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The Digital Life of Songs and Recordings: The Anatomy of Digital Licenses

Friday, October 7, 2016
9:30am-11:00am

Moderator
Zeina H. Grenier
Vice President, Business & Legal Affairs, Universal Music Publishing Group (Santa Monica, CA)

Panelists
Casey M. Chisick
Partner, Cassels Brock & Blackwell LLP (Toronto, Ontario)

Timothy A. Cohan
Senior Vice President, Legal and Business Affairs, Peermusic (Burbank, CA)

David Ring
Attorney and Digital Media Consultant; Former Executive Vice President, Global Digital Business, Universal Music Group (Los Angeles, CA)

Charmaine D. Smith
Shareholder, Entertainment and Media Practice, Greenberg Traurig, LLP (Atlanta, GA)
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Provided with permission of Todd Brabec, Author  
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Music App License Agreement
The Digital Life of Songs and Recordings: The Anatomy of Digital Licenses

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Session Description and Learning Objective

With new technologies evolving almost daily, the role of the music lawyer continues to evolve as well. Panelists will lead you through an in-depth examination of the various issues involved in the negotiation of digital licenses between record labels and music publishers doing business with app creator/streaming services, and other third parties. Gain a better understanding of the basic elements involved in a variety of digital licensing deals through the presentation of a mock negotiation designed to illustrate the numerous issues facing lawyers during such showdowns.
The Performance Right—A World in Transition

Todd Brabec
THE PERFORMANCE RIGHT—A WORLD IN TRANSITION*

Todd Brabec†

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I. INTRODUCTION

17 U.S.C. § 106 states:
[T]he owner of [a] copyright . . . has the exclusive rights
to do and to authorize any of the following: . . . (4) in the
case of literary, musical, dramatic, and choreographic
works, pantomimes, and motion pictures and other
audiovisual works, to perform the copyrighted work
publicly; . . . and (6) in the case of sound recordings, to
perform the copyrighted work publicly by means of a
digital audio transmission.1

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* This is an updated and revised version of an article that first appeared in
the American Bar Association’s Entertainment and Sports Lawyer. Todd Brabec, The
† Todd Brabec, Esq., former ASCAP Executive Vice President and
Worldwide Director of Membership, is a Deems Taylor Award-winning co-author
with Jeff Brabec. See JEFFREY BRABEC & TODD BRABEC, MUSIC, MONEY AND SUCCESS:
THE INSIDER’S GUIDE TO MAKING MONEY IN THE MUSIC BUSINESS (7th ed. 2011). He is
also an Adjunct Professor at University of Southern California, where he teaches
Music Licensing, Music Publishing and Film, Television and Video Game Scoring,
and Song Contracts; a Governing Committee member of the American Bar
These two exclusive rights of copyright are at the heart of the worldwide business of music. They involve musical compositions and sound recordings, rights of copyright owners and limitations on those rights, and how creators and copyright owners are compensated.

II. THE MUSIC BUSINESS PRE-DIGITAL

In the world of traditional media—primarily radio and television—music licensing has evolved into a fairly straightforward process. For musical compositions, songwriters, composers, and music publishers join or affiliate with the American Society of Composers, Authors and Publishers (ASCAP), Broadcast Music, Inc. (BMI), or SESAC, which are performing rights organizations (PROs) who negotiate license agreements for the use of music, collect the fees, and distribute them back to writers and publishers who have performances in specific media. If a PRO and a user cannot agree on license fees, courts intervene and determine “reasonable fees” for music use. In the area of sound recordings, performances on traditional over-the-air radio are exempt from royalties and considered to be “promotional” tools to drive sales. A record company’s main source of income, other than record sales, comes from the licensing of master recordings to television series, feature films, and advertising commercials, among other uses. And then came the digital world—a technological revolution that changed everything.

This is a rather simplistic view of the music business, but one that serves as an appropriate starting point for an increasingly complex and changing business.

III. MUSICAL COMPOSITIONS

In the United States, there are three primary organizations that represent songwriters, composers, and music publishers on a non-exclusive basis in the negotiation, collection, and distribution

2. See infra Part III.
3. See infra Part III (discussing Rate Courts).
4. See infra Part VII.
of music performance license fees. The organizations are the ASCAP, BMI, and SESAC. The primary sources of license fees are traditional radio, broadcast and cable television, and general licensing (e.g., live performance, music in bars and restaurants, etc.).

New media license fees, which include online and digital music services, currently represent a relatively small portion of U.S. domestic music license fees (approximately $150 million of a total annual domestic PRO collection of $1.5 billion). Royalty distributions are made—fifty percent to writers and fifty percent to music publishers—after operating costs (approximately twelve to thirteen percent in the cases of ASCAP and BMI) are taken into account. There is a PRO in practically every country of the world where, via reciprocal agreements with ASCAP, BMI, and SESAC, U.S. writers’ and publishers’ works are represented and paid for when performances occur in foreign territories.

ASCAP and BMI entered into Consent Decrees with the federal government in 1941, with amendments to those Decrees in 1950, 1960, and 2001 in the case of ASCAP, and amendments in 1966 and 1994 in the case of BMI. One aspect of these Decrees, which has had a significant effect on the determination of license

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6. Id. § 8:55.
7. Id. § 8:58.
8. See Todd Brabec & Jeff Brabec, Performing Rights Licensing in the United States: A World of Multiple Choices, Considerations, and Results, 30 ENT. & SPORTS LAW. 8, 8 (2012).
11. See infra Part III.
fees, is the existence of a separate “Rate Court” for ASCAP and BMI, which comes into play when the PRO and a music user cannot come to a negotiated agreement as to what “reasonable” license fees should be in any given area. The Decrees allow any party to apply to the U.S. District Court for the Southern District of New York for a determination of interim and final fees. These Rate Courts have been in existence with ASCAP since 1950 and with BMI since 1994, and they have determined fees and license terms for the major traditional media areas of radio and broadcast and cable television as well as in recent years, the online music community. It is in these latter “new media” decisions and settlements where most of today’s complex issues have arisen.

SESAC, the smallest of the PROs, operates on a for-profit basis as opposed to the non-profit operations of ASCAP and BMI. SESAC is not governed by a Consent Decree with the government and does not have a “Rate Court” type procedure for license fee adjudications and disputes. Under a recent October 2014 settlement with the Television Music License Committee (TMLC) regarding a class action antitrust suit involving local television stations though, SESAC has agreed, as part of the settlement, to binding arbitration for any future licensing fee disputes with the settlement class that cannot be resolved by negotiation. It was further agreed that SESAC could not interfere with the ability of any affiliate to issue a public performance rights license directly to a settlement class member. In July 2015, SESAC also came to a settlement with the Radio Music Licensing Committee (RMLC) to end antitrust litigation anticompetitive behavior regarding license fees. As part of the settlement, SESAC agreed to binding arbitration if future negotiated license fee discussions were
unsatisfactory, as well as provisions allowing writers and publishers more flexibility in granting direct licenses to radio stations.\(^{21}\)

In the online world of music licensing, the ASCAP Rate Court has been instrumental in deciding not only what “reasonable” license fees should be, but also what is actually licensable by PROs. Interim fee and final fee decisions have involved many of the biggest players in the “new media/technology” world and have resulted in license fees significantly below what PROs and copyright owners were requesting.\(^{22}\) To put the online fees into perspective, ASCAP, BMI, and SESAC collected approximately $1.5 billion in domestic U.S. license fees (e.g., radio, broadcast television, cable television, live performance).\(^{23}\) Of this amount, approximately $150 million was generated from all online/digital uses.\(^{24}\) PROs receive an additional $700 million each year from foreign collection societies (e.g., PRS, GEMA, SIAE, SGAE, SOCAN, APRA, IMRO, JASRAC, BUMA) for performances of U.S. writers’ works performed in foreign countries, with a small portion of that money attributable to online use.\(^{25}\) Most publishers, incidentally, collect their foreign country performance royalties directly from those societies as direct members or through sub-publishers.

Commencing with the 2007 AOL/RealNetworks/Yahoo case, Rate Court filings, hearings, and decisions have involved YouTube, MobiTV, AT&T Mobility, Verizon Wireless, Spotify, Ericsson, and Netflix, among others. A brief summary of some of the most important points of these cases should help in understanding the current status of online performance licensing.\(^{26}\)

The AOL/RealNetworks/Yahoo Rate Court case had major worldwide significance as there was a summary judgment ruling that the downloading of a music file did not constitute a public

\(^{21}\) Id.


\(^{23}\) See ASCAP REPORT, supra note 9, at 17; BMI REVIEW, supra note 9, at 13. SESAC estimates provided by the author.

\(^{24}\) See ASCAP REPORT, supra note 9, at 15; BMI REVIEW, supra note 9, at 3. SESAC estimates provided by the author.

\(^{25}\) ASCAP REPORT, supra note 9, at 15, 17; BMI REVIEW, supra note 9, at 12. SESAC estimates provided by the author.

\(^{26}\) See Todd Brabec & Jeff Brabec, Online Music Licensing: From PROs, AOL, and MobiTV to SoundExchange, AT&T, and the CRB, 29 ENT. & SPORTS LAW. 1 (2011).
THE PERFORMANCE RIGHT

performance under the Copyright Act—a ruling totally contrary to the laws of most other countries, with the exception of Canada. This decision was affirmed by the Second Circuit Court of Appeals, with certiorari denied by the U.S. Supreme Court. The circuit court also remanded the fee formula back to the district court for further proceedings. The 2009 Verizon Wireless Rate Court case reaffirmed the “no performance in a download” decision in a ruling that stated that the transmission of a ringtone to a cellular telephone customer did not constitute a performance and the mechanical ringtone rate of twenty-four cents per download was the only appropriate right and compensation involved. The primary issue of the 2009 AT&T case was whether previews of ringtones were to be considered “fair use” rather than licensable performances. The court ruled in favor of ASCAP, and a customer’s previewing of ringtones was therefore licensable by PROs.

A 2009 interim fee decision regarding YouTube is a good example of the size of court-set “reasonable” music license fees, with an order of $70,000 a month. The 2010 MobiTV case involved what a reasonable license fee should be for the delivering of television programming to mobile telephones and audio channels. In this case, the court returned to the early 1990s ASCAP performance licenses with Turner Broadcasting, which set a three-tiered license based on the music intensity of the program.

27. See AOL/RealNetworks/Yahoo I, 485 F. Supp. at 441.
28. See David M. Given, A Modern Pandora’s Box Music, the Internet, and the Dilemma of Clearing Public Performance Rights, 26 ENT. & SPORTS LAW. 1, 19 (2008).
29. See United States v. Am. Soc’y of Composers, Authors, & Publishers (AOL/RealNetworks/Yahoo II), 627 F.3d 64, 73 (2d Cir. 2010) (“The downloaded songs are not performed in any perceptible manner during the transfers; the user must take some further action to play the songs after they are downloaded.”), cert. denied, 132 S. Ct. 366 (2011).
30. Id. at 76.
33. See id. at 434.
36. Id. at 222.
The music intensive fee was 0.9% of defined revenue with a 0.375% fee for general entertainment and a 0.1375% fee for news and sports programming. The Second Circuit Court of Appeals affirmed the lower court’s decision.

