Formata

United States Response to Questionnaire Concerning
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***Authors' Note*: The U.S. Copyright Act is contained in Title 17 of the United States Code and is available on the Copyright Office website, <http://www.copyright.gov>. Statutory references in this response are to Title 17, unless otherwise indicated.**

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Panel I

1. What types of performers are there according to your legal framework?

The Act does not define "Performer" or "Author." Generally, attorneys use the word "Author" to refer to any creator, no matter the medium of expression.

2. Do all types of performers enjoy Neighbouring Rights Protection?

In the United States, we do not have distinct neighboring rights. But performers of recorded musical compositions and phonogram producers may be copyright owners, if their contributions result in a sound recording that manifests sufficient original authorship. The scope of copyright protection for sound recordings, however, is limited: it excludes public performance rights, except for certain digital transmissions.[1] See Panel I, Question 4-II(h). In addition, performers of musical compositions enjoy an exclusive right to prevent or authorize the fixation of their live performances (see Panel I, Question 4-1(a)).

[1] By contrast, composers and their successors in title enjoy full exclusive public performance rights. *See* §114(d)(1).

3. Does the law distinguish between featured/non-featured performers? How

Most laws of the United States do not distinguish between featured and non-featured performers.

The exception is the § 114 compulsory license for digital, non-interactive public performances which distinguishes between featured and non-featured recording artist or artists. 45% of the royalties go to the featured recording artist or artists, 2½% go to an agent representing non-featured musicians who perform on sound recordings, and 2½% to an agent representing non-featured vocalists who perform on sound recordings.

Organizations such as Screen Actors Guild-American Federation of Television and Radio Artists ("SAG-AFTRA") are labor unions that represent the interests of audiovisual and theater performers. These unions or guilds create working condition protections for its members, such as establishing minimum pay rates, setting maximum hours worked, and setting up compensation metrics for re-broadcasts of recorded works.

Not everyone is eligible to become a member. Typically, members can join these guilds by being hired to work for an employer who is a signatory to a Guild contract. For example, SAG-AFTRA membership is available to those who work in a position covered by a SAG-AFTRA bargaining agreement ("Bargaining Agreement").[2]

SAG-AFTRA has what is called a "Basic Agreement" with the Alliance of Television and Motion Picture Producers (AMPTP).[3] This Agreement spells out the terms and conditions of performer employment at any AMPTP signatory organization (of which there are more than 350).

The only distinction the Basic Agreement makes between performers is between actors with speaking parts and those commonly called "extras," or background actors. Background actors have different (lower) pay rates, attribution rights and other obligations. The comparable organization for musicians is the American Federation of Musicians (AFM) which is an advocacy

[2] *2020 TV Theatrical Contracts*, SAG-AFTRA, https://www.sagaftra.org/contracts-industry-resources/contracts/2 020-tvtheatrical-contracts (last visited July 5th, 2022).

[3] *Theatrical*, SAG-AFTRA, https://www.sagaftra.org/production-center/contract/818/agreement/document (last visited July 5th, 2022). The Directors Guild of America and the Writers Guild also have Basic Agreements. *2020 Writers Guild of America Theatrical and Television Basic Agreement*, WRITERS GUILD OF AMERICA WEST, https://www.wga.org/ contracts/contracts/mba (last visited July 5th, 2022).

group for individual and group performers that has agreements with Canada and relevant industry players who may use members' music; these agreements spell out performers' rights.[4]

4. Which rights are awarded to each type of performer?

4-I. Live performers

As noted below in the answer to 4-I(a), § 1101 of the Act and various state laws forbid the recording or fixation of live musical performances. In addition, 18 U.S.C. § 2319A provides for criminal penalties for such actions.

4-I(a). Which rights are awarded to: Live performances and fixation?

Federal copyright law limits performer's rights in live performances to musical performances. Under § 1101, it is illegal for anyone except the performer to fix sound or images of live musical performances, transmit or communicate to the public sounds or images of live musical performances, or distribute, sell, offer to sell, rent or traffic in copies of live musical performances, regardless of whether the fixation occurred in the United States.[5] The Act exempts any unauthorized fixations and the trafficking in of such fixations created or completed before December 8, 1994 (the date the Uruguay Round Agreements were enacted).

