

MUSIC LICENSING ON THE INTERNET 101

***** FEATURING *****

STEPHEN H. BLOCK

////////// THE HARRY FOX AGENCY

▲▲▲▲ JOE DIMONA

////////// BMI

▲▲▲▲ ALEX ELLERSON

////////// RIGHT SIZED MEDIA

▲▲▲▲ JOE SALVO

////////// WEIL GOTSHAL & MANGES LLP

JEFFREY LIEBENSON

////////// HERRICK FEINSTEIN LLP (MODERATOR)



STEPHEN H. BLOCK is Vice President of Business Affairs and Senior Counsel for The Harry Fox Agency, where he has been instrumental in handling several non-traditional licensing arrangements. Prior to Harry Fox, Mr. Block founded a private practice in 2005, where , Mr. Block was General Counsel and Executive Vice President of Business Affairs at the Digital Club Network (DCN), eMusic, and The Orchard. Prior to joining DCN, Mr. Block was the managing partner at the intellectual property law firm Kahn & Block. He received his B.A. magna cum laude from Georgia State University, and obtained his J.D. from the Benjamin N. Cardozo School of Law, where he was the managing editor of the Arts & Entertainment Law Journal.

JOE DIMONA is Vice President, Legal Affairs, for BMI, the music performing rights licensing organization. Joe joined BMI in 1992 as Assistant Vice President, Licensing, and Counsel, and was made Vice President, Legal Affairs in 2002. Joe has negotiated BMI public performing right license agreements with a broad array of music using industries, and was involved in the creation of BMI's first Internet web site license in 1995. He is active in BMI rate court and Copyright Royalty Board involving rights fees for BMI music, as well as anti-piracy efforts and copyright education. Joe also advises BMI on legislative and regulatory matters affecting music copyrights. Joe began his law career as an associate in the Washington, D.C. law office of Reid & Priest from 1986-92, where he represented a range of clients in regulatory and IP matters. He received his J.D. degree from Columbia University School of Law in 1986.

ALEX ELLERSON is the Senior Vice President of Business Development for Right Sized Media, Inc. He was formerly Head of Entertainment and Premium Content Partnerships for Video at Google and YouTube. Prior to Google, Mr. Ellerson was a Senior Director of Business Development at Yahoo!, where he led business development efforts for Yahoo! Search, including the company's Content Acquisition Program. Before joining Yahoo! in 2000, Mr. Ellerson was the General Counsel and COO of College Media Inc., publisher of the music industry trade journal CMJ New Music Report. At CMJ, Mr. Ellerson led the company's efforts to launch both business-to-business and consumer online businesses, and engineered the sale of the company in 1999. Prior to joining CMJ, he was an associate at Cravath, Swaine & Moore, and a law clerk for the Honorable Arnalva Kearse on the Court of the Appeals for the Second Circuit. He is a graduate of the Columbia University School of Law and Swarthmore College.

JOE SALVO is Special Counsel at Weil Gotshal & Manges in New York, where he specializes in copyright, and all facets of the music recording and publishing industries. Originally a litigator at Weil Gotshal, Mr. Salvo has since spent 12 years of practice in-house at Sony Music, Arista Records and most recently as Vice President & Senior Counsel for the merged Sony BMG Music Entertainment. He was heavily involved in a recent series of multilateral publishing agreements with the world's largest music publishers dealing with a variety of new forms of digital media and digital exploitations and counsels various music services on publishing and recording rights issues. Since 1994, he has negotiated and drafted recording, publishing and licensing agreements for Bruce Springsteen, John Mayer, Celine Dion and the Dixie Chicks, among others. Mr. Salvo is also an adjunct professor of law at St. John's University School of Law and co-chair of the NY chapter of the Copyright Society.

JEFFREY LIEBENSON (MODERATOR) is Counsel at Herrick, Feinstein LLP, where he specializes in digital entertainment, music and intellectual property law. Jeff has over 20 years experience in the entertainment industry, which includes representing Gracenote in obtaining digital lyric rights from the music publishing industry, Sony Music in the establishment of its Pressplay online service with Universal, and EMI Recorded Music in the first iTunes negotiations with Apple. Prior to joining Herrick, Jeff served as Vice President of International Legal and Business Affairs for BMG Entertainment. Jeff received a J.D. and a L.L.M. in Trade Regulation from New York University School of Law.



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Presented by: Joseph P. Salvo
Weil, Gotshal & Manges

Jeffrey M. Liebenson
Herrick Feinstein

Alex Ellerson
Sr. Vice President
Business Development
Right Sized Media, Inc.