All of the aforementioned cases were eventually settled with additional settlements and agreements entered into with Apple Radio, Spotify, Netflix, and Hulu, as well as others. Practically all settlements in this area are confidential.

IV. DMX AND PANDORA

Two additional Rate Court cases, DMX and Pandora, involved not only the determination of reasonable license fees, but also the role that direct licensing plays in the PRO licensing picture. Under the ASCAP and BMI Consent Decrees, the agreements that writers and music publishers sign with ASCAP and BMI are non-exclusive; members and affiliates are allowed to directly license their works to a music user and bypass the PRO structures entirely.

DMX is a leading background and foreground music service provider that provides pre-programmed music for business establishments via direct broadcast satellites or on premise delivery mechanisms. DMX hired a company to assist and design a direct licensing program with copyright owners which eventually resulted in direct licenses representing over 7,000 catalogues, including one major music publisher, Sony. DMX requested from ASCAP and BMI a “through to the audience” blanket license which reflected the DMX direct licenses already obtained as well as those to be negotiated in the future.

In July of 2010, the BMI Rate Court entered a final rate for the blanket license, subject to adjustment of DMX’s BMI directly

licensed performances. In a separate decision, the ASCAP Rate Court ruled that ASCAP is required to issue to DMX a blanket license with “carve outs” for the direct licensing program. Both decisions were appealed to the Second Circuit Court of Appeals which, in June of 2012, affirmed the district court decisions. The resulting rates significantly reduced the license fees that DMX was paying to ASCAP and BMI.

Pandora is the leading Internet customized radio service and is considered a non-interactive service, as opposed to an on demand/interactive service where the user chooses what they want to hear. Pandora entered into license agreements with both ASCAP and BMI in 2005 and terminated those licenses at the end of 2010 and 2012 respectively. In the case of ASCAP, Pandora applied to the court for a “through to the audience” blanket license for the period 2011 through 2015. In the case of BMI, Pandora filed an application for a five-year license commencing January 1, 2013.

Based primarily on the small license fees that were awarded by the ASCAP and BMI Rate Court judges, commencing with the AOL/RealNetworks/Yahoo case in 2007, the major music publishers, starting with EMI (later acquired by Sony), notified ASCAP and BMI that they were withdrawing their catalogues for online licensing purposes. The major publishers felt strongly that they could negotiate more financially acceptable online value deals than the arrangements that had been set by prior Rate Court decisions and the subsequent settlements emanating from those decisions.
These online media withdrawals were accomplished by specific changes in the rules, regulations, and practices of ASCAP and BMI. Upon withdrawing their works, a number of the publishers entered into direct licensing deals with Pandora, in effect creating a system whereby Pandora had licenses with ASCAP, BMI, and SESAC, as well as short-term negotiated direct performance licenses with the major publishers. Discussions were also held between ASCAP, BMI, and the major publishers with a view toward ASCAP and BMI handling the administration of the online licenses negotiated by the publishers.

In response to a motion for summary judgment in September 2013, Judge Denise Cote, the ASCAP judge, ruled that a selective withdrawal of new media rights by publisher members could not be implemented without violating the Consent Decree. Judge Cote further ruled that the ASCAP repertory subject to that license was all works in ASCAP at the time Pandora applied for a license (January 1, 2011), not when the final license arrived. In short, an application for a license is treated as a license in effect, and in this case, no works could be removed by any ASCAP member during the period of 2011 through 2015. Prior to this decision, interim licenses were never considered “licenses in effect” until such time as a final Rate Court decision was rendered or an agreement was reached. Further, when works are finally removed by any publishers, those works have to be removed for all licensing purposes, not just for online licensing. Any users with license agreements still in effect at the time of the withdrawal could continue to use the withdrawn works up until their specific license agreement expires.

In a similar summary judgment hearing in the BMI case, Judge Louis Stanton allowed the removal of works which occurred prior to January 1, 2013, but ruled that those works could not be licensed by BMI to any others after any existing license agreements expired. If BMI cannot offer those compositions to new media

53. Id. at *2.
54. Id. at *3.
55. Id. at *10–11.
56. Id. at *11.
57. Id. at *9.
58. Id.
applicants, their availability does not meet the standards of the BMI Decree and they cannot be held in the BMI repertory. To put both judges’ “all in or all out” summary judgment decisions into a real world perspective, if one were to remove works from the current $150 million PRO annual license fee area of the online world, one would be forced, eventually, to remove those works from the other $1.35 billion in PRO domestic license fees being generated by traditional media (e.g., radio, broadcast television, cable television, live). Not to mention the effect that such withdrawals would have on the reciprocal “flow through of money” agreements between foreign collection societies and U.S. PROs. As a point of reference, it is important to note that practically all new PRO licensing deals with traditional media include streaming, website music uses, mobile apps, digital and primary broadcasts, mobile and wireless platforms, webcasts, and multi-casts.

On March 14, 2014, Judge Cote issued her “determination of reasonable license fees” in a 136-page decision in the Pandora Rate Court case. The judge ruled that the appropriate fee for the years 2011 through 2015 was 1.85% of revenue less certain deductions. ASCAP had requested a rate of 1.85% for 2011 and 2012, 2.5% for 2013, and 3% for 2014 and 2015. Pandora had requested a rate between 1.7% (the current traditional radio rate—Pandora had acquired a small radio station in an attempt to qualify for this rate) and 1.85% (the ASCAP form rate in effect for Pandora since 2005).

Two of the more important issues in the Pandora Rate Court proceedings involve: first, the concept of the divisibility of copyrights, which allows a publisher or copyright owner to make deals with various classes of users for their catalogue, and second, the disparity in payments between artists and record companies and songwriters and music publishers for the same type of performance.

As to the latter issue, the AOL/RealNetworks/Yahoo 2007 Rate Court case provided evidence of more than $30 million paid by

60. Id. at *4.
62. Id. at 372.
63. Id. at 320.
64. Id.
65. Id.
these services to the major record companies over a two-year period, whereas their fees to PROs were, in comparison, very small. According to Pandora’s Securities and Exchange Commission Form 10-K filing, the company expended approximately 48% of its total revenue of $920.8 million on Content Acquisition costs in 2014. As to the 48% figure, 44% represented costs for internet transmissions of sound recordings (primarily to SoundExchange, as well as some direct license with labels), with the remaining 4% paid for the musical composition performance right (PROs and music publishers).

In July of 2014, ASCAP—with Universal Music Publishing, Sony/ATV Music, and EMI Music as intervenors—appealed the two district court opinions to the Second Circuit. The basis of the appeal was that the district court erred in ruling that the Amended Final Judgment of 2001 (AFJ 2) prohibited ASCAP from accepting partial grants of public performance rights and that the district court, in setting a final license fee, ignored recent arm’s length relevant benchmark agreements.

As to the “partial grants” prohibition, ASCAP’s position was that the Consent Decree long ago removed any prohibition on the right of members to reserve for themselves the right to grant exclusive licensing rights to music users. Further, such a prohibition is in direct conflict with the exclusive rights provided by the copyright law to copyright owners.

As to the issue of ignoring benchmark agreements in the setting of final reasonable license fees, ASCAP pointed out that the Sony/ATV Music, EMI Music, and Universal Music Pandora direct license deals were all in excess of the 1.85% court set fee, as was the 2013 negotiated ASCAP Apple iTunes radio license—all “arms

68. Id. at 20.
69. Id. at *23, *25, *29.
70. Id. at *25.
71. Id. at *26.
72. Id. at *19.
length willing buyer and willing seller agreements.” Further, the Second Circuit, in its 2010 AOL/RealNetworks/Yahoo decision, confirmed that a 2.5% rate was a valid benchmark even though it vacated the district court’s across-the-board application of that rate to all of Yahoo and RealNetwork’s services. Accordingly, the current “District Court erred in ignoring [the Second Circuit’s] guidance in RealNetworks, which established that a rate of 2.5% revenue (or higher) is reasonable for all-audio, music-intensive digital music services similar to Pandora’s.”

In May 2015, the Second Circuit affirmed the March 2014 Federal Rate Court decision, which set the rate of the ASCAP blanket license at 1.85% of revenue and prevented music publishers from partially withdrawing the public performance licensing rights from ASCAP. As to the BMI/Pandora Media litigation concerning reasonable fees and terms for an adjustable fee blanket license, Judge Stanton issued a decision—after a five-week jury trial—on May 27, 2015, that the 2.5% of revenue rate and other terms offered by BMI to Pandora were reasonable. The 2.5% of gross revenue is subject to adjustments to accommodate performances of works that Pandora licensed directly. Further, Pandora may deduct up to 15% of commissions paid to third party advertising agencies. The benchmarks the judge relied upon in determining the “reasonable” fee included those between Pandora, Sony EMI, and the Universal Music Group, which ranged from 2.25% to 5.85% of Pandora’s revenue; the direct licenses with EMI and BMG; its license with ASCAP; and BMI’s agreement with the RMLC. The term of the deal is four years and runs from 2013 through 2016. Pandora subsequently appealed the decision to the Second Circuit.

74. Id. at *9.
75. Id. at *21.
76. Id. at *27.
77. Pandora Media, Inc. v. Am. Soc’y of Composers, Authors, & Publishers (Pandora II), 785 F.3d 73, 75 (2d Cir. 2015).
79. Id. at *24–25.
80. Id. at *26.
81. Id. at *23–24.
82. Id. at *26.
V. DIRECT LICENSING

The ability of a copyright owner to directly license a work to a music user and bypass PROs was a major issue in the *AOL/RealNetworks/Yahoo* and *BMI/DMX Rate Court* decisions, as well as the current Pandora litigation.84 Language in both the ASCAP and BMI Consent Decrees guarantee the right of any member or affiliate to directly license their works to a user.85 SESAC, as it is not under a Consent Decree with the government, incorporates the following language in its writer and publisher affiliation agreements that insures the right to directly license: “Publisher retains the right to issue non-exclusive licenses directly to any third person for the public performance in the U.S., its territories and possessions, of any work subject to this Agreement.”86

When songwriters, composers, and music publishers join or affiliate with ASCAP, BMI, or SESAC, they sign representation agreements granting to the PRO the non-exclusive right to license the non-dramatic public performances of their works. Though each PRO contract and governing documents are different as to terms, length of contract, withdrawal of works, resignation or termination provisions, dispute resolution procedures, payments schedules, distribution rules, and benefits, they all are non-exclusive agreements whereby the writer or publisher can license a work directly.87 PROs cannot interfere in any way with this right or the ability to exercise this right.

Language as to the ability to direct license as well as the effect of a direct license has been standard in many types of industry

84. See *Pandora III*, 785 F.3d 73, 76 (2d Cir. 2015); see also *Broad. Music, Inc.*, 2015 WL 3526105, at *6–7.


86. See generally Todd Brabec & Jeff Brabec, *Performing Rights Licensing in the United States: A World of Multiple Choices, Considerations, and Results*, 30 ENT. & SPORTS LAW. 8, 10 (2012) (discussing the standard SESAC writer or publisher affiliation agreement).

license agreements, including work-for-hire and employee-for-hire contracts for many decades. A sample clause might read:

The performing rights in the composition, to the extent permitted by law, shall be assigned to and licensed by the applicable [PRO] with said organization authorized to collect and receive all monies earned from the public performance of the composition and to pay the writers and publishers directly. If to the extent it is unlawful for the PRO, or any of its affiliates, to issue blanket small performing right licenses or the applicable performing rights society does not from time to time, for any reason whatsoever maintain a regular system of collecting performance fees and/or a third party licensee (i.e., a television network, independent television station, digital music service, etc.) requires direct licensing of such rights, company and publisher shall have the right to directly license their respective shares of the public performances rights in the composition to such third parties. If the company or publishing designee receives a distribution of earned public performance fees from any source that does not make a separate distribution directly or indirectly to publisher and to composer, then publisher shall be entitled to receive its portion of such fees and composer shall be entitled to receive the writer’s share of such fees.

