright interest protects the actual recording of a musical composition, which copyright law refers to as the ***"sound recording."*** This interest is also sometimes referred to as the "master" or the "recording."

While an unsigned songwriter who performs and records his or her own original songs owns both the musical work and sound recording copyrights in the song, it is often the case that the two distinct copyright interests are owned by separate individuals or entities.

In general, music publishers own or control the musical work copyright, and record companies own or control the sound recording copyright.

MUSIC PUBLISHERS = Musical Work Copyright
RECORD COMPANIES = Sound Recording Copyright

This means that anytime a broadcaster wants to use a recorded song, both the musical work copyright interest and the sound recording copyright interest must be considered.

Exclusive Rights

The owner of a **musical work** copyright has the exclusive rights under copyright law to:

1. Reproduce (copy) the musical work;

2. Adapt and prepare derivative works based on the musical work;

3. Distribute copies of the musical work;

4. Perform the musical work publicly; and

5. Display the musical work publicly.

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The owner of a **sound recording** copyright has the exclusive rights under copyright law to:

1. Reproduce (copy) the sound recording;

2. Adapt and prepare derivative works based on the sound recording;

3. Distribute copies of the sound recording; and

4. Perform the sound recording publicly by digital audio transmissions (other than by terrestrial over-the-air digital transmissions made by broadcasters).

As discussed further on pages 3 and 8 below, a significant distinction between the musical work exclusive rights and the sound recording exclusive rights is that musical works have a broad public performance right while sound recordings have a narrow public performance right limited to digital audio transmissions (e.g., Internet streaming).

In addition, federal copyright law historically did not recognize a copyright interest in sound recordings until 1972. That is, sound recordings made before February 15, 1972, were not subject to federal copyright protection. However, effective October 11, 2018, the Classics Protection and Access Act, which was enacted as part of the **Orrin G. Hatch-Bob Goodlatte Music Modernization Act ("Music Modernization Act")** (H.R. 1551), provides that the unauthorized use of pre-1972 recordings in contravention of the sound recording exclusive rights is now subject to the same federal copyright infringement liability as sound recordings made on or after February 15, 1972. Issues relating to pre-1972 recordings are discussed further on page 11 below.

The typical uses of music by broadcasters invoke the following exclusive rights:

- The **public performance right** for **musical works** is invoked when songs are "performed" by over-the-air broadcasting or Internet streaming (discussed further on pages 3-8);

- The **public performance right** for **sound recordings** is invoked when audio-only music recordings are "performed" by Internet streaming (but not by over-the-air broadcasting) (discussed further on pages 8-11);

- The **reproduction right** for **musical works** is invoked when songs (whether as re-performed or recorded) are reproduced (or copied) in recorded programs, promos, commercials, and other station programming (discussed further on pages 12-18); and

- The **reproduction right** for **sound recordings** is invoked when music recordings are reproduced (or copied) in recorded programs, promos, commercials, and other station programming (discussed further on pages 12-18).

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Copyright Infringement

Broadcasters who don't have appropriate music licenses in place run the serious risk of copyright infringement. Copyright infringement is "strict liability." This means that an infringer does not have to intend to infringe to be liable for infringement. Liability can also be imposed on others who induce or encourage infringement ("contributory"), or who profit from infringement while declining to stop it ("vicarious liability").

Copyright infringement can be very expensive. Statutory damages could be up to $150,000 per instance for willful infringement—regardless of whether the usage resulted in any actual monetary loss to the music rights holder or profit to the infringer. And in a copyright infringement action, infringers can also be liable for the music rights holder's attorneys' fees (in addition to the infringer's attorneys' fees).

II. WHAT LICENSES ARE REQUIRED TO BROADCAST MUSIC OVER THE AIR?

The **public performance** right is invoked when a musical work is broadcast over the air, whether as part of a radio station's music programming, as bumper music, as theme songs or background music in television shows, in commercials, or in station promotions. As noted above, in general, musical works (and the related public performance rights) are owned or controlled by music publishers.

For over-the-air broadcasts, the public performance right **only applies to musical works**. For many years there have been efforts to change copyright law to extend the public performance right for sound recordings to over-the-air broadcasting. If successful, broadcasters would have to pay music licensing fees to sound recording owners, which as noted earlier are generally record companies. Fortunately and most recently, these lobbying efforts were once again unsuccessful in connection with the passage of the Music Modernization Act, which did not include a sound recording public performance right covering broadcasting.

Accordingly, broadcasters continue to have no federal sound recording public performance royalty obligation to record companies for over-the-air broadcasts. However, as noted below on page 11, there is an open question as to whether there may be public performance royalty obligations under state laws for the broadcast of sound recordings created prior to February 15, 1972.

