

Past and Present Copyright Tribunals for Setting Royalties in the United States

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INTRODUCTION

I was asked to participate in The Kernochan Center's Symposium addressing "Past, Present and Future of Copyright Licensing." I noted that in light of my current role on the United States Copyright Royalty Board, my presentation and discussion participation would focus on the past and the present of *statutory* Copyright Licensing in the United States. I chose to exclude any personal outlook on the *future* of Copyright Licensing, leaving that to other participants. The same holds true for this Article, which adheres to the topics addressed in my presentation. Thus, as the Symposium and the public look to potential licensing solutions that may emerge amidst the development of Artificial Intelligence products, my hope is to offer a *brief*, and high-level, background on how the United States has approached statutory licensing in the copyright realm. In doing so, I often look to the Register of Copyright's 2015/2016 study, *Copyright and the Music Marketplace*,¹ and recommend that study as a far more comprehensive portrait of the *music* licensing landscape at it existed at the time—prior to the enactment of the Music Modernization Act in 2018.² Additional Copyright Office publications are available with more comprehensive information regarding the statutory licenses addressed herein.³

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1. U.S. COPYRIGHT OFF., COPYRIGHT AND THE MUSIC MARKETPLACE (2015), [hereinafter, COPYRIGHT AND THE MUSIC MARKETPLACE]. <https://www.copyright.gov/policy/musiclicensingstudy/copyright-and-the-music-marketplace.pdf> [https://perma.cc/CK9J-4WKA].

2. For detailed information about the enactment of the Music Modernization Act, see *The Music Modernization Act*, COPYRIGHT.GOV, <https://www.copyright.gov/music-modernization/> [https://web.archive.org/web/20250121143204/https://www.copyright.gov/music-modernization/] (last visited Feb. 8, 2025).

3. See *Policy Studies*, COPYRIGHT.GOV, <https://copyright.gov/policy/> [https://perma.cc/JUW2-669D] [https://web.archive.org/web/20250319123632/https://copyright.gov/policy/] (last visited Mar. 19, 2025) (providing access to various Copyright Office publications).

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I. OVERVIEW OF STATUTORY LICENSES UNDER U.S. COPYRIGHT LAW

As much of what follows addresses statutory licensing in the realm of music, the following background is in order. A musical recording encompasses two distinct works of authorship: the *musical work*, which is the underlying composition created by the songwriter or composer along with any accompanying lyrics,⁴ and the *sound recording*, which is the particular performance of the musical work that has been fixed in a recording medium such as a CD or digital file.⁵ Given this overlap, musical works and sound recordings are frequently confused. However, a musical work and sound recording are separately protected, and can be separately owned, under copyright law.⁶

Generally speaking, *statutory* licenses are licenses created by operation of law as opposed to by contract or agreement by the parties. Generally, statutory licenses set forth processes as well as rates and terms under which specific classes of works may be used by specific types of users. Statutory licenses are also distinct from the collective licenses, such as those offered by performance rights organizations such as the American Society of Composers, Authors, and Publishers (“ASCAP”) and Broadcast Music, Inc. (“BMI”), which are enabled by authority of the copyright owner, and which I do not address herein.

The United States Copyright Royalty Board (“CRB”), through and with the Library of Congress and the Copyright Office, currently administers the following licenses through various record-based proceedings, which are to be conducted pursuant to Chapter 8 of Title 17.

A. SECTION 114 AND SECTION 112

The section 114 and section 112 licenses allow for and facilitate different types of noninteractive digital music services to publicly perform sound recordings upon compliance with the statutory license requirements, including the payment of royalties as determined by the Copyright Royalty Board. Section 114 provides licenses or exemptions from the exclusive right to publicly perform sound recordings.⁷ Section 112 provides licenses and exemptions for the making of the server copies necessary for transmissions which publicly perform sound recordings.⁸

The “CRB” sets the rates and terms for the section 114 and section 112 licenses.⁹ Generally, the lists of various rate-setting proceedings and updates to rates and terms occur on five-year cycles.¹⁰

4. A musical work can be in the form of sheet music, i.e., notes and lyrics written on a page, or embodied in a phonorecord, i.e., in a recording of the song.