Additional variations of a direct license clause are as follows:

Licensee desires to obtain from publisher a blanket license for all necessary performance, reproduction and distribution rights implicated by the delivery of programming embodying publisher’s catalogue and publisher is willing to grant such right to license on a non-exclusive basis.

The right to publicly perform and to authorize others to perform the composition by means of a media entity not licensed by ASCAP, BMI, or SESAC is subject to clearance of the performing right either from Licensor or from any other duly authorized licensor acting for or on behalf of Licensor subject to good faith negotiations in accordance with established industry customs and practices.

An issue in many agreements is what happens to the writer’s share when a copyright owner, usually the music publisher, directly licenses a work to a user. Clauses range from “payments to be made based upon the prevailing PRO rates for the specific use,” “compensation to be negotiated in good faith,” “reasonable fee,” “fee subject to arbitration,” “a complete buyout with no further
compensation or continuing royalties,” or “50% of any license fee received.”

A further unresolved issue as to an allowable and effective direct license under court or Consent Decree interpretation involves the situation where a music user (e.g., traditional broadcaster, online music service, etc.) contacts a copyright owner directly with the request, versus the situation where the ASCAP or BMI copyright owner approaches the user to negotiate a direct license. This is a fine distinction, but an important one in current litigation and Consent Decree interpretation.

VI. DEPARTMENT OF JUSTICE INTERVENTION

In part because of the Pandora decisions, a major development occurred in June 2014 when the Department of Justice announced that it would review both the ASCAP and BMI Consent Decrees “to account for changes in how music is delivered to and experienced by listeners . . . .”88 The Department allowed a sixty-day period for comments from any interested party (e.g., music publishers, songwriters and composers, PROs, online service companies, music users of any nature, the general public, etc.).89

A cross-section of some of the views was illustrative of the issues as well as the diametrically opposed positions of many of the parties. The comments very much reflected a creators versus users scenario.

On the music user side, the National Association of Broadcasters (NAB), the Digital Media Association (DiMA), Netflix, Fox News, the RMLC, the National Restaurant Association, and the Consumer Electronics Association, among others, submitted comments.90 The creator/copyright representative side

89. See id.
included comments from the performing right organizations ASCAP, BMI, PRS for Music (U.K.), SOCAN (Canada), JASRAC (Japan), SIAE (Italy), as well as the Society of Composers and Lyricists (SCL—film and television composers), Nashville Songwriters Association International (NSAI), the National Music Publishers Association (NMPA), and the Screen Actors Guild-American Federation of Television and Radio Artists (SAG-AFTRA), among others.

ASCAP, in its comments, requested that the Rate Court be replaced with a faster and cheaper dispute resolution procedure, that ASCAP be allowed to bundle and license multiple rights (the current Decree prohibits ASCAP from licensing any right other than performance), and allowed partial grants of rights from its members. The arguments centered on the fact that new media
users need multiple rights in their business; that publishers need flexibility to manage rights and negotiate contracts terms; and that property rights are divisible, assignable, and licensable either in whole or in part. BMI, which is not prevented from bundling or licensing multiple rights, requested that publishers be allowed to withdraw digital rights and that a binding arbitration model replace the Consent Decree mandate. The SCL were in favor of Consent Decree changes and expressed concerns that if the major music publishers withdrew completely from ASCAP and BMI, “the transparency of accountability currently afforded . . . by the PROs and the collective licensing model” would be affected. The SCL further asserted that in a bundled rights situation, it would be difficult to ascertain the value of the performance right in bundled transactions. Most writers in this field sign “work-for-hire” contracts where the back end performance royalties represent a substantial portion of their income. The 165,000-member organization, SAG-AFTRA, the “largest labor union representing working media artists,” commented that the “scales have tipped too far in favor of licensees’ interests over those of the artists” and that the rate-setting process set forth by the Consent Decrees is inefficient, expensive, and burdensome upon PROs and if not modified will significantly devalue writers’ works. Sony/ATV Music supported amending the Consent Decrees to allow copyright owners the ability to limit the scope of the rights they grant to ASCAP and BMI in their musical compositions and to require PROs to accept those grants; supported an expedited arbitration process for resolving rate disputes; and recommended that the reviews of the Decrees occur periodically to take into account new technology changes and conditions. Sony/ATV was


93. See id. at 16, 19–21.
95. See Society of Composers and Lyricists, supra note 91, at 2.
96. Id.
97. See id. at 1 (describing the uniqueness of American work-for-hire contracts).
98. Screen Actors Guild—American Federation of Television and Radio Artists, supra note 91, at 3.
not in favor of allowing PROs to handle rights other than performing rights, as it was their position that these markets already functioned well and that the introduction of such regulated entities into the market for these other rights would be “costly and disruptive.”

As to the foreign performing right organizations who submitted comments, widespread concern centered on the belief that the current Consent Decrees were outdated in today’s world and that changes were essential if music was to be appropriately licensed and compensated. Partial grants of rights and the bundling of multiple rights are commonplace in the foreign marketplace, and dispute resolution procedures are less cumbersome than the U.S. Rate Court. PRS for Music in the U.K., which receives over $100 million a year in U.S. performance royalties for its members from ASCAP and BMI, expressed concerns over the present Decrees and stated that they would consider licensing the British repertory directly in the United States rather than through intermediaries if it proved more efficient.

DIMA, a trade organization whose members include Apple, Amazon, Microsoft, and YouTube, stated that the Decrees have not harmed ASCAP or BMI financially in terms of the music industry generally, and that PROs must be subject to oversight as their anti-competitive behavior continues to this day. Further, if the Justice Department allows all PROs to bundle rights, as well as allow partial withdrawals, then substantial oversight must be put in place and songwriters must be allowed to keep their rights with their PRO if that’s what they wanted regardless of whether the publisher removed the works.

The RMLC strongly felt that the Decrees were necessary to keep the market power of ASCAP and BMI in check. Also, if publishers were allowed to withdraw from PROs, they could

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100. Id. at 26.
101. See, e.g., Memorandum from Performing Right Soc’y, Ltd., supra note 91, at 2; Society of Composers, Authors and Music Publishers, supra note 91, at 1; Societa’ Italiana Delgi Autori ed Editori, supra note 91, at 1–2.
102. Memorandum from Performing Right Soc’y, Ltd., supra note 91, at 3.
103. Id. at 2.
104. Digital Media Association, supra note 90.
105. Id. at 23.
106. Radio Music License Committee, supra note 90.
leverage their outsize market share to extract exorbitant license fees from licensees. Both the NAB and TMLC also shared these views. As to Netflix, their position was that the Decrees were in place to constrain PROs’ market power. They were against allowing partial publisher withdrawals, but if the Department allowed them, then conditions would have to be imposed to mitigate any adverse consequences. Finally, the Rate Court must stay in place, though it does need to be streamlined.

VII. SOUND RECORDINGS

Prior to 1972, no federal copyright protection existed for sound recordings. Congress rectified that situation by extending copyright to any recordings that were fixed on or after February 15, 1972. The owners of the copyright, therefore, had the exclusive right to reproduce and distribute phonorecords embodying the sound recording, including by means of digital transmission, and to authorize others to do the same. Pre-February 15, 1972, recordings remained subject to the protection afforded by state laws.

As to the performance right aspect of sound recordings, the right that was enjoyed by musical compositions was non-existent for records. No performance royalty existed in any medium for sound recordings. That changed in 1995 with the passage of the Digital Performance Rights in Sound Recordings Act (DPRSRA), which provided for a limited right when sound recordings are publicly performed “by means of a digital audio transmission.”

108. Netflix, supra note 90.
109. Id. at 9.
Digital Millennium Copyright Act (DMCA) included webcasting as a category of performance applicable to this limited performance right.\(^{115}\) This new right applied specifically to satellite radio (e.g. Sirius XM), internet radio (e.g. Pandora), and cable television music channels (e.g. Music Choice).\(^{116}\) Broadcast radio continued to be exempt.\(^{117}\)

It is important to note that the statutory license applies only to non-interactive services.\(^{118}\) The right to perform copyrighted sound recordings for on-demand services (interactive services) remains with the copyright owner (normally the label) and is a negotiated agreement between the label and the music user.\(^{119}\) These deals have taken many forms, including percentage of gross or net revenue formulas, per performance rates, an equity stake in the business, or a combination of these and other elements.

The rates and terms of the sound recording statutory license are set by the Copyright Royalty Board (CRB), an administrative body created by Congress.\(^{120}\) SoundExchange, a non-profit organization, has been designated by the Librarian of Congress and the CRB to be the sole entity to collect, administer, and distribute the royalties from non-interactive webcasting, digital cable and satellite transmissions, and satellite audio services.\(^{121}\) Congress also gave SoundExchange the right to negotiate agreements separate from those set by the CRB through the Webcaster Settlement Acts of 2008 and 2009.\(^{122}\) Services therefore can choose whether to be licensed under the CRB rates or the SoundExchange negotiated rates.

There are five major sound recording licensing categories, each of which is subject to a separate rate proceeding. The categories are webcasting, satellite radio, pre-existing music

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117. Id. §§ 112(a)(1), 114(d)(1).
118. Id. § 114(d)(2).
119. Id. § 114(d)(5)(C).
120. Id. § 801.
services, other cable and satellite music providers, and business establishments. An example of a rate proceeding involved Sirius XM satellite radio; the proceeding concluded in 2012 and set rates at 9% of gross revenue for a five-year period beginning in 2013, and increasing to 11% in 2017.\textsuperscript{121}

*Webcasting IV*—the proceeding regarding future webcasting rates—commenced in early 2014 and concluded at the end of 2015 and set rates for the period 2016 through 2020.\textsuperscript{125} Recent five-year CRB per performance statutory webcasting rates were $0.0019 for 2011, $0.0021 for 2012 and 2013, and $0.0023 for 2014 and 2015.\textsuperscript{126}

The Webcaster Settlement Acts of 2008 and 2009 allowed SoundExchange to negotiate alternative royalty rates (“Pureplay” rates) with certain webcasters.\textsuperscript{127} For non-subscription services and broadcasters streaming their content on the internet, the “Pureplay” per performance rate started as $0.00102 for 2011 and increased to $0.0013 in 2014 and $0.0014 in 2015.\textsuperscript{128} The rate applicable is the greater of the per performance rate or 25% of U.S. gross revenue.\textsuperscript{129} The “Pureplay” per performance rate for subscription services started at $0.0017 in 2011 and increased to $0.0023 and $0.0025 for 2014 and 2015, respectively.\textsuperscript{130} No percentage of revenue figures applied to the subscription rate.\textsuperscript{131}

Under those agreements, Webcasters therefore had a choice to be licensed through 2015 either with the CRB rates or the SoundExchange “Pureplay” rates.