Performing Rights Organizations

Radio and television stations must have public performance licenses to broadcast musical works over the air. Musical work public performance licenses are typically obtained from performing rights organizations ("**PROs**"). PROs aggregate their respective members' rights for the public performance of copyrighted musical works and collectively license those rights to broadcasters and other music users. PROs distribute these fees to their members—songwriters and music publishers.

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Historically, there were three PROs in the United States—ASCAP, BMI, and SESAC. In recent years, two new PROs have come onto the scene—Global Music Rights (**"GMR"**) and Pro Music Rights (**"PMR"**).

Except in the rare circumstance where a broadcaster can control all of the music broadcast on its station (including in commercials, syndicated programs, and all other programming) and therefore can ensure that songs from a particular PRO's catalog will not be broadcast, **broadcasters generally need public performance licenses from all PROs**.

Antitrust Consent Decrees

ASCAP and BMI both operate under long-standing Department of Justice antitrust consent decrees (since 1941 for ASCAP and since 1966 for BMI). The consent decrees are intended to protect broadcasters and other music licensees by limiting the anticompetitive effects of ASCAP's and BMI's market power.

In December 2017, the United States Court of Appeals for the Second Circuit held that the BMI consent decree permits BMI to engage in **"fractional licensing."** Fractional licensing means that, where a song has more than one songwriter (which is frequently the case), BMI may license only the fraction of the song that is attributable to the BMI songwriter(s) and the broadcaster would need to obtain licenses from the other applicable PRO(s) to use the song. This decision was a disappointment to broadcasters who had argued that the consent decree requires BMI to license 100% of every song in its repertory even when BMI doesn't represent all the songwriters of a particular song (known as "100% licensing"). While the ASCAP consent decree was not technically considered by the Second Circuit, the court's reasoning would also apply to the ASCAP consent decree.

In early June 2019, the Department of Justice (**"DOJ"**) announced that the DOJ has opened a review of the ASCAP and BMI consent decrees in which the DOJ is seeking comment on whether the consent decrees should be terminated. Broadcasters are concerned that doing away with these longstanding consent decrees would raise prices, stifle competition, and harm consumers. Fortunately, thanks to the recently enacted Music Modernization Act, the DOJ must now report to Congress before terminating the consent decrees. Earlier this year, Senator Lindsey Graham (R-S.C.), the chair of the Senate Judiciary Committee, held meetings with industry stakeholders to discuss the DOJ's potential termination of the consent decrees and replacing them with an alternative licensing framework (such as a compulsory license akin to that applicable to noncommercial broadcasters and discussed on page 6 below). No consensus was reached among the stakeholders during those meetings. The period for public comment in the DOJ's review of the ASCAP and BMI consent decrees ended August 9, 2019.

SESAC is not subject to a similar consent decree. However, as a result of antitrust litigation settlements with the radio and television industries in 2015, rate disputes with SESAC are governed by a binding arbitration process.

Neither GMR nor PMR are subject to consent decrees or binding arbitration. However, in 2016, the Radio Music License Committee (**"RMLC"**) and GMR brought antitrust claims against each other and those cases remain pending.

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Commercial Broadcaster PRO Licenses and Rates

PRO licenses and rates for commercial broadcasters are generally negotiated at the industry level by the RMLC for commercial radio stations and the Television Music License Committee (**"TVMLC"**) for commercial television stations. The industry-negotiated licenses and license fees are available for broadcasters who timely authorize the RMLC or TVMLC, as applicable, to act on their behalf in negotiations with the PROs. These industry-negotiated licenses generally cover primary station broadcasts as well as multicast feeds and translator station rebroadcasts (in addition to Internet streaming, as noted on page 8 below).

Under the ASCAP and BMI consent decrees, in the event the RMLC or TVMLC cannot agree on license fees with ASCAP or BMI, either party can initiate a "rate court" proceeding in the U.S. District Court for the Southern District of New York to have the court determine reasonable license terms and fees. The new Music Modernization Act added two important provisions relating to these rate court proceedings:

- First, the new law provides that rate courts cannot use evidence of higher sound recording public performance fees for Internet streaming (discussed on page 8) to increase ASCAP and BMI royalty rates for broadcasters.

- Second, the new law provides that rate-setting cases are to be randomly assigned among all judges in the court instead of the previous process where rate proceedings were overseen by the same two judges (Judge Cote for ASCAP cases and Judge Stanton for BMI cases).

Commercial Radio. The current status of radio industry licenses with each of the PROs is as follows:

- **ASCAP.** The current RMLC-negotiated license with ASCAP was finalized in December 2016 and covers the 2017–2021 period.

- **BMI.** After two years of unsuccessful negotiations with BMI over rates for the 2017–2021 period, RMLC initiated a rate court proceeding against BMI in May 2018. Pending this proceeding, interim BMI license fees apply and will be trued-up once the final rates are determined.