4-I(b) Which rights are awarded to: live performances and broadcasting?

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[4] *Our Musicians: Recording and Digital Media*, AMERICAN FEDERATION OF MUSICIANS, https://www.afm.org/our-musicians/recording-digital-media/ (last visited July 5th, 2022).

[5] Section 1101 reads,

"(a)Unauthorized Acts.—Anyone who, without the consent of the performer or performers involved—

(1) fixes the sounds or sounds and images of a live musical performance in a copy or phonorecord, or reproduces copies or phonorecords of such a performance from an unauthorized fixation,

(2) transmits or otherwise communicates to the public the sounds or sounds and images of a live musical performance, or

(3) distributes or offers to distribute, sells or offers to sell, rents or offers to rent, traffics in any copy or phonorecord fixed as described in paragraph (1), regardless of whether the fixations occurred in the United States shall be subject to the remedies provided in sections 502 through 505, to the same extent as an infringer of copyright.

(b)Definition.—As used in this section, the term "traffic means to transport, transfer, or otherwise dispose of, to another, as consideration for anything of value, or make or obtain control of with intent to transport, transfer or dispose of.

(c)Applicability.—This section shall apply to any act or acts that occur on or after the date of the enactment of the Uruguay Round Agreements Act.

(d)State Law Not Preempted.—Nothing in this section may be construed to annul or limit any rights or remedies under the common law or statutes of any State."

Additionally, state bootlegging statutes may offer further protection for live performances and are not preempted under The Copyright Act of 1976.[6] For example, California prohibits the intrastate transport of unauthorized fixations of any live performance, not limited to musical performances, for monetary or other consideration.[7]

4-II. Fixed performances:

4-II(c). Which rights are awarded with regards to fixed production and reproduction?

Under § 106(1) the copyright owner has the exclusive right to reproduce his or her work, subject to the exceptions and limitations in §§ 107 et seq. of the Act. These include the compulsory license for non-interactive digital performance of phonorecords (§ 114) and the fair use doctrine (§ 107), which exempts certain reproductions, derivative works, distributions, public performances or public displays that a court considers as a whole meet the four statutory considerations.[8]

4-II(d). Which rights are awarded with regards to fixed production and distribution?

Under § 106(3) the owner of copyright has exclusive distribution rights subject to the First Sale doctrine[9], which courts have interpreted to apply to physical but not purely digital copies.10

[6] § 1101(d).

[7] Cal. Penal Code § 653s (2011).

[8] Section 107 reads, " Notwithstanding the provisions of sections 106 and 106A, the fair use of a copyrighted work, including such use by reproduction in copies or phonorecords or by any other means specified by that section, for purposes such as criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research, is not an infringement of copyright. In determining whether the use made of a work in any particular case is a fair use the factors to be considered shall include—
(1) the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes;
(2) the nature of the copyrighted work;
(3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and
(4) the effect of the use upon the potential market for or value of the copyrighted work."
Fair use is a highly controversial area of American copyright law because it is often differently interpreted by the courts. In addition, any analysis must be done on the facts presented, and, therefore, it is often hard for future litigants to ascertain whether the courts have set any controlling precedent.

[9] The First Sale Doctrine is codified in § 109(a) which reads, "Notwithstanding the provisions of section 106(3), the owner of a particular copy or phonorecord lawfully made under this title, or any person authorized by such owner, is entitled, without the authority of the copyright owner, to sell or otherwise dispose of the possession of that copy or phonorecord."

[10] Capitol Records, Inc. v. ReDigi, LLC, 910 F.3d 649 (2d Cir. 2018).

Congress determined no specific legislation was needed to adapt the distribution right to the making available right, but some courts have interpreted the distribution right too narrowly to cover offerings to distribute.[11]

4-II(e). Which rights are awarded with regards to fixed production and rental?

Under § 106(3) the owner of copyright has the exclusive right to distribute copies of his or her works in any manner he or she desires, subject to the First Sale doctrine under § 109(a), as described in footnote 9. As a result, after the sale of a lawfully made copy, the copyright owner cannot prevent third parties from renting or lending that copy (but not to digital copies, see answer to preceding question). Copyright owners can control rentals of copies in which the copyright owner has not transferred physical ownership.