5. A sound recording comprises the fixed sounds that make up the recording.

6. COPYRIGHT AND THE MUSIC MARKETPLACE, *supra* note 1, at 18.

7. See 17 U.S.C. § 114.

8. See *id.* § 112.

9. See *id.* §§ 114, 112.

10. See *id.* § 804.

The section 114 and section 112 licenses address the following types of licensed uses of sound recordings:¹¹

- Free and paid internet radio services¹²
- Preexisting satellite radio services¹³
- Preexisting music subscription services¹⁴
- Business establishment services¹⁵

The Copyright Royalty Board rate setting proceedings for the section 114 and section 112 license also include designating an entity to serve as a Collective for purposes of collecting, monitoring, managing, and distributing the sound recording royalties. In all recent proceedings, SoundExchange has been designated as the collective for the section 114 and section 112 license.¹⁶

B. SECTION 115

Section 115 allows for certain digital music services to make and distribute nondramatic musical works upon compliance with the statutory license requirements, including the payment of royalties as determined by the CRB.¹⁷ Such rights for making and distributing of musical works are often referred to as “mechanical rights.”¹⁸ The Musical Works Modernization Act, in 2018, replaced the existing song-by-song compulsory licensing structure for making and distributing musical works with a blanket licensing system for digital music providers to make and distribute digital phonorecord deliveries (e.g., permanent downloads, limited downloads, or interactive streams).¹⁹

11. Traditional over-the-air broadcasts are expressly exempted from the sound recording public performance right. *See id.* § 114(d)(1).

12. Free noninteractive internet radio services not exempt under 17 U.S.C. § 114(d)(1) qualify as “eligible nonsubscription services,” and paid noninteractive internet radio services qualify as “new subscription services” under § 112 and § 114. *Id.* § 114(j)(6), (8).

13. A preexisting satellite digital audio radio service is a subscription satellite audio radio service provided pursuant to a satellite digital audio radio service license issued by the FCC on or before July 31, 1998. *Id.* § 114(j)(10).

14. A preexisting subscription service is a noninteractive audio-only service that was in existence on or before July 31, 1998. *Id.* § 114(j)(11).

15. Certain “business establishment services” may publicly perform sound recordings pursuant to an exemption from specified exclusive rights. *See id.* § 114(d)(1)(C)(iv). These services may make ephemeral copies of sound recordings pursuant to the statutory license in 17 U.S.C. § 112(e)(1) to facilitate digital audio transmissions of those sound recordings to business establishments.

16. *See e.g.*, Determination of Rates and Terms for Digital Performance of Sound Recordings and Making of Ephemeral Copies To Facilitate Those Performances (Web V), 86 Fed. Reg. 59452, 59585 (Oct. 27, 2021).

17. *See* 17 U.S.C. § 115.

18. *Mechanical Rights*, SONGTRUST, <https://www.songtrust.com/music-publishing-glossary/glossary-mechanical-rights> [https://perma.cc/NGJ5-FNA3] [https://web.archive.org/web/20250319132352/https://www.songtrust.com/music-publishing-glossary/glossary-mechanical-rights] (last visited Mar. 19, 2025).

19. *See The Music Modernization Act*, *supra* note 2; U.S. COPYRIGHT OFF., *Musical Works Modernization Act*, COPYRIGHT.GOV, <https://www.copyright.gov/music-modernization/115/> [https://perma.cc/G2TH-

The CRB sets the rates and terms for the section 115 license.²⁰ Generally, the rate-setting proceeding and updates to rates and terms occur on a five-year cycle.²¹ The CRB is also authorized to determine the amount of an administrative assessment fee to be paid by various licensees for the reasonable costs of starting up and continuing to operate the mechanical licensing collective, which is an entity designated by the Register of Copyrights, with the approval of the Librarian of Congress, to collect and distribute section 115 royalties as well as other related responsibilities.²²

C. SECTION 118

Section 118 provides a compulsory license for the use of published nondramatic musical works and published pictorial, graphic, and sculptural works in connection with noncommercial broadcasting.²³