- **SESAC.** As discussed above, RMLC and SESAC negotiations are governed by a 2015 antitrust litigation settlement agreement. The most recent SESAC license term expired on December 31, 2018. SESAC licensee fees and terms for 2018 remain in place until rates for the 2019–2022 period are determined through negotiation or arbitration.

- **GMR.** RMLC's negotiations with GMR have been unsuccessful. RMLC filed an antitrust lawsuit in November 2016 against GMR in Pennsylvania, and GMR responded with its own antitrust lawsuit against RMLC in California. On March 29, 2019, the Pennsylvania court ruled that it did not have personal jurisdiction

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over GMR and transferred RMLC's case to the California court. In late December 2016, GMR made available to radio stations an interim license agreement pending the resolution of these lawsuits. GMR has continued to offer extensions of the interim license agreement, with the current extension expiring on September 30, 2019. The interim license agreement and extensions are not automatic. Stations must obtain the license agreement and extensions directly from GMR (844-827-5467).

- **PMR.** At this point, there is no RMLC-negotiated license agreement with PMR.

Commercial Television. The current status of television industry licenses with each of the PROs is as follows:

- **ASCAP.** The most recent TVMLC-negotiated ASCAP license expired on December 31, 2016. ASCAP licensee fees and terms for 2016 remain in place until new rates are determined.

- **BMI.** Similar to ASCAP, the most recent TVMLC-negotiated BMI license expired on December 31, 2017. BMI licensee fees and terms for 2017 remain in place until new rates are determined (subject to a new TVMLC allocation of the fees among stations each year).

- **SESAC.** Similar to radio SESAC licenses, TVMLC and SESAC negotiations are governed by a 2015 antitrust litigation settlement agreement. The current TVMLC-negotiated license with SESAC covers the 2016–2019 period.

- **GMR.** At this point, there is no TVMLC-negotiated license agreement with GMR.

- **PMR.** At this point, there is no TVMLC-negotiated license agreement with PMR.

Noncommercial Broadcaster PRO Licenses and Rates

Unlike commercial broadcasters, the public performance of musical works by noncommercial educational television and radio stations is allowed under the terms of a **"statutory"** or **"compulsory"** license provided in Section 118(c)(1) of the Copyright Act. In accordance with Section 118, the PROs and representatives of noncommercial broadcasters generally negotiate rates and terms that are submitted to and approved by the Copyright Royalty Judges, which is a board of judges appointed by the Librarian of Congress to oversee the Copyright Act statutory licenses.

The current noncommercial broadcaster public performance royalty rates adopted by the Copyright Royalty Judges cover licenses from ASCAP, BMI, and SESAC for the 2018–2022 period. One set of rates applies to noncommercial radio stations licensed to colleges and universities (based on the number of students attending the school). Another set of rates applies to all other noncommercial radio stations that are not affiliated with NPR, including religious broadcasters (based on the population served by the station). And another set of rates applies

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to NPR-affiliated radio stations and PBS-affiliated television stations (which rates are subject to a confidentially agreement), and all other noncommercial television stations ($1 per year).

Because GMR failed to participate in the 2018–2022 rate proceeding, the public performance royalty rate for noncommercial stations is $1 per year to cover GMR-controlled musical works (and any other works not controlled by ASCAP, BMI, or SESAC). Similarly, PMR did not participate in the 2018–2022 noncommercial broadcast rate proceeding.

Important PRO License Limitations

Broadcaster PRO licenses cover the public performance of musical works solely in connection with over-the-air broadcasting (and as discussed below, Internet streaming).

Broadcaster PRO licenses do not cover other public performances of music, including, for example, station concerts, promotions, and other events where live or recorded music is performed. They also do not cover recorded or live music performed in bars, restaurants, or other similar businesses or retail establishments—including when such businesses simply play radio or television broadcasts in their establishments. And broadcaster PRO licenses do not cover the use of broadcast programming with telephone music-on-hold systems. In these situations, additional PRO licenses may be necessary.

Additionally, as discussed below on page 12, PRO licenses do not authorize the reproduction (or copying) of music in recorded programs, promos, commercials, or otherwise.

Broadcast Radio / Television in Business Establishments

While a broadcaster's PRO licenses do not authorize businesses to play the station's broadcast in their establishments, the Copyright Act provides exceptions for business establishments in certain cases.

Provided the business does not charge customers to listen to or watch a broadcast, a business can play a station's over-the-air broadcast within their establishment without the establishment having its own PRO licenses in the following circumstances:

- If the establishment uses a single radio or television receiver "of a kind commonly used in private homes";

- If the establishment is a food service or drinking establishment with less than 3,750 gross square feet, or any other type of establishment with less than 2,000 gross square feet (regardless of the number or type of receivers); or

- If the establishment is a food service or drinking establishment with 3,750 gross square feet or more, or any other type of establishment with 2,000 gross square feet or more, and it has no more than 6 speakers (not more than 4 in any one room) and no more than 4 televisions (each with a screen size no greater than 55 inches and not more than 1 in any one room).