4-II(f). Which rights are awarded with regards to fixed production and making available?

Section 106 encompasses the copyright owner's exclusive rights to reproduce their work, prepare derivative works, distribute copies or phonorecords of his or her work, and perform or display his or her work publicly. With regard to internet streaming or online image display, the US provides the making available right through the public performance and public display rights guaranteed under § 106(4)–(6).[12]

4-II(g). Which rights are awarded with regards to fixed production and communication to the public?

To the extent that the question is asking about the right of public performance and display of analog works, authors have the rights guaranteed under § 106 (4)-(6). But to the extent that

[11] Compare, e.g., Capitol Records, Inc. v. Thomas-Rasset, 579 F. Supp. 2d 1210 (D. Minn. 2008) (holding that an acceptance of the offer to download is an essential component for a work to be considered distributed; making a work available for copying did not constitute distribution) with London-Sire Records, Inc. v. Doe 1, 542 F. Supp. 2d 153, 169 (D. Mass. 2008) (holding that the offering to distribute copies online justifies a presumption that distribution has occurred).

[12] Section 106(4-6) reads, "(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;
(5) in the case of literary, musical, dramatic, and choreographic works, pantomimes, and pictorial, graphic, or sculptural works, including the individual images of a motion picture or other audiovisual work, to display 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."

communication to the public concerns dissemination of digital copies, US rights have generally been molded by case law. Courts have typically concluded that digital transmissions are within the scope of § 106(3). For example, in *London-Sire Records, Inc. v. Doe 1*[13], the court noted that digital files are material objects, and, thus, qualify as distributions under § 106 (3).[14] And in *American Broadcasting Cos. v. Aereo, Inc.*, the Second Circuit ruled that the public performance right includes the transmission of copyrighted works to the public through individualized streams.[15]

4-II(h). Which rights are awarded with regards to fixed production and public performance?

The Digital Performance Right in Sound Recordings Act of 1995 ("DPRA"), amended in 1998, granted digital performance rights for sound recordings. Copyright owners have the exclusive right to perform the copyrighted work publicly by means of an interactive digital audio transmission, and there is a statutory license for non-interactive digital transmissions.[16] A digital transmission is a transmission in whole or in part in a digital or other non-analog format.[17] A digital audio transmission is a digital transmission as defined in § 101, that embodies the transmission of a sound recording.[18] This term does not include transmissions of audiovisual works.[19] For example, analog radio broadcasts are public performances but are not digital transmissions, and therefore do not give rise to public performance rights in sound recordings. By contrast, digital radio broadcasts are considered digital transmissions.[20]

US law differentiates between sound recordings and other fixed public performances, such as literary or audiovisual works. Sound recordings enjoy only a partial performance right. As noted above, the DPRA granted digital audio performance rights for sound recordings. Copyright owners have the exclusive right to perform the copyrighted work publicly by means of a digital audio

[13] 542 F. Supp. 2d 153 at 170.
[14] Section 106(3) reads, "Subject to sections 107 through 122 [of the Act], the owner of a copyright under this title has the exclusive right to distribute copies or phonorecords of the copyrighted work to the public by sale or other transfer of ownership, or by rental, lease or lending."
[15] ABC, Inc. v. Aereo, Inc., 573 U.S. 431, 134 S. Ct. 2498 (2014)
[16] §§ 106(6), 114.
[17] § 101.
[18] A "digital transmission" as defined in § 101 "is a transmission in whole or in part in a digital or other non-analog format." "Sound recordings" under § 101 "are works that result from the fixation of a series of musical, spoken, or other sounds, but not including the sounds accompanying a motion picture or other audiovisual work, regardless of the nature of the material objects, such as disks, tapes, or other phonorecords, in which they are embodied."
[19] § 114(j)(5).
[20] Maria Pallante, *Copyright and the Music Marketplace, A Report of the Register of Copyrights*, 87 (2015). Note that there is an exemption for public performances of sound recordings by terrestrial radio stations, which broadcast their radio waves by a land-based radio station in § 114(d)(1).