The CRB sets the rates and terms for the section 118 license.²⁴ Generally, the rate-setting proceeding and updates to rates and terms occur on a five-year cycle.²⁵

D. SECTION 111 AND SECTION 119

Section 111 provides cable service providers with a statutory license to retransmit a performance or display of a work embodied in a “primary transmission” made by a television station licensed by the Federal Communications Commission (“FCC”).²⁶ Section 119 provides satellite service providers with a similar statutory license to retransmit a performance or display of a work.²⁷

The CRB is authorized to adjust the section 111 and section 119 royalty fees. The royalty fees and statements of account detailing the retransmissions are provided by licensees semiannually to the Copyright Office. The Copyright Office deposits the royalties into the United States Treasury for later distribution to copyright owners of the broadcast programming that the cable systems retransmit, such distributions are determined through proceedings before the CRB.

On an annual basis, the Copyright Royalty Judges receive claims filed by persons claiming to be entitled to deposited statutory license fees. The Copyright Royalty Judges then commence *distribution* proceedings to address controversies that exist among claimants. Those proceedings may be consolidated to cover several years in a single proceeding. Completion of a proceeding occurs only after a final determination addressing allocation and a final determination addressing distribution, as well as

C6YH] [https://web.archive.org/web/20250125224818/https://www.copyright.gov/music-modernization/115/] (last visited Mar. 19, 2025).

20. See 17 U.S.C. § 115.

21. See *id.* § 804.

22. See *id.* § 115.

23. *Id.* § 118.

24. See *id.*

25. See *id.* § 804.

26. See *id.* § 111.

27. See *id.* § 119.

ensuing full and accurate final payments. However, the Copyright Royalty Judges may authorize the partial distribution of deposited cable and satellite royalty fees on motion by an interested claimant, provided certain conditions are met, including that the recipient of any partial distribution enters into an agreement to return any excess amounts to the extent necessary to comply with the final determination on the distribution of royalty fees.²⁸

The CRB's proceedings for determining the distribution of the cable license royalties have historically been conducted in two phases. In Phase I, the royalties were divided among programming categories. The claimants to the royalties have organized themselves into categories of programming retransmitted by cable systems, e.g., movies and syndicated television programming; sports programming; commercial broadcast programming; religious broadcast programming; noncommercial television broadcast programming; Canadian broadcast programming; noncommercial radio broadcast programming; and music contained on all broadcast programming. In Phase II, the royalties allotted to each category at Phase I were subdivided among the various copyright holders within that category. In more recent proceedings, the Judges combined Phase I and Phase II into more singular proceedings addressing both the allocation of funds between program categories and distribution of funds among claimants. Completion a proceeding occurs only after a final determination addressing allocation and a final determination addressing distribution, as well as ensuing full and accurate final payments.²⁹

E. CHAPTER 10

The statutory obligation in § 1003 of the Copyright Act provides that those who import or manufacture and distribute in the United States any digital audio recording device or digital audio recording medium must file notices of distribution and quarterly and annual statements of account and make royalty payments.³⁰ Compliance with the obligations in Chapter 10 protects against actions for infringement of copyright based on the manufacture, importation, or distribution of a digital audio recording device, a digital audio recording medium, an analog recording device, or an analog recording medium, or based on the noncommercial use by a consumer of such a device or medium for making digital musical recordings or analog musical recordings.³¹

The Copyright Office deposits the royalties into the United States Treasury for later distribution to copyright owners of the broadcast programming that the cable systems retransmit, such distributions are determined through proceedings before the CRB. The *distribution* proceedings operate similarly to those described above regarding the section 111 and section 119 royalties.