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III. WHAT LICENSES ARE REQUIRED TO STREAM MUSIC ON THE INTERNET?

As with broadcasting, Internet streaming invokes the musical work public performance right. However, unlike broadcasting, audio Internet streaming also invokes the **limited sound recording public performance right**.

The sound recording public performance right only applies to digital audio transmissions. It does not apply to transmissions of recordings that include video. So, as a practical matter for broadcasters, the sound recording public performance right only applies to Internet streaming by radio stations and not television stations (except where a television station is doing an audio-only stream).

Accordingly, when a broadcaster streams recorded music over the Internet, licenses to perform both the musical works and the sound recordings should be considered.

PRO Licenses for Musical Works

For musical works, the industry-negotiated PRO licenses for commercial radio and television stations discussed above generally also cover Internet streaming. So, no additional licenses are required from the PROs. This includes the right to stream musical works as archived programs and as included video content on station websites and mobile platforms.

However, for noncommercial broadcasters, **the Section 118 statutory license does not cover Internet streaming**. Accordingly, noncommercial stations that stream musical works on the Internet require additional licenses from the PROs to cover Internet streaming.

SoundExchange for Sound Recordings

Stations that stream audio-only sound recordings on the Internet must, in addition to having PRO licenses, comply with the statutory license provisions of Section 114 of the Copyright Act (or otherwise have an appropriate negotiated license with the applicable sound recording owners). The Section 114 statutory license is administered by an organization called **SoundExchange**. SoundExchange collects statutory royalties from stations and other music streaming providers and distributes those fees to the sound recording owners (typically record labels) and artists.

Under Section 114, before a station starts streaming music, the station must file a “Notice of Use” with the Copyright Office. Once the required notice is filed, the station is automatically entitled to the Section 114 statutory streaming license provided the station complies with the statutory conditions, including the following:

- The music programming cannot be interactive (that is, songs cannot be played “on demand” and songs cannot be played within one hour of a request or at a time designated by the listener).

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- The stream must include the information encoded in the sound recording by the copyright owner, such as the title, featured artist, and other related information.

- The station cannot, during any three-hour period, play more than three sound recordings from one album (and no more than two songs played consecutively) or four sound recordings from the same artist or from any set or compilation.

- The station cannot publish an advance program schedule or make a prior announcement of when specific songs will be played.

- The stream cannot be part of an archived program of fewer than five hours in duration, an archived program of five hours or greater in duration that is made available for a period exceeding two weeks, a continuous program fewer than three hours in duration, or an identifiable program in which songs are played in a predetermined order (other than an archived or continuous program).

- The station must file monthly "Reports of Use of Sound Recordings" with SoundExchange containing certain information on all sound recordings performed during the month (referred to as "census" reporting).

- The station must pay monthly license fees to SoundExchange.

It is also important to note that SoundExchange only covers the public performance of sound recordings in the United States. Internet streaming outside of the United States requires licenses from applicable organizations (including musical work PRO licenses) in all territories where the stream is available.

Section 114 (SoundExchange) Rates. The rates for the Section 114 licenses are set by the Copyright Royalty Judges. In September 2018, the United States Court of Appeals for the District of Columbia Circuit rejected an appeal from SoundExchange and upheld the Section 114 rates adopted by the Copyright Royalty Judges for years 2016 through 2020 (subject to annual increases based on the Consumer Price Index). The Section 114 rates are on a "per-performance" basis. That is, the applicable rate is multiplied times the number of times any portion of a sound recording is streamed to a listener (e.g., two songs streamed to 100 listeners equals 200 performances).

The current Section 114 rates for commercial and noncommercial stations are:

- **Commercial Stations.** The 2019 rate is $0.0018 per performance (for nonsubscription transmissions), subject to an annual minimum fee of $500 per station.

- **Noncommercial Stations.** The 2019 rate is a minimum annual fee of $500 per station; provided that if a station stream exceeds the monthly threshold of 159,140 aggregate tuning hours, the station must also pay $0.0018 per

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performance in excess of the monthly threshold. Note that these rates do not apply to public radio stations that are affiliated with NPR, PRI, or otherwise are qualified to receive funding from the Corporation for Public Broadcasting (**"CPB"**). Such CPB-support stations operate under a negotiated agreement. CPB pays the Section 114 royalty fees for all CPB-support stations.