As to the current *Webcasting IV* CRB proceeding, SoundExchange’s rate proposal for the 2016–2020 period was a “greater of” formula taking into account a per-performance rate and a percentage of the service’s revenue.\textsuperscript{132} Specifically, the per-


\textsuperscript{126} 37 C.F.R. § 380.3(a)(1) (2014).


\textsuperscript{128} Id. at 34,799.

\textsuperscript{129} Id.

\textsuperscript{130} Id.

\textsuperscript{131} See id.

\textsuperscript{132} Introductory Memorandum to the Written Direct Statement of
performance rate for commercial webcasters would commence at $0.0025 in 2016, then escalate to $0.0029 in 2020.\footnote{Id.} The percentage of revenue figure would be 55\% of attributable revenue from activities in the United States for all five years.\footnote{Id. at 2.} Non-commercial webcaster per-performance rates would be the same as the commercial rates but would only contain a minimum fee and no percentage of revenue calculation.\footnote{See id. at 3.} Their proposal was based on the facts that webcasting is a vibrant and growing industry, that it has widespread adoption by consumers, and that direct licensing deals between record companies and on demand services (interactive streaming) were the most appropriate benchmarks to use. A review of these deals confirmed that the record companies received a minimum share of 50\% to 60\% of a service’s revenue with allocations based on each record company’s share of total streams.\footnote{See generally Written Direct Testimony of Michael Herring at 2–3, Webcasting IV, No. 14-CRB-0001-WR (C.R.B. Oct. 6, 2014), http://www.loc.gov/crb/rate/14-CRB-0001-WR/statements/Pandora/11_Written_Direct_Testimony_of_Michael_Herring_with_Exhibits_PUBLIC.pdf; Testimony of David B. Packman at 3, Webcasting IV, No. 14-CRB-0001-WR (C.R.B. Oct. 7, 2014), http://www.loc.gov/crb/rate/14-CRB-0001WR/statements/iHeartMedia/Vol_2014_10_07_Testimony_of_D_Pakman_with_Appendices.pdf.}

Music services, on the other hand, argued in their case that the industry is not profitable even considering payments under the reduced Webcaster Settlement Act agreements.\footnote{Proposed Rates and Terms of Pandora, Inc. at 1–2, Webcasting IV, No. 14-CRB-0001-WR (C.R.B. Oct. 7, 2014), http://www.loc.gov/crb/rate/14-CRB-0001WR/statements/Pandora/2_Pandora_Proposed_Rates_and_Terms_pdf.pdf.} Pandora’s proposal for non-subscription services was a per-performance rate of $0.0011 in 2016 increasing to $0.00118 in 2020, a subscription rate $0.00215 in 2016 increasing to $0.0023 in 2020, and a “greater of” figure that is 25\% of revenue.\footnote{Proposed Rates and Terms of Pandora, Inc. at 1–2, Webcasting IV, No. 14-CRB-0001-WR (C.R.B. Oct. 7, 2014), http://www.loc.gov/crb/rate/14-CRB-0001WR/statements/Pandora/2_Pandora_Proposed_Rates_and_Terms_pdf.pdf.} iHeartMedia and the NAB proposed a per-performance rate of $0.0005 for five years with no
percentage of revenue alternative. Any direct licenses entered into would be excluded from the calculations.

On December 16, 2015, the CRB issued their written determination as to the royalty rates and terms applicable to the digital performance of sound recordings over the Internet by nonexempt, non-interactive transmission services (webcasters).

The rate for commercial subscription services in 2016 is $0.0022 per performance with commercial nonsubscription services at $0.0017 per performance. The rates for 2017 through 2020 for both types of services shall be adjusted to reflect the increases or decreases as measured by the Consumer Price Index applicable to that rate year. In addition, the rates for noncommercial webcasters are $500 annually for each station or channel for all webcast transmissions totaling not more than 159,140 Aggregate Tuning Hours (ATH) with a per performance rate of $0.0017 for any performances in excess of the ATH figure.

The “greater of [percentage] of revenue versus per performance rate” (Revenue Share) concept, as set forth in the prior Webcaster Settlement Acts, was not included in the 2016-2020 rate determination. CRB decisions are appealable to the United States Court of Appeals for the District of Columbia Circuit within thirty days after publication of the determination in the Federal Register.

VIII. SOUNDEXCHANGE DISTRIBUTIONS AND DIRECT LICENSES

The total of all royalties collected by SoundExchange in 2014 was $788 million, with the statutory license accounting for $755

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142. Id.

143. Id.

144. Id.

million of that figure.\textsuperscript{146} The remaining collections represent royalties received from non-statutory services, including foreign country collective management organizations.\textsuperscript{147} Total gross distributions were $773 million to artists and sound recording copyright owners.\textsuperscript{146} Royalty distributions are allocated 50% to sound recording copyright owners (many times the label), 45% to featured artists, and 2.5% each to non-featured musicians and non-featured vocalists via the Intellectual Property Rights Distribution Fund, administered by the American Federation of Musicians (AFM) and the SAG-AFTRA.\textsuperscript{149} As to the amount of sound recording royalties coming in from foreign countries, it is important to note that it is limited based on the reciprocal right being administered in each country. As the U.S. sound recording performance right is a very limited one (non-interactive streaming primarily), it substantially reduces the amount of royalties coming into the United States for overseas sound recording performances.

Finally, in the case of rights owners wishing to directly license their works to non-interactive services and not rely on the statutory license or SoundExchange separately negotiated deals, SoundExchange does offer administration services to both labels as well as artists for those works.

IX. PRE-1972 SOUND RECORDINGS

As previously mentioned, sound recordings fixed prior to February 15, 1972, are not subject to copyright under § 301(c), and further, any rights they do have depend solely on whatever rights are afforded to sound recording owners under state law.\textsuperscript{150}

\begin{itemize}
\item 147. \textit{Id.} at 4 n.2.
\item 148. \textit{Id.}
\item 150. 17 U.S.C. § 301(c); \textit{see also} Flo & Eddie, Inc. v. Sirius XM Radio, Inc., 62 F. Supp. 3d 325, 336 (S.D.N.Y. 2014) (“Recordings ‘fixed’ (recorded) prior to February 15, 1972 were not, and still are not, eligible for federal copyright protection.”); Capitol Records, Inc. v. Naxos of Am., Inc., 830 N.E.2d 250, 252 (N.Y. 2005) (“Sound recordings produced after February 15, 1972 can be protected from infringement under federal copyright law but Congress did not extend statutory protection to recordings created before that date.”).
\end{itemize}
In September 2014, in the U.S. District Court for the Central District of California case Flo & Eddie, Inc. v. Sirius XM Radio, Inc., the court ruled in a motion for summary judgment that copyright ownership of a sound recording under the California statute includes the right to publicly perform the recording. The court further held that Sirius XM’s streaming of the 1960s band The Turtles’ pre-1972 recordings without authorization and without paying royalties constituted copyright infringement. In November 2014, the U.S. District Court for the Southern District of New York ruled in Flo & Eddie, Inc. v. Sirius XM Radio, Inc. that Sirius had committed copyright infringement and engaged in unfair competition by publicly performing sound recordings owned by Flo & Eddie. These cases and their appeals, as well as similar pending cases regarding the same or similar issues, need to be watched as they will have a very significant impact on future sound recording license fees as well as royalties to labels and artists.

X. WHERE DO WE NOW STAND?

Of the two performance areas under discussion—musical composition rights and sound recording rights—the sound recording seems much clearer than the composition side. The sound recording performance right, at least for now, is a very limited right (traditional radio, for example, is not included) and has a statutory scheme in place with rates set by either the CRB, by SoundExchange with users, or by direct negotiations between copyright owners and users. Over the past ten years, this has been, percentage-wise, by far the biggest growth area for sound recording copyright owners. Though the status of pre-1972 sound recordings is not yet finalized, all indications are that significant royalties will start to flow for this category of works.

152. Id.
The musical composition performance right, on the other hand, has more questions and unresolved issues in the licensing process than ever before. Not only are there unresolved Rate Court cases and issues affecting every aspect of the licensing of music in the “new media” world (not to mention the effect on traditional media licensing), but also the entrance into the field of new types of PRO models (e.g., music publishers, business entities, administration services, foreign territory rights management organizations, etc.) which could, depending on one’s point of view, significantly complicate the existing licensing structure for music users, achieve “willing buyer, willing seller” market rates for the creative community and their representatives, strengthen the arguments for licensing through the traditional PRO model, weaken the current traditional PRO structures, increase license fees and royalties in some areas with reductions in others, initiate an era of PRO selective administration services only, and create new writer and music publisher royalty payment formulas, values, compensation plans, guarantee arrangements, competitive matching payment systems, royalty advance deals, bonus and “rewards for success” policies as well as other financial incentive plans, among other possibilities and results.

In addition, the direct licensing of works by copyright owners, never a major factor in the past, has taken on new significance in not only the online “new media” world of music licensing, but also in traditional media music licensing practices. Finally, the Department of Justice review of the ASCAP and BMI Consent Decrees, in effect since 1941, could have a significant effect on the future of music performance licensing, assuming that any changes encompass more than just minor modifications.

The foreign marketplace, responsible for the collection of an excess of $1.5 billion in annual U.S. writer and publisher performance fees, represents an additional area of concern regarding the stability, continuation, and accuracy of “overseas” royalty collections and payments. The issues in this area are more significant for songwriters and composers than music publishers, as many publishers collect their monies directly from foreign societies as direct members or via sub-publishers. For successful songwriters, film and television composers, and writer estates, foreign royalties—for many, easily in excess of 50% of their short-term and long-term royalty income—have always flowed through the societies through reciprocal agreements. Therefore, any change in those
relationships could have a major impact on the ability to license, track, audit, collect, and receive foreign country songwriter and composer royalties.

The best advice for the future—in all of your deals, negotiations, and contracts—prepare for every contingency and possibility," as they may very well come true.

Welcome to the “new world of performance licensing.”
LICENSING DIGITAL MUSIC IN CANADA
LICENSING DIGITAL MUSIC IN CANADA
SERVICE PROVIDERS’ GUIDE TO DIGITAL MUSIC IN CANADA

WELCOME TO CANADA’S DIGITAL MUSIC MARKET

This guide has been prepared for businesses seeking to start a digital music service in Canada. Here you will find information on market opportunities, Canadian consumer preferences, music licensing, and more.

Canada’s music market is in transition. Every year, more Canadians buy and enjoy music online and on mobile devices.

Canada’s major and leading independent record labels are proactively helping digital music service providers succeed through initiatives such as this guide. Beyond this, Canada’s recently reformed copyright framework offers the prospect of an improved legal environment for digital music.

The time is right to get your digital music business started in Canada. Canada’s major and leading independent record labels, in association with their trade association, Music Canada, look forward to helping you navigate and maximize the opportunities for success.