transmission under § 106(6). The DPRA also created statutory licenses under sections 112 (limiting the reproduction right for purposes of ephemeral recordings made in connection with transmissions) and 114 (the performance right) for non-interactive satellite subscription providers[21], namely satellite radio services, that are engaged in digital performances. This statutory framework only applies to non-interactive services.[22] Royalties under sections 112 and 114 are paid to a society, SoundExchange, which distributes payment directly to artists, or their labels, rather than flowing through a record label.[23] By contrast, interactive streaming services like Apple Music, YouTube or Spotify, do not qualify for the statutory license, and license their performance and reproduction rights from record labels and other distributors, typically at a higher rate than satellite radio. Unlike other industrialized nations, the US does not extend the sound recording performance right to terrestrial radio.[24] Other works, including motion pictures or literary works, as well as musical compositions, enjoy full public performance rights and are not subject to relevant statutory license schemes for public performances.

4-II(i). Which rights are awarded with regards to fixed production and broadcasting?

In the US, a broadcast transmission is a transmission made by a terrestrial broadcast station licensed by the Federal Communications Commission (FCC).[25] Non-subscription, non-interactive broadcast transmissions are exempt from the sound recording performance right, even if they are a digital audio transmission under § 114(d)(1)(A). As noted above, the US does not recognize a performance right for sound recordings on terrestrial or analog broadcasts. By contrast, with respect to the musical compositions incorporated in sound recordings, these enjoy full public performance rights. [26]

US copyright law otherwise generally treats broadcasting through the performance right for other works, as opposed to a separate form of protection. There are other exceptions for limited uses, such as noncommercial broadcasting.[27]

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[21] § 114(d)(2), Interactive services allow a member of the public to "receive a transmission of a program specially created for the recipient" or "[receive] on request, a transmission of a particular sound recording" selected on behalf of the recipient.
[22] *See* §§ 112(e), 114(d)(2)–(3), 114(f).
[23] *Copyright and the Music Marketplace* at 47.
[24] § 114(d)(1).
[25] § 114(j)(3).
[26] There are some exemptions for broadcasts of musical compositions under narrow conditions, such as noncommercial educational broadcast stations or radio subcarriers. *See, e.g.*, § 110(8).
[27] *See, e.g.*, § 118.

As the US has adopted a registration requirement to litigate in court, there is also a process exception for initial broadcast transmissions.[28]

4-II(j). Which rights are awarded with regards to fixed production and retransmission?

Several kinds of retransmissions are exempt from the sound recording performance right. This includes retransmissions if the original transmitter is licensed to publicly perform the sound recording and authorizes the retransmission.[29] Retransmissions of non-subscription broadcast transmissions are also exempt under § 114(d)(1)(B).

For audiovisual works, again, this is addressed through the performance right rather than a separate protection. The secondary transmission of signals is limited by a statutory license available to qualifying cable systems or satellite operators, a relatively dense area of US copyright law that interacts with its communications law.[30] In recent years, technological transformations have made it so reliance on these licenses has substantially diminished.

4-II(k). Which rights are awarded with regards to fixed production and direct injection?

There is not a special US treatment for this scenario; direct injection is not a term used in the US.

4-III. Are moral rights attributed to performers? Which prerogatives does it comprehend?

The United States does not provide moral rights to performers. In the case *Garcia v. Google, Inc.*, 743 F.3d 1258 (9th Cir. 2014), a film producer and writer dubbed over an actress' performance with controversial new lines. The actress received death threats after the film was posted on YouTube. She sued the producer of the film to have the post removed. The 9th Circuit Court of Appeals ruled that "[e]xcept for a limited universe of Works of Visual Art[31], such as paintings and

[28] § 407(e).
[29] § 114(d)(1)(C)(iii).
[30] For more information, *see* §§ 111; 119; 122.
[31] A "visual art", is, under § 101, "a painting, drawing, print, or sculpture, existing in a single copy, in a limited edition of 200 copies or fewer that are signed and consecutively numbered by the author, or, in the case of a sculpture, in multiple cast, carved, or fabricated sculptures of 200 or fewer that are consecutively numbered by the author and bear the signature or other identifying mark of the author; or (2) a still photographic image produced for exhibition purposes only, existing in a single copy that is signed by the author, or in a limited edition of 200 copies or fewer that are signed and consecutively numbered by the author."

drawings protected under the Visual Artists Rights Act of 1990, United States copyright law generally does not recognize moral rights. Motion pictures specifically are excluded from moral rights protection [under] 101 ('[W]ork of visual art does not include . . . any . . . motion picture or other audiovisual work . . . .')."[32]

5. What is the nature of those rights? Statutory? Contractual?

As discussed in our answer to Question 4-III, the US does not grant moral rights to performers.