28. See *id.* §§ 111, 801.

29. See, e.g., Distribution of Cable Royalty Funds, 84 Fed. Reg. 3552 (Feb. 12, 2019).

30. See 17 U.S.C. § 1003.

31. See 17 U.S.C. ch. 10.

II. DEVELOPMENT OF STATUTORY LICENSING AND RATE-SETTING IN THE UNITED STATES

By the early 1900s, technological advances made music available for the first time via “mechanical” renderings of songs captured in player piano rolls and phonograph records. Although music publishers insisted that physical embodiments of their works were copies, the Supreme Court held otherwise in the 1908 case *White-Smith Music Publishing v. Apollo*, reasoning that such reproductions were not in a form that human beings could “see and read.”³²

So, at that point, there was no mechanical right held by copyright owners and thus no basis for infringement claims. Then, Congress overrode the Supreme Court and recognized copyright owners’ exclusive right to make and distribute, and authorize the making and distribution, of phonorecords—i.e., mechanical reproductions—of musical works.

Congress established these new rights, but made copyright owners subject to a mechanical statutory license, and at the same time set a \$0.02 rate per use, in 1909.³³ This rate stayed the same for many, many years, all the way to 1976, when it was increased to 2.75 cents.³⁴

At the same time, Congress also created the Copyright Royalty Tribunal (“CRT”), which was composed of five commissioners appointed by the President. The CRT was authorized to *adjust* the mechanical royalty rate thereafter.³⁵

The idea of adjusting the statutory mechanical royalty rate periodically stemmed from a suggestion by a representative of the Recording Industry Association of America (“RIAA”) in a 1967 hearing. He stated that such adjustments should reflect the “accepted standards of statutory ratemaking.”³⁶

In testimony in 1975, then-Register of Copyrights Barbara Ringer suggested that Congress could simplify the process of administering the mechanical license (as well as other proposed licenses) by establishing a separate royalty tribunal. The tribunal would base royalty rates on standards set by Congress.³⁷

The Copyright Royalty Tribunal was eventually replaced in 1993 by the Copyright Arbitration Royalty Panel (“CARP”) system. Rather than permanent appointees, the CARP arbitrators were convened for specific rate proceedings.³⁸ The CARP system, in

32. *White-Smith Music Publ’g Co. v. Apollo Co.*, 209 U.S. 1, 8–9, 17–18 (1908).

33. H.R. REP. NO. 94-1476, at 111 (1976).

34. *Id.*

35. Copyright Act of 1976, Pub. L. No. 94-553, §§ 801–802, 90 Stat. 2541, 2594–96.

36. Frederick F. Greenman Jr. & Alvin Deutsch, *The Copyright Royalty Tribunal and the Statutory Mechanical Royalty: History and Prospect*, 1 CARDOZO ENT. & L.J., 1, 21–22 (1982). See also *Copyright Law Revision: Hearing on S. 597 Before the Subcomm. on Patents, Trademarks, & Copyrights of the S. Comm. on the Judiciary*, 90th Cong. 373, 377 (1967) (statement of Leonard Feist, Exec. Sec’y of Nat’l Music Publishers Ass’n).

37. See *Copyright Law Revision: Hearing on H.R. 2223 Before the Subcomm. on Cts., C.L. & the Admin. of Just. of the H. Comm. on the Judiciary*, 94th Cong. 1901, 1914 (1975) (statement of Barbara Ringer, Register of Copyrights).

38. Copyright Royalty Tribunal Reform Act of 1993, Pub. L. No. 103-198, § 802, 107 Stat. 2304, 2305 (codified as amended at 17 U.S.C. § 802).

turn, was replaced in 2005 by the current system, the CRB, which is composed of three administrative judges appointed by the Librarian of Congress.³⁹ The establishment of various rate-setting and license administration bodies occurred as the number and variety of licenses and administration obligations increased.

A. COPYRIGHT ROYALTY TRIBUNAL (1978–1993)

At first the CRT was responsible only for administering the Section 115 license (mechanical rights) and Section 118 licenses (rights usage in noncommercial broadcasting).

In 1990, Congress reduced the number of Commissioners from five to three, after concluding that three Commissioners were sufficient to handle the workload.⁴⁰

In 1992, just prior to the CRT being replaced, Congress created a statutory royalty obligation for the manufacture and importation of digital audio recording technology (Chapter 10, Digital audio recording devices), and the CRT was tasked with administering the *distribution* of Digital audio recording royalties.⁴¹

Even with these new responsibilities, critics of the Tribunal believed that there was insufficient work.