CANADIAN MARKET SNAPSHOT

<table>
<thead>
<tr>
<th>Country Stats</th>
<th></th>
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<tbody>
<tr>
<td>Population (July 1, 2013)¹</td>
<td>35.2 million</td>
</tr>
<tr>
<td>GDP (2014)²</td>
<td>$1.9 trillion</td>
</tr>
<tr>
<td>World Rank of Economy (2013)³</td>
<td>11th</td>
</tr>
<tr>
<td>GDP per Capita (2013)⁴</td>
<td>US$51,206</td>
</tr>
<tr>
<td>Median Age</td>
<td>41</td>
</tr>
<tr>
<td>Official Languages</td>
<td>English/French</td>
</tr>
</tbody>
</table>

¹ Statistics Canada
² Ibid
³ International Monetary Fund
⁴ The World Bank
<table>
<thead>
<tr>
<th><strong>Canada’s Music Market</strong></th>
</tr>
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<tbody>
<tr>
<td>World Rank (2013)(^5)</td>
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<tr>
<td></td>
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<td></td>
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<tr>
<td>Recorded Music Retail Sales (2013)(^6)</td>
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<tr>
<td>Digital Music Retail Sales (2013)(^7)</td>
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<tr>
<td>Digital Share of Retail Sales(^8)</td>
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<tr>
<td>Digital Sales Growth(^9)</td>
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</table>

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<tr>
<th><strong>Breakdown of Digital Music Sales, 2013</strong></th>
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<tbody>
<tr>
<td><img src="chart.png" alt="Pie Chart" /></td>
</tr>
</tbody>
</table>

**SOURCE:** International Federation of the Phonographic Industry (IFPI), “2013 Recording Industry In Numbers”

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\(^5\) International Federation of the Phonographic Industry (IFPI), “2013 Recording Industry In Numbers”
\(^6\) Ibid
\(^7\) Ibid
\(^8\) Ibid
\(^9\) Ibid (based on year-over-year retail value of digital music sales, in US$)
Canada’s Digital Landscape

<table>
<thead>
<tr>
<th>Metric</th>
<th>Value</th>
</tr>
</thead>
<tbody>
<tr>
<td>Internet access (% of households with access to the Web)</td>
<td>83%</td>
</tr>
<tr>
<td>Households with broadband</td>
<td>10.9 million</td>
</tr>
<tr>
<td>Mobile subscriptions (as of Q1 2014)</td>
<td>27.5 million</td>
</tr>
<tr>
<td>Smartphone users</td>
<td>17.4 million</td>
</tr>
<tr>
<td>World rank in internet use (volume of data per capita)</td>
<td>2</td>
</tr>
<tr>
<td>Facebook – # users / world rank</td>
<td>19.9 million / 1</td>
</tr>
<tr>
<td>Proportion of online Canadians who visit social networks weekly/daily</td>
<td>45% / 30%</td>
</tr>
</tbody>
</table>

Canadian Service Providers (2013 market share)

- Rogers Wireless: 35%
- Bell Wireless: 29%
- Telus Mobility: 29%
- Other: 8%

**SOURCE:** CWTA Subscriber Stats, Q3 2013

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10 Statistics Canada, “Canadian Internet Use Survey”, 2012
11 IFPI, “2013 Recording Industry in Numbers”
12 Canadian Wireless Telecommunications Association (CWTA)
13 IFPI “2013 Recording Industry in Numbers”
14 OECD Communications Outlook 2011
15 The Canadian Press (stat as of August 2013)
16 Ipsos Reid (stats as of July 2011)
CANADIAN MUSIC CONSUMERS

Canada’s major and leading independent record labels, in association with Music Canada, commissioned a national survey on Canadians’ relationship to music and their digital music preferences. The research, conducted independently by Environics Research Group in mid-2011, identified valuable market insights. Selected highlights are provided below.

Canadians’ Relationship to Music

Canadians love music: about half of Canadians say that “music is important to me” or “music is my life.”

We like variety: about 70% of music buyers prefer to sample, buying one or two songs or albums from a wide range of artists. The rest prefer to buy all or most albums from a smaller group of favourite artists.

YouTube has emerged as the favourite place to share music: almost 40% of Canadians say they share music by emailing links to music videos on YouTube. The younger they are, the more they share. (Note: most survey respondents said they do not share music).

We listen while on the move: more than a quarter of Canadians listen to music “most often” with in-car stereo systems while almost one-fifth most often use iPods. This compares to home stereo/theatre systems (14%), desktop computers (13%), and laptops (11%).

Buying Music Online

Younger Canadians are online music buyers: Two-thirds of consumers 13 to 17 years old, and more than half of 18 to 49-year-olds, say they bought music downloads in the past year.

Canada is a digital greenfield opportunity: About half of Canadians say they have never purchased downloadable music. Those buying downloads reported spending $54 on average, and purchasing more online year-over-year.

Night time is buying time: Almost 70% of downloadable music files are purchased in the evening. About one-quarter are bought in the afternoon.
Streaming Music Preferences

**We like digital streaming:** Almost one in five Canadians spent money on digital movie/TV streaming services in the past 12 months, reporting an average spend of $69.

**Make it free, please (unless…):** Two-thirds of Canadians want digital streaming music to be free. However, many say they will accept a monthly fee in exchange for more features, such as no ads (more than a third will pay $2.50 per month; 14% will pay $15).

**What matters:** After price, Canadians rank the number of ads played as the most important attribute in a streaming music service. Few respondents put a high priority on other attributes such as multi-device usability or being able to play streamed music while not connected to the Internet.

**No more contracts:** About three-quarters of Canadians agree that they “don’t need another contract” on top of the mobile, broadband and other contracts they already have, to buy digital music.

**About the Survey**

The research was conducted independently by Environics Research Group via a national online survey of 1,180 Canadians aged 13 and older, from June 27 to July 6, 2011.

For more details on the research findings, please contact Music Canada.

**MUSIC LICENSING: A HOW-TO GUIDE**

**Introduction**

The key players and rights involved in licensing music in Canada closely mirror those of other major markets. Licensing ensures that rights holders, including the artists who create the music offered through digital services, are fairly compensated for their work.

The types of licenses required vary depending on the type of digital music service. These variations – and the rights holders involved – are outlined below.

Depending on the digital service, the rights may be licensed directly from rights holders or, where tariffs apply, from collectives, under pre-defined terms. Tariffs are certified by the Copyright Board of Canada, a government tribunal.
Key Terminology
Reproduction Right – the right of music labels, performers and songwriters/music publishers to control copying of their music.

Communication Right – the right of music labels, performers and songwriters/music publishers to be paid when their music is communicated to the public by telecommunications.

Getting Started
Digital music service providers are invited to contact Sacha Isaacksz, Director, Legal & Business Affairs, Digital Business Development at Connect Music Licensing. Sacha can be reached at 416-922-8727 ext. 107 or sisaacksz@connectmusic.ca.

Or refer to the guide below, which is followed by contact information for each rights holder.

<table>
<thead>
<tr>
<th>Digital Download Services</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>SERVICE DESCRIPTION</strong></td>
</tr>
<tr>
<td><strong>EXAMPLES of services operating in Canada</strong></td>
</tr>
</tbody>
</table>
| **Artists/Record Labels** | 1. Sound recordings are licensed directly with each record label.  
  • See list of record labels below |
| **Music Publishers/Songwriters** | 2. Reproduction rights in musical works (compositions) are licensed under Copyright Board tariffs.  
  • Contact CSI |
## Non-interactive or Semi-Interactive Streaming Services

### SERVICE DESCRIPTION

*Non-interactive* streaming is fully controlled by the provider, i.e. users cannot control the content streamed. *Semi-interactive* streaming allows user-influenced or customized playlists, or allows users to fast-forward/skip tracks.

### EXAMPLES of services operating in Canada

- Galaxie Mobile, Slacker Radio, CBC Music

#### Artists/Record Label

1. Communication rights are licensed under Copyright Board tariffs.
   - Contact Re:Sound
2. Sound recordings can be licensed through Connect Music Licensing (for English Canada) and SOPROQ (for Quebec) who together represent over 1000 record labels in Canada.
   - Contact Connect Music Licensing, SOPROQ

#### Music Publishers/Songwriters

3. Communication rights in musical works (compositions) are licensed under Copyright Board tariffs.
   - Contact SOCAN
4. Reproduction rights in musical works (compositions) are licensed under Copyright Board tariffs.
   - Contact CSI
### Online/Mobile On-Demand Streaming Services

**SERVICE DESCRIPTION**
Services that provide online and/or mobile on-demand streaming. Users have full control over selection and timing of the tracks streamed.

**EXAMPLES of services operating in Canada**
Spotify, Sony Music Unlimited, Deezer, Microsoft Groove

| Artists/Record Labels | 1. Sound recordings are licensed directly with each record label.  
<table>
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<tr>
<th></th>
<th>▪ See list of record labels below</th>
</tr>
</thead>
</table>
| Music Publishers/Songwriters | 2. Communication rights in musical works (compositions) are licensed under Copyright Board tariffs.  
|                         | ▪ Contact SOCAN  
|                         | 3. Reproduction rights in musical works (compositions) are licensed under Copyright Board tariffs.  
|                         | ▪ Contact CSI |

### Streaming Music Videos

**SERVICE DESCRIPTION**
Services that stream music videos.

**EXAMPLES of services operating in Canada**
Youtube, Vevo

| Artists/Record Labels | 1. Sound recordings are licensed directly with each record label.  
|-----------------------|---------------------------------|
| Music Publishers/Songwriters | 2. Communication rights in musical works (compositions) are licensed under Copyright Board tariffs.  
|                         | ▪ Contact SOCAN  
|                         | 3. Reproduction rights in musical works (compositions) through CMRRA.  
|                         | ▪ Contact CMRRA |

### Reporting Requirements

Reporting templates used by record labels in Canada are consistent with those used in other jurisdictions. Further details are available on request.
## Licensing Contacts

### Music Licensing Collectives

<table>
<thead>
<tr>
<th>Connect Music Licensing</th>
<th>Connect Music Licensing</th>
<th><a href="http://www.connectmusic.ca">www.connectmusic.ca</a></th>
<th>Sacha Isaacksz</th>
<th>(416) 922-8727 x 107 <a href="mailto:sisaacksz@connectmusic.ca">sisaacksz@connectmusic.ca</a></th>
</tr>
</thead>
</table>

Connect Music Licensing administers licensing in Canada for the reproduction of sound recordings and reproduction and broadcast of music videos on behalf of copyright owners (usually, record companies). Connect Music Licensing has more than 1,000 members.

<table>
<thead>
<tr>
<th>CSI</th>
<th>CMRRA-SODRAC Inc.</th>
<th><a href="http://www.cmrrasodrac.ca/">www.cmrrasodrac.ca/</a></th>
<th>Natacha Labelle</th>
<th>(416) 926-1966 x 252 <a href="mailto:csi@cmrrasodrac.ca">csi@cmrrasodrac.ca</a></th>
</tr>
</thead>
</table>

CSI licenses the reproduction rights in the joint repertoire of CMRRA and SODRAC to various music users, including radio stations, background music services and online music services. Together, CMRRA and SODRAC represent the vast majority of songwriters and music publishers whose songs are active in the Canadian market place.