6. Which of them are exclusive right/s remuneration rights?

Apart from the special statutory licensing regime for non-interactive digital transmissions, to the extent performers are copyright owners, they enjoy exclusive rights.

7. Which exceptions/limitations generate remuneration rights for performers?

No exceptions or limitations other than the § 114 license for non-interactive digital streams directly generate remuneration rights for performers. That license is administered by a collective, SoundExchange. SoundExchange must pay artists directly for their performance per the provisions of a charter which was reviewed and approved by the US Copyright Royalty Board[33], a regulatory body.[34] By statute, two other organizations, AFM and SAG-AFTRA, described above, receive money from the § 114 license that is paid directly to session musicians and background singers.[35]

8. Which rights are transferred to music/audiovisual producers? For how long?

Which, if any, rights transferred from the initial copyright holder to a music or audiovisual producer is, in most cases, up to private contract law. There are exceptions, however, most notably the work made for hire doctrine as defined in § 101 of the Act. Under this provision of US copyright law, the authorial copyright interest in works produced under certain circumstances vests not in the original author or performer but in the entity, person or corporation that is the original author's or performer's employer or, for certain specified categories of works, commissioning agent. A work made for hire can only occur in two instances: 1) where the work is made by an

[32] Garcia v. Google, Inc., 786 F.3d 733, 746 (9th Cir. 2015).
[33] For more on the Copyright Royalty Board, *see* https://www.crb.gov/.
[34] § 114(g)(4).
[35] § 114(g)(2).

employee as part of his or her regular duties of employment or 2) where a commissioned work comes within one of the nine limitative categories of works, the agreement is in writing and signed by both parties.[36] Works that qualify for commissioned work made for hire status include but are not limited to musical arrangements, contributions to collective or audiovisual works, compilations, tests, or instructional texts.[37]

The Act does not list musical works and sound recordings as specific works which may be commissioned as works made for hire. However, some US companies consider sound recordings created as part of a label deal to be works made for hire because they are part of a compilation or collective work. This is an area of current litigation in connection with the US' termination rights.[38] Because copyright vests originally in the producer in the case of works made for hire, there is no attendant termination right for the employee or other original creator.

There is no limit to the length of transfer of rights, however, as noted below, there is a termination of transfer right under US law, but, as noted in the previous paragraph, it does not apply to works made for hire.

9. Are there any legal presumptions of transfer or is it voluntary/contractual?

Unless the work is made in the scope of someone's employment or under a written agreement as enumerated in the work made for hire definition, discussed in Question 8, all transfers or assignments are voluntary and contractual.

10. Are there any unwaivable and inalienable remuneration rights?

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[36] § 101.

[37] A "work made for hire" as defined by § 101 is,
"(1) a work prepared by an employee within the scope of his or her employment; or
(2) a work specially ordered or commissioned for use as a contribution to a collective work, as a part of a motion picture or other audiovisual work, as a translation, as a supplementary work, as a compilation, as an instructional text, as a test, as answer material for a test, or as an atlas, if the parties expressly agree in a written instrument signed by them that the work shall be considered a work made for hire.
In determining whether any work is eligible to be considered a work made for hire under paragraph (2),
(A) shall be considered or otherwise given any legal significance, or
(B) shall be interpreted to indicate congressional approval or disapproval of, or acquiescence in, any judicial determination,… by the courts or the Copyright Office."

[38] *See*, *e.g.*, Waite v. UMG Recordings, Inc., 450 F. Supp. 3d 430 (N.D.N.Y. 2020). *See also* Johansen v. Sony Music Entm't Inc., 2020 U.S. Dist. LEXIS 56675 (S.D.N.Y. Mar. 31, 2020).