B. COPYRIGHT ARBITRATION ROYALTY PANEL (1993–2004)

The CARP system “consist[ed] of *ad hoc* arbitration panels” that conducted record-based proceedings and “recommend[ed] the royalty rates and distribution of royalty fees collected under certain of the statutory licenses and set some of the terms and conditions of some of the statutory licenses.”⁴²

Each CARP was selected for a particular proceeding and had up to 180 days to deliver its recommendation for a rate adjustment or distribution.⁴³

A CARP Report, which articulated the reasons for its recommendations and the evidence that supports its conclusions, was delivered to the Librarian of Congress.⁴⁴

- (1) Upon receipt of the CARP report, the Librarian had 90 days in which to either accept the determination of the CARP or to reject it.⁴⁵

39. 17 U.S.C. §§ 801–05; Copyright Royalty and Distribution Reform Act of 2004, Pub. L. No. 108-419, 118 Stat. 2341.

40. Copyright Royalty Tribunal Reform and Miscellaneous Pay Act of 1989, Pub. L. No. 101-319, 104 Stat. 290, enacted July 3, 1990.

41. See Audio Home Recording Act of 1992, Pub. L. No. 102-563, § 2, 106 Stat. 4237, 4237–48 (codified at 17 U.S.C. ch. 10).

42. *Copyright Arbitration Royalty Panel (CARP) Structure and Process: Hearing Before the Subcomm. on Cts., the Internet, & Intell. Prop. of the H. Comm. on the Judiciary*, 107th Cong. 34 (2002) (statement of Marybeth Peters, Register of Copyrights).

43. *Id.*

44. *Id.*

45. *Id.*

- (2) The Librarian could reject the recommendation only if he or she determined that it was arbitrary or contrary to the provisions of the Copyright Act. The Register of Copyrights was directed to advise the Librarian on his or her decision.⁴⁶
- (3) If the Librarian rejected the CARP's recommendation, there would be an additional 30 days for the Librarian to issue a final order setting forth the rate adjustment or distribution, as the case may be.⁴⁷

The number and type of proceedings for which CARP was responsible increased while the CARP system existed. The CARP system administered the licenses that the CRT had under its authority (Section 115, Section 118, Chapter 10), but also was tasked with administering the section 111 license (cable retransmission), the section 119 license (satellite retransmission). And, in 1995 and 1998, the CARP system was tasked with administering additional section 114 and section 112 licenses.⁴⁸

Among the criticisms of the CARP system arose from the fact that, as an ad hoc system, there was not a lot of predictability as to what arbitrators were to preside in a given proceeding. Relatedly, there were concerns about lack of institutional expertise. Cost of proceedings was also a significant criticism. Arbitrators were compensated at between \$200 and \$400 an hour.⁴⁹ In proceedings involving many parties and large amounts of testimony, the costs steadily mounted. In royalty distribution proceedings, the arbitrators are paid from the collected royalty funds.⁵⁰ In royalty adjustment proceedings, the participants paid the arbitrators out of their own pockets.⁵¹

C. COPYRIGHT ROYALTY BOARD (2004–PRESENT)

The CRB is composed of three administrative judges appointed by the Librarian of Congress. The offices of the Copyright Royalty Judges and staff are located in the Library of Congress. The Librarian of Congress provides the Copyright Royalty Judges with the necessary administrative services related to CRB proceedings. Congress imposed strict qualifications for these positions. Each CRB judge is required to have at least seven years of legal experience.⁵² The chief copyright royalty judge must have a minimum of five years of experience in adjudications, arbitrations, or court trials.⁵³ As for the other two judges, one must have significant knowledge of copyright law, and

46. *Id.*

47. *Id.*

48. Digital Performance Right in Sound Recordings Act of 1995, Pub. L. No. 104-39, 109 Stat. 336; Digital Millennium Copyright Act of 1998, Pub. L. No. 105-304, 112 Stat. 2960.