<table>
<thead>
<tr>
<th>Re:SOUND</th>
<th>Re:Sound Music Licensing Company</th>
<th><a href="http://www.resound.ca">www.resound.ca</a></th>
<th>Fallon-Peage Tulloch</th>
<th>(416) 355-8323 <a href="mailto:ftulloch@resound.ca">ftulloch@resound.ca</a></th>
</tr>
</thead>
</table>

Re:Sound represents artist and record companies, administering their rights for performance and broadcast of their work in Canada, and through collaboration with international counterparts abroad.

<table>
<thead>
<tr>
<th>SOCAN</th>
<th>Society of Composers, Authors and Music Publishers of Canada</th>
<th><a href="http://www.socan.ca">www.socan.ca</a></th>
<th>James Leacock</th>
<th>(416) 445-8700 x 3793 <a href="mailto:leacockj@socan.ca">leacockj@socan.ca</a></th>
</tr>
</thead>
</table>

SOCAN is the Canadian copyright collective that administers the performing rights of over three million Canadian and international music creators and publishers by licensing their musical works in Canada.

<table>
<thead>
<tr>
<th>SOPROQ</th>
<th>Quebec Collective Society for the Rights of Makers of Sound and Video Recordings</th>
<th><a href="http://www.soproq.org">www.soproq.org</a></th>
<th>Sébastien Sangollo</th>
<th>(514) 842-5147 x 231 <a href="mailto:ssangollo@soproq.org">ssangollo@soproq.org</a></th>
</tr>
</thead>
</table>

The Quebec Collective Society for the Rights of Makers of Sound and Video Recordings (SOPROQ) represents more than 825 members in Quebec and administers licensing on their behalf for the reproduction of sound recordings and reproduction and broadcast of music videos.
## Major Record Labels

<table>
<thead>
<tr>
<th>Label</th>
<th>Website</th>
<th>Contact Person</th>
<th>Phone</th>
<th>Email</th>
</tr>
</thead>
<tbody>
<tr>
<td>Sony Music Canada</td>
<td><a href="http://www.sonymusic.ca">www.sonymusic.ca</a></td>
<td>Mike Lawless</td>
<td>416-589-3168</td>
<td><a href="mailto:Mike.Lawless@sonymusic.com">Mike.Lawless@sonymusic.com</a></td>
</tr>
<tr>
<td>Universal Music Canada</td>
<td><a href="http://www.universalmusic.ca">www.universalmusic.ca</a></td>
<td>Jon Box</td>
<td>(416) 718-4422</td>
<td><a href="mailto:jon.box@umusic.com">jon.box@umusic.com</a></td>
</tr>
<tr>
<td>Warner Music Canada</td>
<td><a href="http://www.warnermusic.ca">www.warnermusic.ca</a></td>
<td>Rob Bolton</td>
<td>(416) 758-1126</td>
<td><a href="mailto:rob.bolton@warnermusic.com">rob.bolton@warnermusic.com</a></td>
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## Indie Record Labels

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<thead>
<tr>
<th>Label</th>
<th>Website</th>
<th>Contact Person</th>
<th>Phone</th>
<th>Email</th>
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<tbody>
<tr>
<td>6.8.2. Records</td>
<td><a href="http://www.682records.com">www.682records.com</a></td>
<td>Lynn Johnston</td>
<td>(705) 523-9682</td>
<td><a href="mailto:lynnjohnston682@me.com">lynnjohnston682@me.com</a></td>
</tr>
<tr>
<td>604 Records</td>
<td><a href="http://www.604records.com">www.604records.com</a></td>
<td>Nick Whitcomb</td>
<td>(604) 681-1410</td>
<td><a href="mailto:nick@lightorganrecords.com">nick@lightorganrecords.com</a></td>
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<tr>
<td>Awesome Music</td>
<td><a href="http://www.awesomemusic.ca">www.awesomemusic.ca</a></td>
<td>Asim Awesome Awan</td>
<td>(416) 583-5050</td>
<td><a href="mailto:awesome@pathcom.com">awesome@pathcom.com</a></td>
</tr>
<tr>
<td>Coalition Music</td>
<td><a href="http://www.coalitionent.com">www.coalitionent.com</a></td>
<td>Serena Ragogna</td>
<td>(416) 755 – 0025</td>
<td><a href="mailto:Serena.Ragogna@coalitionmusic.com">Serena.Ragogna@coalitionmusic.com</a></td>
</tr>
<tr>
<td>Dine Alone Music Inc.</td>
<td><a href="http://www.dinealonerecords.com">www.dinealonerecords.com</a></td>
<td>Lisa Logutenkow</td>
<td>(416) 585-7885</td>
<td><a href="mailto:lisa@bedlammusicmgt.com">lisa@bedlammusicmgt.com</a></td>
</tr>
<tr>
<td>Distribution Select</td>
<td><a href="http://www.distributionselect.ca">www.distributionselect.ca</a></td>
<td>Nicolas Palhier</td>
<td>(514) 566-8098</td>
<td><a href="mailto:Nicolas.palhier@select.quebecor.com">Nicolas.palhier@select.quebecor.com</a></td>
</tr>
<tr>
<td>eOne Music</td>
<td><a href="http://www.eonedistribution.ca">www.eonedistribution.ca</a></td>
<td>William Crowley</td>
<td>(212) 353.8800 x 5271</td>
<td><a href="mailto:WCrowley@EntOneGroup.com">WCrowley@EntOneGroup.com</a></td>
</tr>
<tr>
<td>MapleCORE Ltd.</td>
<td><a href="http://www.maplecore.com/">www.maplecore.com/</a></td>
<td>Avi Diamond</td>
<td>(416) 961-1040</td>
<td><a href="mailto:Avi.Diamond@maplemusic.com">Avi.Diamond@maplemusic.com</a></td>
</tr>
<tr>
<td>Quinlan Road</td>
<td><a href="http://www.quinlanroad.com">www.quinlanroad.com</a></td>
<td>Ian Blackaby</td>
<td>44 207 435 7706</td>
<td><a href="mailto:ian@ardentmusic.co.uk">ian@ardentmusic.co.uk</a></td>
</tr>
<tr>
<td>Slaight Music</td>
<td><a href="http://www.slaightmusic.com">www.slaightmusic.com</a></td>
<td>Derrick Ross</td>
<td>(416) 934-7419</td>
<td><a href="mailto:derrick.ross@slaight.com">derrick.ross@slaight.com</a></td>
</tr>
<tr>
<td>Troubadour Music Inc.</td>
<td><a href="http://www.raffinews.com/contact/mission">www.raffinews.com/contact/mission</a></td>
<td>Judy Wilson</td>
<td>(250) 539-3588</td>
<td><a href="mailto:jwilson@troubadourmusic.net">jwilson@troubadourmusic.net</a></td>
</tr>
<tr>
<td>Canadian Independent Music Association</td>
<td><a href="http://www.cimamusic.ca">www.cimamusic.ca</a></td>
<td>Stuart Johnston</td>
<td>(416) 485-3152 x 232</td>
<td><a href="mailto:stuart@cimamusic.ca">stuart@cimamusic.ca</a></td>
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<tr>
<td>Additional Resources</td>
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<tr>
<td><strong>Canada music sales statistics</strong></td>
<td><a href="http://www.musiccanada.com">www.musiccanada.com</a></td>
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<td>(includes list of leading digital music services in Canada)</td>
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<td><strong>More IFPI statistics</strong></td>
<td><a href="http://www.ifpi.org/content/section_statistics/index">www.ifpi.org/content/section_statistics/index</a></td>
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<td><strong>Statistics Canada Sound Recording and Publishing Statistics</strong></td>
<td><a href="http://www5.statcan.gc.ca/olc-cel/olc.action?objId=87F0008X&amp;objType=2&amp;lang=en&amp;limit=0">http://www5.statcan.gc.ca/olc-cel/olc.action?objId=87F0008X&amp;objType=2&amp;lang=en&amp;limit=0</a></td>
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<td><strong>Music tariffs certified by the Copyright Board of Canada</strong></td>
<td><a href="http://www.cb-cda.gc.ca/tariffs-tarifs/index-e.html">www.cb-cda.gc.ca/tariffs-tarifs/index-e.html</a></td>
<td></td>
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<tr>
<td><strong>Pro-Music’s global list of digital music services</strong></td>
<td><a href="http://www.pro-music.org/">www.pro-music.org</a></td>
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The information in this guide is intended solely as an overview and should not be considered as legal advice. Businesses seeking to establish operations in Canada should consult independent Canadian legal counsel.

This document was updated on January 6, 2016. The information is subject to change.
Music App License Agreement

This _____________ Agreement (this "Agreement") is made and entered into effective as of _____, 20___ (the "Effective Date") by and between ________________ with offices located at ___________________ ("Licensee"), and __________________, with offices located at ___________________ ("Publisher").

WHEREAS, Licensee operates the Service and wishes to license from Publisher certain rights with respect to Publisher Compositions;

WHEREAS, Publisher is willing to license certain rights to Licensee to exploit Publisher Compositions via the Service, pursuant to the terms and conditions in this Agreement and all Exhibits annexed hereto which are incorporated herein by reference.

NOW, THEREFORE, in consideration of the mutual covenants and agreements set forth herein, and for other good and valuable consideration, the receipt and adequacy of which is hereby acknowledged, the parties hereby agree as follows:

1. Definitions

a) “Authorized Service Provider” means a third party approved by Publisher in writing that provides services for or on behalf of Licensee in connection with the administration of music publishing rights, royalties, and/or payments during and after the Term, as applicable.

b) “Company App” means a Licensee branded and developed stand-alone software application downloadable on a mobile telephone, tablet, or personal computer from an application store, solely for the making available of the Service online, via mobile networks, or Wi-Fi and that complies fully with all requirements set forth in this Agreement, including without limitation, the approved Terms of Service/End User Licensing Agreement set forth on Exhibit __, and the Security Requirements For Streaming set forth on Exhibit __.

c) “Company Site” means any site or page located on the Internet where an End User can access the Service on a mobile device or a personal computer through a web browser or client interface that is owned, operated, maintained, or branded by Licensee, and that is hosted on, and transmitted from, Licensee’s servers for purposes of provision of the Service with the uniform resource locator of www._________________.com. [Use if Service also has a website.]

d) "End User" means an individual, natural person (i.e., not an entity, business, or organization) who resides anywhere in the Territory and who accesses the Service through the Company Site or Company App for his/her own entertainment and non-commercial use, and who complies with Licensee’s approved Terms of Service/End User Licensing Agreement.

e) “End-User Video” means a user-generated video created by an End User via tools provided by the Company App featuring a segment of a Publisher Composition embodied within a Master Recording.

f) "Gross Revenue" means:

i. all sums payable to, credited to, or received by Licensee in connection with the Service, the Company Site and/or the Company App, which includes, without limitation the following revenue sources:
1. advertising of all kinds on the Service and any area outside of the Service that Licensee controls (including, without limitation, audio and visual advertising, and sponsorships);
2. payment from End Users for access to or use of the Service, or portions thereof, including, without limitation, online and other connection charges, subscriptions, payments from Internet service providers, transaction charges, and commissions, as well as any monies earned from the sale of in-Service virtual goods, e-greeting cards, ringtones, and/or any other in-Service purchases by End-Users; and
3. e-commerce bounties or click-through royalties, or referral or affiliate program fees or the like.

   ii. For purposes of determining any non-cash component of Gross Revenue, such non-cash consideration will be accounted for based on the fair market value of any goods, services or other real, personal, tangible or intangible property received (except as otherwise determined consistent with GAAP).