For performers, the only statutory remuneration rights are set out in § 114, discussed below. While the statute allocates shares of the statutory compensation among record producers and featured and non-featured performers, the statute does not explicitly state that the performers may not transfer their rights to receive the statutory compensation.

11. What type of compensation is paid in exchange? How is it set? For how long?

Under § 114, certain non-exempt transmissions of phonorecords must pay digital performance royalties. The Copyright Royalty Judges determines rates under proceedings outlined in §§ 801–804. The rates and terms of the licenses should be those that would be "negotiated in the marketplace between a willing buyer and a willing seller."[39] Oftentimes, performers will associate with a Performing Rights Organization (PROs") that will collect royalties in exchange for licensing exclusive public performance rights and distribute them to the performers.[40] Blanket licenses, which give access to a PRO's catalog for a flat fee and percentage of revenues, are common.[41]

State contract law will govern the terms of compensation, including any provisions in contracts conferring rights of exploitation. In California, personal services employment contracts are limited to a 7 year term under California Labor Code § 2855.[42] However, this 7 year limit does not apply to contracts between musicians and record labels.[43] Under a 1987 amendment to § 2855, record labels can sue musicians who leave a contract after 7 years without delivering the number of albums specified under the contract. Recently, the proposed Free Artists from Industry Restrictions Act (FAIR), which would bring musicians and record labels under the 7 year rule, failed to pass out of the California State Senate's Judiciary committee.[44]

12. How is "streaming" qualified in your Country for rights award purposes?

[39] § 114(f)(B).
[40] *Copyright and the Music Marketplace* at 20.
[41] *Copyright and the Music Marketplace* at 33.
[42] CA Labor Code § 2855(a) (2021).
[43] CA Labor Code § 2855(b) (2021).
[44] Jem Aswad, *FAIR Act to Overturn California's 'Seven-Year Statute' Fails in State Senate*, VARIETY, (June 29, 2022), https://variety.com/2022/music/news/fair-act-to-overturn-californias-seven-year-statute-fails-in-state-senate-1235305896/.

"Streaming" implicates the public performance right, falling under the definition of "perform" in § 101, whether the work at issue is a literary, audiovisual, or musical work, or sound recording.[45]

In addition, depending upon the technology behind streaming, it may be that the reproduction or distribution rights are also implicated. For motion pictures or sound recordings, the scope of rights licensed (and the determination of what portions of those works would be considered works made for hire) would be addressed through private contracts and guild agreements, and the awards available in the case of infringement would not necessarily turn on which § 106 rights are implicated.

With respect to musical works, the statute is more specific in light of the statutory licensing scheme. When a digital phonorecord delivery (DPD) is created, there is also a mechanical right subject to compulsory licensing.[46] The US changed the law to stipulate that an interactive stream is a DPD.[47] The use of non-interactive streaming services, like Pandora, may only implicate a public performance right, although the details of whether the reproduction or distribution rights would be implicated would turn upon the technological specifics behind the service's operation.

For sound recordings, the § 114 statutory license also discusses non-interactive streams in the context of the public performance right, and it has not been typical for services like Pandora to separately license the recording or distribution rights for streams.

13. Whose authorization is required for the "streaming" of music/audiovisual content?

In theory, the copyright owner must authorize streaming, as defined above in Panel I, Question 12, for both music and audio visual content.

With regard to streaming of musical content, for public performance licensing, the owner of the musical composition and the sound recording often differ, so potential users must seek permission from each owner with respect to interactive streaming. For non-interactive streaming, performers

[45] Section 101 defines "perform" as the following,
"To 'perform' a work means to recite, render, play, dance, or act it, either directly or by means of any device or process or, in the case of a motion picture or other audiovisual work, to show its images in any sequence or to make the sounds accompanying it audible."
[46] § 115(e)(7).
[47] *Compulsory License for Making and Distributing Digital Phonorecords and Limitations on Liability Prior to the License Availability Date*, Circular 73B, January, 21, 2021, https://www.copyright.gov/circs/circ73b.pdf.

and sound recording producers have only a remuneration right under the § 114 statutory license. However, in the US, songwriters and publishers associate with PROs and grant these organizations the power to authorize streaming as a form of public performance.[48]