49. *Copyright Royalty and Distribution Reform Act of 2003: Hearing on H.R. 1417 Before the Subcomm. on Cts., the Internet, & Intell. Prop. of the H. Comm. on the Judiciary*, 108th Cong. 21 (2003) (statement of Marybeth Peters, Register of Copyrights)

50. H.R. REP. NO. 108-408, at 21 (2004).

51. *Id.* at 17.

52. 17 U.S.C. § 802(a).

53. *Id.*

the other must have significant knowledge of economics.⁵⁴ The judges are set to serve for terms of six years, with two-year intervals between each of the three judges' terms.⁵⁵

The Register of Copyrights also plays a role in CRB rate-setting, in that he or she is responsible for reviewing the CRB's determinations to ensure they are free from material legal error, and may also be called upon to address material questions of substantive law that impact the proceedings.⁵⁶ Final determinations are appealable to the United States Court of Appeals for the District of Columbia Circuit.⁵⁷

Congress revised the rate-setting process to encourage voluntary industry agreements when possible.⁵⁸ For example, Congress provided antitrust exemptions to statutory licensees and copyright owners of sound recordings, so that they could designate common agents to collectively negotiate and agree upon royalty rates.⁵⁹ The statute also allows for settlement of rate-setting disputes, and mandates a three-month "voluntary negotiation period" at the start of each proceeding before the parties submit their cases.⁶⁰ If a settlement is reached among some or all of the participating parties, the Act empowers the CRB to adopt that settlement "as a basis for statutory terms and rates" that will apply to all parties under the statutory license.⁶¹ Absent a settlement, the CRB must conduct a proceeding to determine the rates and terms of the statutory license.

Although the CRB has flexibility in organizing its procedures, many aspects of its proceedings are dictated by the statute.⁶² In many instances, these procedures depart from practices used in ordinary civil litigation. For instance, participating parties must file their written direct cases in support of their requested rates—including witness testimony and supporting exhibits—before any discovery has been taken.⁶³ Additionally, the statute requires separate direct and rebuttal phases of rate-setting hearings.⁶⁴ Several of these procedures cannot be altered by the CRB even upon stipulation of the parties.⁶⁵

There have been some criticisms of the CRB process, including a desire to ensure that the CRB is able to address various proceedings in a consistent and timely manner. Relatedly, there have been proposals for additional licenses that would add to the CRB's jurisdiction and schedule. Recently, in an effort to address such concerns, Congress

54. *Id.*

55. *Id.* § 802(c).

56. H.R. REP. NO. 108-408, at 26 (2004); 17 U.S.C. § 802(f)(1).

57. 17 U.S.C. § 803(d)(1).

58. H.R. REP. NO. 108-408, at 24.

59. 17 U.S.C. §§ 112(e)(2), 114(e)(1), 115(c)(3)(B).

60. *See id.* § 803(b)(1)–(3).

61. *Id.* § 801(b)(7).

62. *See id.* § 803(b).

63. *See id.* § 803(b)(6)(C)(i) (requiring written direct statements, including witness testimony and exhibits, to be filed within four to five months after the negotiation period, before discovery begins); *id.* § 803(b)(6)(C)(iv) (providing for a discovery period following submission of written direct statements).

64. *See id.* § 803(b)(6)(C)(ii) (providing for written rebuttal statements to be filed after the discovery period, distinct from the direct case phase).

65. *See id.* § 803(b)(6)(C) (mandating procedural steps that constrain the CRB's discretion, even where parties might agree to alternative procedures).

removed a statutory cap on the staffing of the CRB.⁶⁶ Furthermore, the Library of Congress and the Copyright Office have devoted attention and resources toward ensuring more efficient issuance and implementation of final determinations from the CRB.

III. CONCLUSION

This overview on how the United States has approached statutory licensing in the copyright realm is admittedly a brief one, and there is much more detail that resides within every aspect recounted above. Despite the brevity, I hope that this Article and the Kernochan Center's Symposium may be fruitful as the public looks to potential licensing solutions that may emerge amidst the development of Artificial Intelligence products.

66. The Library of Congress Technical Corrections Act of 2019, Pub. L. No. 116-94, 133 Stat. 2534, 3208.