The Section 114 license also applies to Sirius XM (and others that provide noninteractive digital audio transmission services). Over the years, Sirius XM has lobbied vigorously for the extension of the sound recording public performance right to over-the-air broadcasting (arguing that it is not fair for satellite radio to have to pay sound recording performance royalties while over-the-air broadcasting is exempt from such royalty obligation). Of interest to broadcasters is that the new Music Modernization Act contains a provision that locks in the current Section 114 rates for satellite radio until 2027, while Section 114 rates for broadcasters and others will be reevaluated by the Copyright Royalty Judges for the 2023–2027 period. Reportedly, this accommodation for Sirius XM was made to obtain Sirius XM's support for passage of the Music Modernization Act despite the absence of an extension of the performance right and related royalty obligations to over-the-air broadcasting.

Section 114 (SoundExchange) Reporting Requirements. In general, stations must file with SoundExchange monthly Reports of Use with detailed information on every sound recording, including the total number of performances of each sound recording, together with a Statement of Account for and payment of any royalties due, within 45 days after the end of each calendar month.

However, AM or FM broadcasters that do not exceed the minimum $500 annual fee (so-called **"eligible minimum fee webcasters"**) may alternatively elect to submit quarterly sample Reports of Use covering two periods of seven consecutive 24-hour days and report only aggregate tuning hours, the program or channel name, and play frequency (in lieu of reporting actual total performances).

Noncommercial stations that are affiliated with educational institutions (and are not qualified to receive funding from CPB) that do not exceed 80,000 aggregate tuning hours in any month for any individual stream in the prior year, and do not expect to exceed such amount in any month in the current year, can elect to pay an additional $100 reporting waiver fee in lieu of providing Reports of Use (payment is due January 31 of the applicable current year).

As noted above, CPB-supported stations operate under a negotiated agreement and are subject to different reporting requirements.

Section 114 (SoundExchange) Performance Complement Waivers. Certain of the Section 114 statutory conditions (noted above) require streaming operations that are not consistent with the way broadcasters typically program over-the-air broadcasts. For example, the restrictions limit the number of songs that can be streamed from the same artist or album in a row or within any 3-hour period and prohibit the announcement of when certain songs or artists will be played. These restrictions are known as the **"performance complement."**

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In 2016, NAB concluded negotiations with Sony Music Entertainment and Warner Music Group for agreements that waive the performance complement, subject to certain conditions. Stations must affirmatively "opt into" the Sony waiver, which they can do through NAB (stations do not have to be an NAB member). Information about the Sony waiver and the process for "opting-in" is available on the NAB's website at **http://www.nab.org/sites/sonywaiver/.**

The Sony waiver applies to both commercial and noncommercial stations and expires December 31, 2020.

No action is required for the Warner waiver, which automatically applies to commercial AM and FM stations. The Warner waiver only applies to commercial stations and expires September 30, 2019.

It is important to note that the Sony and Warner waivers only apply to sound recordings in each of their respective catalogs (including their respective subsidiary label catalogs). The Section 114 performance complement limitations continue to apply in full to sound recordings owned or controlled by all other labels.

Pre-1972 Sound Recordings. Historically there has been no federal protection for sound recordings created prior to February 15, 1972. The rights in such pre-1972 recordings have generally been governed by a patchwork of state laws. In recent years, dozens of lawsuits have been filed over the question of whether these state laws require broadcasters to pay royalties for streaming and broadcasting pre-1972 recordings.

The Classics Protection and Access Act, recently enacted as part of the Music Modernization Act, addresses this issue by **creating a new federal right for pre-1972 recordings**. Under the new law, any activity that the owner of a pre-1972 sound recording would have the exclusive right to do if the sound recording were a post-1972 sound recording is now protected under the federal Copyright Act. The term of this new right is staggered depending on when the pre-1972 recording was created, but, at the outside, the new right expires in 2067.

Accordingly, the Section 114 statutory license now also applies to pre-1972 recordings. That is, **stations that stream pre-1972 recordings must now ensure that they are paying Section 114 royalties to SoundExchange** for such pre-1972 recordings. The new law protects stations that were streaming pre-1972 recordings prior to the enactment of the new law (on October 11, 2018) from state law claims if the prior use would have satisfied the Section 114 requirements and the station paid royalties to SoundExchange by July 8, 2019, for all such streaming during the 3-year period prior to enactment (October 11, 2015 through October 11, 2018). The new law also limits potential copyright liabilities for stations that were streaming pre-1972 recordings as of October 11, 2018, if the station filed a Notice of Contact Information with the Copyright Office by April 9, 2019.

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Notably, although the Classics Protection and Access Act addresses the issues relating to pre-1972 recordings in the context of streaming, the new law has no express effect on state laws that may potentially require broadcasters to pay royalties for over-the-air broadcasting of pre-1972 recordings (given there is not, and never has been, a broadcast public performance right under federal copyright law for any sound recordings). According, the answer to this question remains open.