g) "Master Recording" means an authorized master sound recording licensed by Licensee from the applicable record company which controls such recording. [This definition may be used if licensee plans to use label masters.]

h) "Publisher Composition" means a non-dramatic musical composition in which the rights that are the subject of this Agreement are owned or controlled by Publisher, in whole or in part, solely to the extent of Publisher’s ownership or control thereof in the Territory, and subject to any restrictions or limitations thereon imposed pursuant to songwriter agreements or other applicable license, administration or similar agreements with rights holders, societies or a similar organization that administers rights in compositions.

i) “Publisher’s Pro-Rata Ownership Share” means Publisher’s percentage of ownership and/or control of each Publisher Composition. [This definition can be used in the royalties section when revenue is allocable per transaction to one song.]

j) “Publisher’s Pro-Rata Share” means a fraction, the numerator of which is the total number of Publisher Compositions distributed via the Service in the applicable accounting period (pro-rated commensurately to Publisher’s percentage of ownership and/or control of each Publisher Composition), and the denominator of which is the total number of musical compositions distributed via the Service of all musical compositions, including Publisher Compositions, in the applicable accounting period. [This definition is used in the royalties section when the deal is structured as a rev-share, based on a publisher pool, where there isn’t individual revenue tied to one transaction for a particular composition. For example, Subscription Services and ad-supported models could use this definition.]

k) “Service” means the service owned, controlled and operated by Licensee specifically in accordance with the descriptions contained herein, and solely branded under the name ____________________ (without the ability to “white-label” the Service to third parties) that enables End Users (i) to create End User Videos embodying Publisher Compositions via the Company Site or Company App, and (ii) to share and distribute the End User Videos via the Company Site and/or Company App on Publisher-approved social media networks or via a link that points back to Licensee’s server.
[Several other definitions may be required in the “Definitions” Section depending on the specifics of a particular deal and the functionality of the Service.]

2. Scope.

a) **License Grant.** Subject to the terms and conditions of this Agreement and all Exhibits, Publisher hereby grants to Licensee, on a non-exclusive, non-transferable, non-sublicenseable basis, during the Term and within the Territory, the right to do the following, solely as required to operate the Service: (i) enable End Users to synchronize Publisher Compositions with video content using tools provided within the Company App, (ii) reproduce Publisher Compositions recorded by End Users in End User Videos, (vi) make reproductions of Publisher Compositions solely insofar as they are incidental and necessary to exploit the Publisher Compositions as permitted in this Agreement, and (vii) store and host Publisher Compositions on Licensee owned or controlled servers in the Territory. [This paragraph needs to be customized to include whatever rights the Publisher has agreed to grant. In this example, the Publisher is granting synchronization and reproduction rights. Other rights the publisher may grant may include lyric rights, print rights, public performance rights, etc].

b) **Catalogue Availability [OPTION 1].** The Publisher Compositions listed on Schedule A shall be licensed hereunder (as such Schedule may be amended periodically by Publisher throughout the Term via email notification to Licensee). [Use a paragraph like this for a Schedule A deal.]

c) **Catalogue Availability [OPTION 2]** Publisher’s entire catalogue of Publisher Compositions owned or controlled by Publisher during the Term shall be licensed hereunder, excluding musical compositions written by Publisher songwriters on the Restricted List as set forth herein on Exhibit __. For the avoidance of doubt, Publisher may unilaterally amend the Restricted List from time to time in an electronic format, which such list shall be incorporated herein as updated, provided Publisher shall use reasonable efforts to provide notice to Licensee thereof. [Use a paragraph like this for a blanket deal.]

d) **Authorized Service Provider.** Licensee is required to use an Authorized Service Provider (as set forth on Exhibit __) to perform its administration and accounting obligations under this Agreement, and Licensee shall maintain control over, and retain liability hereunder in connection therewith, including, without limitation, a breach of confidentiality by Authorized Service Provider as described in the next sentence. Prior to engaging in any transaction for or on behalf of Licensee, Authorized Service Provider shall agree to hold the terms of this Agreement and all information furnished by Publisher as confidential and shall execute Publisher’s standard confidentiality and non-disclosure agreement.

e) **Takedown.** Notwithstanding anything herein to the contrary, Publisher may terminate or suspend Licensee’s rights to use a Publisher Composition(s) by notifying Licensee in writing, including via email in Publisher’s sole discretion. Licensee shall cease to make available such Publisher Compositions as soon as reasonably practicable, but no later than within two (2) business days following receipt of notice.

**Give Language:** for any of the following reasons: (i) for writer relations reasons; (ii) due to Publisher’s reasonable belief that Publisher has lost rights or has contractual limitations with respect to such Publisher Compositions; or (iii) in the case of a third party claim or anticipated third party claim, or other legal risk to Publisher, Licensee or both. Licensee shall cease to make available such Publisher Compositions as soon as reasonably practicable, but no later than within two (2) business days following receipt of notice.
f) **Reservation of Rights.** All rights not expressly granted herein are reserved to Publisher. Except as specifically stated herein, the rights granted under this Agreement do not include any other rights, including without limitation, download, public performance, lyrics, karaoke, print, derivative work, ringtone, and/or ringback or, any rights to use a Publisher Composition for or in connection with a marketing campaign, product tie-in, or other promotional activity which might directly or indirectly imply a songwriter or Publisher sponsorship or endorsement of any product or service, including without limitation, the Service as set forth in this Agreement. This Agreement does not grant Licensee any rights to distribute Publisher Compositions by way of a so-called application programming interface (API). This Agreement does not grant any right to use the name, signature, voice, likeness, biographical materials or other information concerning the composer of any Publisher Composition, provided, however that Licensee shall have the right to use the titles of Publisher Compositions and the names of the writers of Publisher Compositions for purposes of identifying such Publisher Compositions on the Service. In the event a public performance license is required to operate any portion of the Service during the Term, Licensee shall be responsible for obtaining such license under a separate agreement. [This paragraph also needs to be customized per the rights specifically granted in the deal.]

3. **Term; Termination.**

   a) **Term.** The term of this Agreement shall commence on the Effective Date and shall expire [two (2) year][Note: Negotiated point.] thereafter, unless sooner terminated pursuant to the terms of this Agreement. Upon expiration (or earlier termination) of the Term, Licensee's rights hereunder shall terminate. Licensee shall withdraw the Publisher Compositions and any content embodying Publisher Compositions from the Service and Licensee shall make no further use of Publisher Compositions whatsoever. Any use of the Publisher Compositions in a manner, during a time period or in a territory not expressly described and permitted hereunder shall be deemed copyright infringement, and in such event Publisher shall have the right, in addition to whatever other legal or equitable remedies are available, to terminate this Agreement immediately upon written or email notice to Licensee.

   b) **Termination.** Without limiting any other remedy available at law or equity, Publisher may terminate this Agreement, effective upon written notice to Licensee, if Licensee materially breaches (e.g., failure to make payments when due) any of the provisions of this Agreement and fails to cure same within thirty (30) days (except for the failure to pay any fees or royalties due hereunder, in which case the period for cure shall be fifteen [15] days) after Licensee’s receipt of such written notice. In addition, without limiting any other remedy available at law or equity, Publisher may terminate this Agreement if Licensee is unable to pay its debts when due, makes any assignment for the benefit of creditors, files any petition under the bankruptcy or insolvency laws, has a receiver or trustee to be appointed for its business or property, or is adjudicated bankrupt or insolvent. Upon any expiration or termination of this Agreement, Licensee shall immediately cease to exercise any of the rights otherwise granted hereunder. Notwithstanding the foregoing, Sections of this Agreement which by their nature are intended to survive the expiration or termination of the Term shall survive.

4. **Territory.** The United States, its territories, and possessions (the “Territory”).

5. **Minimum Guarantee.** Licensee shall pay to Publisher a non-refundable minimum guarantee in the amount of __________ Dollars ($____.00) (the "Minimum Guarantee") as follows: (a) for the
period commencing as of the Effective Date until the end of the day one (1) year following the Effective Date ("Period 1"), the amount of _______ Thousand Dollars ($_________00) payable within ten (10) days of the full execution of this Agreement, which shall solely be recoupable from royalties otherwise payable to Publisher for Period 1, and (b) for the period commencing as of the close of Period 1 until the end of the day one (1) year following the commencement of Period 1 ("Period 2"), the amount of _______ Thousand Dollars ($_________) payable within ten (10) days of the commencement of Period 2, which shall be solely recoupable from royalties otherwise payable to Publisher for Period 2 (as such royalty rate is set forth in Section 6 below). For the avoidance of doubt, in the event total royalties (pursuant to Section 6) payable to Publisher for Period 1 or Period 2 exceed the portion of the Minimum Guarantee with respect to each such period, such excess royalties will be paid to Publisher in accordance with Section 8 below.

6. **Royalties.** In accordance with Section 8 below, Licensee shall pay to Publisher royalties equal to the following:

   a) Publisher’s Pro-Rata Share of [twenty five percent (25%)] of Gross Revenue for the applicable accounting period in respect of subscription services and advertising revenue, and all other revenue sources (as referenced in the definition of Gross Revenue) excluding those revenue sources set forth in paragraph 6(b) below. [This type of royalty structure is for a pool based royalty and the percentage is a negotiated point.]

   b) The greater of Publisher’s Pro-Rata Ownership Share of the following: (i) twenty-five percent (25%) of the retail price per a-la-carte Publisher Composition purchased during the applicable accounting period by an End User, or (ii) twenty (20) cents ($0.20) per Publisher Composition purchased by an End User. [This type of royalty structure is for revenue tied to an individual song per transaction with a penny floor per song.]

7. **Most Favored Nations.** Licensee covenants and agrees that, in the event it provides any more favorable financial terms (e.g., royalties, minimum guarantees, advances, flat payments, equity, computation of Gross Revenue, etc.) to any other music licensor than those set forth herein, it shall promptly offer such more favorable term(s) to Publisher as of the date Licensee provided such more favorable terms to any other music licensor. Licensee will not frustrate the purposes of this section by setting up an alternative payment and licensing arrangement to avoid its obligations. The parties understand and agree that no agreement between Licensee and any other music publisher or record company is likely to be identical to this Agreement, and that notwithstanding such differences, this favored nations provision is intended to cover any such agreement. On each anniversary of the Effective Date that occurs during the Term, Licensee shall send notice to Publisher either (a) affirmatively representing that Licensee is in full compliance with Licensee's duties under this Section 7, or (b) listing any such more favorable financial terms.

8. **Accounting/Payments.** Authorized Service Provider shall pay to Publisher royalties on a quarterly basis, within forty-five (45) days after the end of each calendar quarter, and shall, along with such payments, account to Publisher providing electronic statements in a manner compatible with Publisher’s royalty accounting systems, facilitating automated ingestion of such accountings into such systems and in such a manner as to facilitate Publisher's ability to account to Publisher's writers and other clients. Such statements shall be provided to Publisher in Publisher’s standard reporting format as set forth on Exhibit __, or another mutually agreed electronic format, and shall include all data elements set forth therein (for avoidance of doubt, including an identification of the applicable rate category[ies], breaking down all royalties and usage by category, and including all data required to verify the calculation of royalty payments set forth in such accountings). All payments to Publisher shall be made by wire or ACH, shall be in U.S. dollars and shall be sent to Publisher per the below
wire/ACH details set forth on the attached Exhibit F. All wire/ACH payments must unambiguously set forth the following reference code: __________________ - DIGITAL. Without limitation of any other rights or remedies available to Publisher, any past due amounts will bear interest daily until paid at a rate of interest equal to the lesser of (a) two percent (2%) per month, or (b) the maximum rate of interest allowed by applicable law.