For mechanical licensing of musical works (most applicable to interactive streaming, as noted above), the streaming provider had historically obtained licenses on a song-by-song basis and served the copyright owner of the composition (or the Copyright Office if the owner cannot be identified) with a Notice of Intent (NOI).[49] The Music Modernization Act (MMA) established an alternative to this process for interactive streaming services by creating the Mechanical Licensing Collective (MLC).[50] The MLC can now authorize blanket licenses after a digital music provider submits a notice of license subject to procedural requirements under § 115(2)(A). Streaming services can still seek authorization from the owner on a voluntary or song-by-song basis.[51] As with public performance rights, the sound recording copyright owner, such as a record label, would license the reproduction and distribution rights directly.

For streaming of audio visual content, authorization for synchronization licenses (public performance, reproduction, distribution and display) must be obtained from the copyright owner, normally through a music publisher and record label or film producer. See Panel II, Question 19 for more information on synchronization rights.

14. What is the estimated level of copyright infringement in your Country?

It is difficult to estimate the level of copyright infringement in the United States. Different studies have used different methodologies to attempt to estimate the amount of piracy that happens in the US. MUSO found that the United States has the highest frequency of visiting piracy websites and accounts for 10.6% of all global piracy traffic.[52] A report prepared for the US Chamber of Commerce estimated that digital video piracy costs the United States between 29 and 71 billion dollars annually.[53] The most recent BSA Global Software survey estimated that the US had a 15%

[48] *Copyright and the Music Marketplace* at 20-21.
[49] *Copyright and the Music Marketplace* at 28.
[50] § 115.
[51] § 115(d)(1)(C).
[52] Andy Chatterley, *2021 Muso Discover Piracy by Industry Data Review*, (6th ed. 2022) at 1.
[53] Blackburn, David et al., *Impacts of Digital Video Piracy on the U.S. Economy* at 12 (Jun. 2019), https://www.theglobalipcenter.com/wp-content/uploads/2019/06/Digital-Video-Piracy.pdf.

rate of unlicensed software installation.[54] A 2018 MusicWatch survey estimated a presence of 17 million stream-rippers in the United States.[55] For more information, please see the Piracy Landscape Study prepared for the US Patent and Trademark office, a meta study on US piracy studies.[56] There is insufficient data on measuring non-piracy copyright infringement.

15. What is the current level of disclosure on economic returns from digital platforms?

There is insufficient data to determine the current level of disclosure on economic returns from digital platforms in the United States. However, major companies frequently disclose numbers from digital platforms in their quarterly fiscal reports.

16. How is performers compensation determined for each business model?

Generally, private contracts determine compensation for performers. See answer to Panel I, Question 3 regarding differing business models for actors and musical performers and the minimum compensation schemes required by various guilds to which these performers may belong.[57]

17. Are there minimum amounts due? any other economic benefits?

As stated above, compensation will depend on private contracts except where the performers belong to a union or a guild which sets minimum payment levels. For more information on these organizations, see Panel 1, Question 3.[58]

18. Do UGC platforms contribute to such compensation schemes? How?

Generally, UGC platforms have not compensated creators for streaming. Some platforms compensate through alternative means, including YouTube, which traditionally pays certain

[54] BSA, *2018 Global Software Survey* at 11 (Jun. 2018), https://gss.bsa.org/wp-2content/uploads/2018/05/2018_BSA_ GSS_Report_en.pdf.
[55] Russ Crupnick, *Thanks to Stream-Ripping, Music Piracy Still a Scourge*, MusicWatch, (May 30, 2019), https://musicwatchinc.com/blog/thanks-to-stream-ripping-music-piracy-still-a-scourge/
[56] Danaher, Brett et al, *Piracy Landscape Study: Analysis of Existing and Emerging Research Relevant to Intellectual Property Rights (IPR) Enforcement of Commercial-Scale Piracy*, USPTO Economic Working Paper No. 2020-2 (Apr. 2020), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3577670
[57] *See Rate Sheet*, sag-aftra, https://www.sagaftra.org/production-center/contract/810/rate-sheet/document (last visited June 6, 2022).
[58] *Id.*