Determining whether a particular recording qualifies as a "pre-1972" recording is not necessarily a simple task, particularly when a pre-1972 recording has been digitally remastered. In 2016, a federal court in California held that when certain pre-1972 sound recordings were digitally remastered after 1972, the remastered sound recordings became exclusively subject to federal copyright law as post-1972 recordings. However, in 2018 the Ninth Circuit reversed and remanded that decision, holding that digital remastering may not involve sufficient creative originality necessary to create a new copyrighted work in all cases.

And of course, it is always important to remember the difference between musical work and sound recording copyrights—just because a musical work was written before 1972 does not necessarily mean that a particular recording of that song is a pre-1972 sound recording.

IV. WHAT LICENSES ARE REQUIRED TO REPRODUCE MUSIC IN CONNECTION WITH BROADCAST OPERATIONS?

The exclusive reproduction right under copyright law is invoked anytime a musical work or sound recording is recorded or otherwise copied. This includes, for example, the incorporation of music into recorded programs, commercials, and promotional spots, the recording of music in synchronization with video, the distribution of music by podcasting, and the posting of music for interactive playback on station websites (including videos containing music).

- When an existing recording of a song is copied (or "dubbed") into a new production, the reproduction rights for **both** the **musical work** and the **sound recording** are invoked.

- When a song is performed by an artist and re-recorded without copying an existing recording, the reproduction right for **only** the **musical work** is invoked.

While the public performance licenses discussed above are required to cover the broadcast or streaming of music, **public performance licenses do not include the right to reproduce music**. Accordingly, except in circumstances where an exception or statutory license under copyright law applies, **broadcasters need additional licenses to reproduce musical works and sound recordings**.

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Exceptions / Statutory Licenses

Copyright law provides that certain uses of music by broadcasters are permitted and do not violate the exclusive reproduction right. These exceptions include:

Ephemeral Recordings. Ephemeral recordings are temporary, short-lived recordings. Under Section 112(a) of the Copyright Act, broadcasters who are authorized (either by license or otherwise under copyright law) to publicly perform a musical work or sound recording may make no more than one (1) ephemeral recording/copy of a broadcast program containing such musical work or sound recording provided that (i) the copy must be retained and used solely by the broadcaster that made it; (ii) the copy must be used solely for the broadcaster's own transmissions within its local service area or for purposes of archival preservation or security; and (iii) the copy must be destroyed within six (6) months after the date the program was first transmitted to the public (unless it is used exclusively for archival purposes).

In situations where these conditions are satisfied, Section 112 could be used to reproduce music in station programming, promotions, and commercials.

In connection with Internet streaming, Section 112(e) permits broadcasters to make more than one (1) ephemeral recording of a publicly available sound recording (but not a musical work) to the extent necessary and commercially reasonable to facilitate the broadcaster's non-interactive streaming of such sound recording. Section 112(e) is subject to compulsory license royalty fees which are included in the Section 114 SoundExchange public performance royalties discussed above on page 9.

Religious Broadcasts. Under Section 112(c), nonprofit organizations may make and distribute copies of a broadcast program containing a musical work of a religious nature, and of a sound recording of such a musical work, if (i) no more than one copy of the broadcast program is provided to any given broadcaster, (ii) there is no direct or indirect charge for making or distributing any such copy, (iii) the copy can only be used by a broadcaster for a single transmission, (iv) the broadcaster must be authorized (by license or otherwise) to publicly perform the musical work embodied in the copy, and (v) all copies must be destroyed within one year from the date of the first transmission (except that one copy may be preserved exclusively for archival purposes).

Noncommercial Broadcasters. In addition to the statutory public performance right in Section 118(c)(1) discussed above on page 6, Section 118(c)(2) also provides a statutory license for noncommercial educational broadcast stations to reproduce musical works in broadcast programs. As with the Section 118 statutory performance license, statutory royalties for the reproduction of musical works are determined by the Copyright Royalty Judges. The current reproduction statutory royalties apply for the 2018–2022 period and vary based on the type of use (e.g., whether the music is used as a feature, in a concert, as background, or as a theme) and whether the program is distributed by PBS, NPR, or otherwise.

Noncommercial educational broadcasters also have the right under Section 114(b), without any royalty obligation, to reproduce, prepare derivative works of, and distribute copies

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of sound recordings in educational television and radio programs, provided that copies of such programs are not commercially distributed to the general public.

Fair Use. In certain instances, a broadcaster can reproduce and otherwise use copyrighted material under the exception known as "fair use." In determining whether an unauthorized use is a "fair use," courts look at four factors:

1. whether the unauthorized copy is for commercial or noncommercial purposes;

2. the creativeness of the original song that was copied;

3. the amount of the song that was copied; and

4. the effect that the unauthorized copy has upon the potential market for the original song.