9. **Audit.** Licensee will, and will cause Authorized Service Provider to, maintain and preserve in its principal place of business, during the Term and for at least five (5) years thereafter, complete and accurate books and records relating to its obligations hereunder. Such books and records shall include, without limitation, the following: data required to verify calculations herein; unfiltered source-level transaction data; Licensee’s cash receipts with the date of each receipt and the source name from which the receipt was sent; advertising income (both from in-house and third-party ad sales teams); and general revenue accounts. Publisher may, on its own or via an independent firm, audit such books and records and any software or systems used to create or maintain such books and records once a year during reasonable business hours (and no more than once for any one accounting period) and upon reasonable notice, and shall be permitted to make limited copies. Upon request, Licensee (or the Authorized Service Provider) shall (a) promptly make available to Publisher and/or its auditor, the foregoing books and records in electronic, searchable and analyzable format (e.g., in Microsoft Excel or another database format), and (b) promptly make available company personnel at an appropriate level of seniority and/or technical ability to discuss and/or resolve particular issues and findings arising out of any audit. Publisher shall pay the cost of such audit, unless such audit reveals an underpayment of five percent (5%) or more of any payment obligations during the audited period, in which case Licensee shall, without limitation of other rights and remedies, promptly pay such underpayment, together with specified interest thereon, and reimburse Publisher for all costs of the audit.

10. **Representations and Warranties.**

a) **Mutual.** Each party hereto represents, warrants and covenants to the other party the following: (i) such party has the full corporate right, power and authority to enter into this Agreement and to perform the acts required of it hereunder; (ii) when fully executed by the parties hereto, this Agreement will constitute the legal, valid and binding obligation of such party, enforceable against such party in accordance with its terms; and (iii) such party acknowledges that the other party makes no representations, warranties or agreements related to the subject matter hereof that are not expressly provided for in this Agreement.

b) **Licensee.** Licensee represents, warrants, and covenants that: (i) it shall be solely responsible for obtaining and paying for any and all necessary rights, permissions, and consents to operate the Service; (ii) it will use industry-standard content identification technology; (iii) it shall not utilize any Publisher Composition with any images or content that could reasonably be perceived as offensive or obscene; (iv) it shall not use a Publisher Composition in a manner that infringes upon the proprietary rights of any third party (including without limitation intellectual property, publicity and privacy rights) or in any way that might be construed as an endorsement, commercial, co-promotions or cross-promotions of any third-party service, product or entity; (v) it shall not reference, advertise or otherwise represent Licensor as a sponsor of or partner in any contest of sweepstakes related to the Services; (vi) the Service will comply at all times with all Exhibits annexed hereto, and (vii) this Agreement will not violate the provisions of any agreement which Licensee is a party or violate any applicable laws or regulations.

11. **Indemnity.**
a) **By Publisher.** Publisher will defend at its expense, indemnify and hold harmless Licensee and its directors, officers, employees, agents and representatives ("Related Parties") from any losses, liabilities, damages, awards, settlements, judgments, fees, costs or expenses (including reasonable attorneys' fees and costs of suit) ("Losses") arising out of any third-party (other than Authorized Service Providers, Services, Licensee’s Related Parties or other parties acting on behalf of Licensee) claim, allegation, action, demand, proceeding or suit that is reduced to a final non-appealable adverse judgment or settlement against any of them that arises out of (i) any breach by Publisher of its warranties and representations hereunder and (ii) any claim that the Publisher Compositions, as used by Licensee in the manner explicitly authorized by this Agreement, infringe the copyrights of a third party. Notwithstanding the foregoing: (xi) Losses shall not include claims that a "sample" and/or "interpolation" (as those terms are generally understood in the music industry) embodied in a Publisher Composition is not authorized, and (xii) in no event shall Publisher’s indemnity obligations per infringement under this Agreement exceed the amount of consideration received by Publisher for use of the applicable Publisher Composition(s) in dispute as of the date of Publisher’s receipt of Licensee’s notice of the alleged breach. Further, in no event shall Publisher’s total indemnity obligations in the aggregate exceed the amount of consideration received by Publisher under this Agreement as of the date of Publisher’s receipt of Licensee’s written notice of the such claim.

b) **By Licensee.** Licensee will defend at its expense, indemnify and hold harmless Publisher and its affiliates and their respective Related Parties from any Losses arising out of any third party claim, allegation, action, demand, proceeding or suit against any of them that arises out of: (i) any breach by Licensee of this Agreement or its warranties, representations, covenants and undertakings hereunder; (ii) operation of Licensee’s Service; or (iii) any claim that Licensee’s use of the Publisher Compositions, other than as explicitly authorized by this Agreement, infringes the rights of a third party.

c) The indemnified party will promptly notify the indemnifying party in writing of any indemnifiable claim and promptly tender its defense to the indemnifying party. The indemnified party will cooperate with the indemnifying party in such party’s defense of any claim, allegation, action, demand, proceeding or suit. The indemnifying party may not settle any claim, allegation, action, demand, proceeding or suit in a manner that adversely affects the indemnified party without such party’s consent (which shall not be unreasonably withheld or delayed). The indemnified party may participate in its defense with counsel of its own choice at its own expense.

12. **Disclaimers; Limitation of Liability.** EXCEPT WITH RESPECT TO BREACHES OF SECTION 2(A) BY LICENSEE, NEITHER PARTY WILL BE LIABLE TO THE OTHER PARTY FOR ANY INDIRECT, INCIDENTAL, PUNITIVE, CONSEQUENTIAL, SPECIAL OR EXEMPLARY DAMAGES ARISING UNDER OR RELATING TO THIS AGREEMENT, THE PUBLISHER COMPOSITIONS AND/OR THE RIGHTS GRANTED HEREUNDER, SUCH AS, BUT NOT LIMITED TO, LOSS OF REVENUE OR ANTICIPATED PROFITS OR LOST BUSINESS. ANY DATA PROVIDED BY OR ON BEHALF OF PUBLISHER TO LICENSEE OR ITS AUTHORIZED SERVICE PROVIDER IS PROVIDED ON AN "AS IS," BASIS AND PUBLISHER MAKES NO REPRESENTATIONS OR WARRANTIES, EXPRESS OR IMPLIED, REGARDING SUCH DATA, INCLUDING ANY IMPLIED WARRANTY OF MERCHANTABILITY, FITNESS FOR A PARTICULAR PURPOSE, TITLE OR NON-INFRINGEMENT. PUBLISHER DISCLAIMS ALL WARRANTIES OF ANY KIND.

13. **Notices.** Unless otherwise explicitly stated in the Agreement, any notice, consent, approval, demand, or other communication to be given to Publisher or to Licensee shall be sent to Publisher or Licensee, as the case may be, at the address mentioned in this Section 13, or to such other address as such party may hereafter designate by notice in writing to the other party. Any notice, consent, approval,
demand, and/or other communication hereunder shall be hand delivered or sent by certified mail, return receipt requested, or via over-night delivery service as follows:

To Publisher: ____________________

____________________________

Attention: ____________

___________@_____.com

To Licensee: ____________________

____________________________

Attention: ____________

___________@_____.com

Any notice shall be deemed complete the earlier of (i) three (3) business days after the same (containing whatever information may be required hereunder) is postmarked by the United States Postal Service, and properly addressed and sent as aforesaid, or (ii) date of receipt, except that (a) all materials personally delivered shall be deemed served when actually received by the party to whom addressed, (b) air express or courier (e.g., UPS, FedEx, etc.) materials shall be deemed served on the day of delivery to the recipient, and (c) notices of change of address shall be effective only from the date of receipt.

14. **No Partnership.** Nothing herein contained shall create any association, partnership, joint venture or relationship of principal and agent between the parties hereto, except as specifically provided for herein; it being understood that the parties hereto are, with respect to each other, independent contractors, and neither party shall have any authority to bind the other or the other’s representatives in any way and shall not hold itself out to any person or entity as having authority.

15. **Miscellaneous.** No change, modification, waiver or termination of this agreement shall be binding upon either party unless it is made by an instrument signed by an authorized officer of the party against whom enforcement is sought. A waiver by either party of any provision of this Agreement in any instance shall not be deemed a waiver of such provision, or any other provision hereof, as to any future instance or occurrence. All remedies, rights, undertakings, and obligations contained in this agreement shall be cumulative and none of them shall be in limitation of any other remedy, right, undertaking, or obligation of either party. The captions of the Sections in this agreement are included for convenience only and shall not affect the interpretation of any provision.

16. **Governing Law.** THIS AGREEMENT HAS BEEN ENTERED INTO IN THE STATE OF CALIFORNIA, AND THE VALIDITY, INTERPRETATION AND LEGAL EFFECT OF THIS AGREEMENT SHALL BE GOVERNED BY THE LAWS OF THE STATE OF CALIFORNIA APPLICABLE TO CONTRACTS ENTERED INTO AND PERFORMED ENTIRELY WITHIN THE STATE OF CALIFORNIA (WITHOUT GIVING EFFECT TO ANY CONFLICT OF LAW PRINCIPLES UNDER CALIFORNIA LAW), ONLY THE CALIFORNIA COURTS (STATE AND FEDERAL) IN LOS ANGELES, CALIFORNIA SHALL HAVE JURISDICTION OF ANY CONTROVERSIES REGARDING THIS AGREEMENT; ANY ACTION OR OTHER PROCEEDING WHICH INVOLVES SUCH A CONTROVERSY SHALL BE BROUGHT IN THOSE COURTS ONLY. THE PARTIES WAIVE ANY AND ALL OBJECTIONS TO VENUE IN THOSE COURTS AND HEREBY SUBMIT TO THE JURISDICTION OF THOSE COURTS.

17. **Press Release.** No party hereto shall, without the prior written consent of the other party, issue any press release or make any other public announcement or statement relating to the existence of this agreement, to any terms and conditions of this Agreement, or to the negotiation thereof to which such
party was privy or of which it was otherwise made aware (e.g., by being copied on correspondence or by being advised by another party to the negotiation).

18. **Assignment.** Licensee may not assign its rights and obligations hereunder without Publisher’s prior written approval. Any purported assignment outside of the foregoing shall be deemed null and void *ab initio* and without force or effect. There shall be no restrictions on Publisher’s ability to assign its rights and obligation hereunder to a third party.

19. **Authority to Bind.** Each party for itself represents and warrants that it is authorized to execute this Agreement, and to do so through the individual signing on its behalf.

20. **Counterparts.** This Agreement may be executed in one or more counterparts, each of which shall be deemed an original, but which together shall constitute one and the same instrument.

**PUBLISHER**

By: ____________________________ By: ____________________________

   Name: ____________________________ Name: ____________________________
   Title: ____________________________ Title: ____________________________

Date Fully Executed: ____________________________

**LICENSEE**