Joseph DiMona
Vice President,
Legal Affairs, BMI

Stephen Block
VP, Business Affairs &
Senior Counsel
The Harry Fox Agency

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-Music and Recording Industry Committee,
Entertainment, Arts & Sports Law Division, NYS Bar Association
-Intellectual Property Society, Cardozo School of Law

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I. Distinct Copyrights in Musical Works and Sound Recordings

- A. Two distinct copyrights
- B. Copyrights in individual sound recordings or “masters” controlled by record companies or “labels”
- C. Ownership in the underlying song or musical composition is typically vested in music “publisher”
- D. Simple act like “streaming” or “downloading” a recording may implicate multiple copyright rights, requiring a licensee to go to different entities or organizations that control the disparate rights

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- E. Each copyright entitles the owner of that copyright to exclusively exploit (or to prohibit exploitation of) four (4) distinct rights
- the right to copy or “reproduce” the work (17 U.S.C. § 106(1));
 - the right to “distribute” copies of the work to the public (17 U.S.C. § 106(3));
 - the right to “publicly perform” or “publicly display” the work (17 U.S.C. § 106(4), (5) and (6)); and
 - the right to “prepare derivative works” based upon the work (17 U.S.C. § 106(2))
- F. Fundamental questions as to which copyrights rights are implicated (and must therefore be licensed) by digital distribution



II. Musical Works

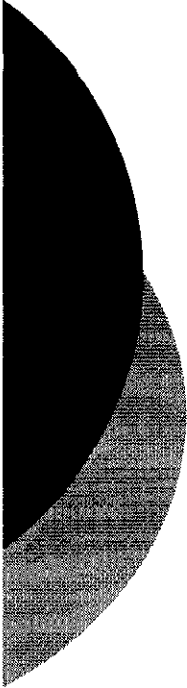
A. Public Performance Rights

- Rights to publicly perform musical works in the U.S. controlled by 3 “performing rights organizations (“PROs”) – ASCAP, BMI & SESAC
- Repertoires do not overlap
- ASCAP and BMI governed by consent decrees
- License is a “blanket license”
- SESAC does not operate under a consent decree
- A public performance right triggered by remote transmission to individuals in private places
- Fees
- Is a “download” a public performance?



B. Reproduction and Distribution Rights

- Right to reproduce a song in the form of a sound recording and to distribute copies or “phonorecords” of the same to the public is “mechanical right”
- Many publishers choose to issue mechanical licenses through the Harry Fox Agency (“HFA”)
- Mechanical licenses for DPDs

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- Is a “mechanical license” necessary for “server” copies and “temporary” copies?
 - HFA/RIAA Agreement (2001)
 - Compulsory licensing for on demand streaming?
 - Copyright Royalty Board proceedings
 - Is a “ringtone” a DPD?



c. Right to Create Derivative Works

- Implicated whenever a song synchronized as part of a music video or other audiovisual work
- When a song is recorded, without material changes to its arrangement, a mechanical license suffices. See, U.S.C. § 115(a)(2)
- For use in a music video, a “synchronization license” needed
- There is no “compulsory license,” no PRO/collective license-equivalent or HFA-type agent available to secure such license



III. Sound Recordings

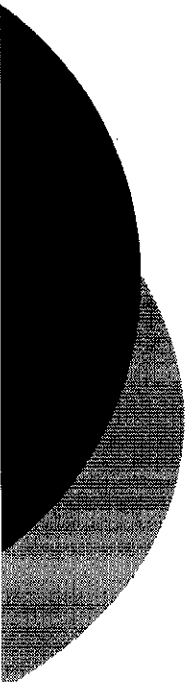
A. Reproduction and Distribution Rights

- No “agents” available to license copies or “downloads” of sound recordings
- No “compulsory license” available for reproductions or distributions of sound recordings, with or without a “first use”
- Need voluntary license to (a) sell copies of a sound recording from website; (b) make a “server” copy of the same; (c) make any “temporary” or “incidental copies of the same
- “Big 4” labels control 80-85% pop repertoire



B. Public Performance Rights

- No public performance right for sound recordings for analog broadcast, such as on radio or TV. See 17 U.S.C. § 114(a).
- In 1995, the Copyright Act was amended to provide for a three-tiered system of public performance rights for digital transmissions of sound recordings.
- Three tiers:
 - pure digital broadcasts of the same radio signal (e.g., HD Radio) are exempt
 - “interactive” digital transmissions implicate “exclusive” performance right
 - Transmissions that qualify for a “statutory” or “compulsory” license

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- These statutory licensees must meet conditions, including, *inter alia*, “sound recording performance complement”
 - There are several sub-categories of statutory licenses, including:
 - certain pre-existing (as of 1995) subscription services engaged in digital cable radio distribution (e.g., Music Choice and DMX)
 - the XM and Sirius satellite radio services (i.e., SDARS)
 - non-subscription webcasting (i.e., internet radio) services
 - “new” subscription services launched after October 1998 (e.g., Pandora)

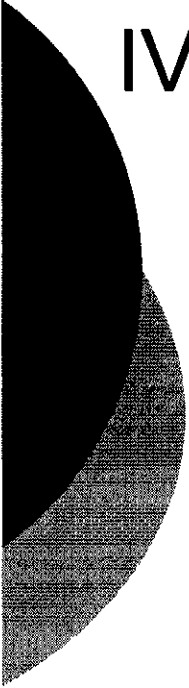
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- 2005-06 CRB Proceedings to set rates for webcasting

- CRB set a “per stream” rate at:

<u>Year</u>	<u>Rate</u>
2006	.08 cents/stream
2007	.11 cents/stream
2008	.14 cents/stream
2009	.18 cents/stream
2010	.19 cents/stream

- CRB abandoned/rejected the prior “percentage of revenue” model
- Small webcasters (less than 159,140 aggregate tuning hours/month) to pay a minimum \$500/station annual fee.
- Sound Exchange and DiMA have since agreed to a \$50,000 cap by a single provider offering multiple stations.

c. Right to Create Derivative Works



IV. Music Videos and Other Audiovisual Works

Voluntary Licenses Required