Unfortunately, there are no bright-line rules that apply when assessing whether something is fair use. For example, it is a common misconception that it is not a copyright violation if only seven seconds of a song are used. That is not true. The specific duration of a copy alone does not control whether something is fair use.

In analyzing the fair use factors, courts frequently focus on whether the unlicensed use was "transformative" (i.e., whether it was used for a different purpose than the original) and whether the quality and quantity of the amount taken was reasonable in light of the circumstances.

In general, fair use is most likely applicable for broadcasters in the context of news reporting. Music that is recorded incidentally in the process of recording a news story is likely a fair use, as is the use of music in the course of reporting and commenting on cultural issues and events or to illustrate a news story by providing context or information in a way that otherwise could not be provided.

Reproduction Licenses and Related Issues

Unless the above limited exceptions or statutory licenses apply, a broadcaster needs reproduction licenses from the applicable rights holders to make copies of music.

- A reproduction license granting the right to use a sound recording is often referred to as a **"master use license."**

- A reproduction license granting the right to use a musical work in radio programming is often referred to as a **"transcription license."**

- A reproduction license granting the right to use a musical work in connection with visual elements (i.e., in a television show or commercial) is often referred to as a **"synchronization (or 'synch') license."**

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Following are some common circumstances where broadcasters may need to secure reproduction licenses or take other appropriate actions.

Production Music. Except in the limited circumstances where the ephemeral recordings provisions of Section 112 apply, stations must ensure that all music used in the production of programming and commercials is appropriately licensed. Because such productions typically involve the copying of recorded music, reproduction licenses for both the musical work and sound recording are generally required.

While broadcasters can sometimes secure free or inexpensive licenses for bumper and background music, popular music can be difficult and expensive to license for reproduction in broadcast programming. Accordingly, stations will typically use **production libraries** for music in "in house" programs, promotions, and commercial productions.

There are numerous production libraries that provide catalogs of wide varieties of music for use in radio and television productions. However, broadcasters should be careful to ensure they understand and comply with the terms of the applicable production library license agreements. For example, some production libraries may limit use to over-the-air broadcasting and require further licenses (and payments) for Internet usage. Other terms may limit a station from transferring or sublicensing the music as contained in a production—which, for example, could be problematic where a broadcaster produces a commercial for a client that the client wants to use on other platforms in addition to the broadcaster's station.

Music in Advertising. As discussed above, stations should be careful in the use of music when producing commercials "in house." But diligence is also required when broadcasting advertising provided by others, as stations could potentially be liable if such ads contain infringing music.

Stations should ensure that their contracts with advertisers and agencies contain all appropriate terms, including non-infringement representations and warranties and indemnification provisions.

Common sense comes into play here too. For example, given the expense of appropriate licenses it would be unusual for a local advertiser to have secured all necessary rights to use popular music in their commercials. License fees will vary from song to song, but as a general baseline, television commercial music license fees can range from around $5,000 per week to hundreds of thousands of dollars, and radio commercial license fees can range from around $1,000 per week to $100,000 or more. Sometimes copyright owners will not license a song for commercial use as a matter of principle to avoid potential dilution or adverse effect on the popularity of the song or artist/songwriter.

Frequently the use of popular music in commercials raises fair use questions, particularly where the song is used in the context of parody or satire. However, in the commercial context of advertising, fair use is unlikely to apply. And again, the limited ephemeral recordings provisions of Section 112 could apply to the use of music in advertising.

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Podcasting / Archived Programming. In typical circumstances, the exceptions and statutory licenses under copyright law do not apply to the recording of music in podcasts. Nor do they typically apply to the use of music in archived programming made available on broadcaster websites or mobile platforms. Broadcasters should carefully vet any music used in podcasts or other similar archived programming and secure appropriate musical work and sound recording licenses as necessary.

Singing / Music Contests. With the popularity of singing competition shows like The Voice, America's Got Talent, and American Idol, it is not uncommon for broadcasters to consider doing station-conducted or sponsor-supported contests that involve viewers or listeners submitting singing or music recordings as entries. In addition to compliance with all applicable contest, sweepstakes, trademark, and other laws, stations should be careful to ensure that such contests do not violate copyright law. The exceptions and statutory licenses under copyright law generally do not cover the use of music in such contests, which inevitably involve the reproduction of music. Stations should make sure that all appropriate safeguards are in place for such contests, including requiring that all submissions are original and owned or controlled by the entrant (i.e., that "cover" songs are not permitted) or ensuring that only particular songs for which the station has secured appropriate licenses are permitted. In the promotion of such contests, stations should also be careful to ensure that they do not inadvertently solicit listeners or viewers to record and submit to the station unauthorized materials, which could potentially make a station a contributory infringer under copyright law.

Hosting Third-Party Music or Other Content on Station Websites. When a broadcaster's website allows viewers or listeners to post music or other content or materials, or contains external links to such content, on the website (whether by uploading content, in feedback comments, etc.), the broadcaster could be on the hook for liability if any such content infringes copyright. Fortunately, however, copyright law provides a simple defense against such claims known as the Digital Millennium Copyright Act (**"DMCA"**) "Safe Harbor." With this defense, broadcasters who inadvertently host or link to third-party infringing content, can be excused from copyright infringement if the broadcaster:

- Adopts, implements, and informs users of a "repeat infringer policy";
- Accommodates "standard technical measures" that are "used by copyright owners to identify or protect copyrighted works";
- Does not have "Actual" or "Red Flag" knowledge of the infringement;
- Upon any such knowledge, acts expeditiously to remove the infringing material;
- Does not receive a financial benefit directly attributable to the infringing material while having the "Right and Ability to Control" such activity; and
- Complies with the "Notice and Takedown" requirements.

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Red Flag knowledge is awareness of facts or circumstances from which infringing activity is apparent. Actual or Red Flag knowledge is "knowledge of specific and identifiable" infringements. Right and Ability to Control is not merely the ability to remove or block access to materials posted on the website, but the exertion of substantial influence on the activities of website users.

The Notice and Takedown requirements require that the station:

- File a Designation of Agent with the Copyright Office;
- Post the agent's information on the service provider's website;
- Remove or disable infringing material upon notice from the copyright owner; and
- Provide a counter-notice from the user, if any, to the copyright owner, and restore the material if the copyright owner does not seek judicial relief within 10 days.

The DMCA "Safe Harbor" is "cheap insurance" that broadcasters frequently overlook—particularly the condition that requires the filing of a Designation of Agent with the Copyright Office (which must be renewed every three years). To designate an agent, you must use the Copyright Office's online registration system available at: **https://dmca.copyright.gov/ osp/login.html**.

Use of Music On Social Media. Stations will frequently want to post music or video clips containing music (even as background music) on social media platforms such as YouTube and Facebook. Common broadcaster music licenses generally do not extend to these platforms. And the posting of music unlicensed for these platforms generally violates the terms of service for these platforms. Accordingly, posting unlicensed music on social media risks not only copyright infringement but also a breach of contract.

Nonetheless, the posting of unlicensed content on such platforms is widespread. These platforms, in particular YouTube, use a system called Content ID, which identifies copyrighted material in user-uploaded content and helps a copyright owner flag and report potential violations. Many rights holders have an agreement with these platforms that effectively permits such content to remain available and allows the rights holders to monetize the content by inserting advertising in or around the content. The rights holders also have the option to demand the content be taken down. And it is important to note that these rights holder agreements, as a technical legal matter, do not extend to or protect the uploader.

Accordingly, broadcasters who post unlicensed material on social media platforms should keep in mind the legal and practical risks of doing so. Notwithstanding Content ID systems, a broadcaster still has potential copyright liability. And, the Content ID systems may result in advertising placed in or around a broadcaster's content, or the removal of the content—neither of which may be ideal for the broadcaster (or the broadcaster's advertising client).

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Listener Concerts / Live Music Performances. Stations often host live music concerts or performances for their listeners, including in-studio performances and performances in local venues. As noted above, broadcaster PRO licenses only cover the public performance of musical works over-the-air and via Internet streaming. For live performances where there is an audience, additional public performance licenses may be necessary (which, in the case of venues, the venues should already have). Stations will also often want to record such live performances for playback on air, on station websites, or on social media platforms. For such recordings, whether audio-only or audio and video, stations need a reproduction license from the rights holder(s) of the musical work.

For artists and musicians who are not signed to record labels or publishers and who control all of the rights in the music they perform, stations can generally secure these rights directly from the artists and musicians using a performance appearance consent and release. In such cases, it is important that the artist does not perform any so-called “cover” songs.

For artists and musicians who are signed to record labels or publishers, stations should coordinate with the respective management, label, and publishers to ensure appropriate permissions are secured. In general, artists who are signed to record labels and publishing companies are not allowed to permit their performance to be recorded without the label’s and publisher’s approvals.

In addition to securing the rights to use the music in connection with live performances, such releases should also secure the right to use the artist’s publicity rights—including the artist’s name, band name, voice, images, pictures, likeness, and biographical materials. Where the filming location is not the station’s studio (or another location controlled by the station), the station should also secure appropriate filming location releases from the applicable venues/locations. Stations should also be careful to ensure that no set props or other items appear in a recording in a way that may suggest sponsorship or otherwise involve third-party rights, such as posters, sculptures, product labels, brand names, T-shirt logos/designs, or artwork.

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