"trusted Creators" through advertising revenue sharing.[59] However, as UGC becomes an increasingly popular source of income, platforms, such as TikTok, have introduced creator funds which pay creators (who must apply to the fund) based on levels of views and user engagement with content.[60] In 2021, Instagram announced plans to implement a similar $1 billion fund that includes new "bonus programs" that compensate creators through traditional ad revenue sharing and by performance based metrics.[61]

19. Has the Beijing Treaty been implemented in your Country, at least, in part?

The United States has not yet implemented the Beijing Treaty. President Obama signed the Treaty in 2016 and sent it to the Senate for ratification, a necessary step towards implementation, but no action was taken.[62]

20. Which rights are collected by Collective Management Organizations (CMOs)?

Authors grant CMOs non-exclusive licenses to collect their public performance rights and mechanical rights.

PROs are responsible for licensing public performance rights. Anyone who publicly performs a musical work included in a PRO's catalog may obtain a license from the PRO, including terrestrial, satellite and internet radio stations, television stations, restaurants, and other commercial establishments that play music. Licensees obtain either a blanket license, which allows the licensee to play any musical works in a PRO's catalog, or a per-program license, which allows the licensee to publicly perform any musical work in a PRO's catalog for a specified program.

American Society of Composers, Authors and Publishers ("ASCAP") and Broadcast Music, Inc. ("BMI") are the two largest PROs, representing over 90% of the songs available for licensing in

[59] *Monetization for Creators*, YOUTUBE, https://www.youtube.com/howyoutubeworks/product-features/monetization/#alternate-monetization (last visited June 3, 2022).
[60] *TikTok Creator Fund: Your questions answered*, TIKTOK, https://newsroom.tiktok.com/en-gb/tiktok-creator-fund-your-questions-answered (last visited June 3, 2022).
[61] Instagram Business Team, *Get the latest from Instagram*, (July 14, 2021), https://business.instagram.com/blog/investing-in-content-creators-facebook-instagram.
[62] *See The Beijing Treaty on Audiovisual Performances*, CONGRESS.GOV, (February 10, 2016), https://www.congress.gov/treaty-document/114th-congress/8/document-text.

the United States.[63] Both organizations represent songwriters and publishers. Publishers, as well as songwriters, can choose to affiliate with a PRO of their choice. ASCAP and BMI are each subject to antitrust consent decrees, which limits their membership and licensing practices. The decrees prohibit ASCAP from licensing any rights other than public performance rights.

The consent decrees, *United States v. ASCAP*, 41 Civ. 1395 (S.D.N.Y.) and *United States v. BMI*, 64 Civ. 3787 (S.D.N.Y.) ("Consent Decrees"), were entered into in 1941 after the United States brought lawsuits against ASCAP and BMI under the Sherman Anti-Trust Act to address competitive concerns of each organization's market power acquired through their aggregation of public performance rights held by their member songwriters and music publishers.[64] The Department of Justice periodically reviews the Consent Decrees. The ASCAP Consent Decree was last amended in 2001 and the BMI Consent Decree was last amended in 1994.[65]

There are also smaller, for-profit PROs like Society of European Stage Authors and Composers ("SESAC") and Global Music Rights ("GMR"). They are not subject to US anti-trust regulations and add new members by invitation only. Additionally, SoundExchange collects the performing rights for statutory licensing of sound recordings under § 112 and § 114 (see answer above to Panel I, Question 7).

Mechanical Rights Organizations (MROs) are responsible for collecting mechanical rights. The Harry Fox Agency and Music Reports Inc. collect the majority of the mechanical licensing fees in the US.[66] As mentioned in Panel I, Question 13, in 2018, the MMA established the MLC which collects mechanical rights from digital music providers under blanket licenses.

21. Which CMO's represent performers in your country?

Soundexchange is a CMO for performers that covers non-dramatic performing rights. Soundexchange collects and pays royalties owed to featured and non-featured artists for non-interactive streaming uses under §112 and §114 statutory licenses. Non-interactive outlets include SiriusXM, where a user cannot choose a song. However, Soundexchange only collects digital

[63] *See* Ben Sisario, *Pandora Suit May Upend Century-Old Royalty Plan*, NEW YORK TIMES, (Feb. 13, 2014), https://www.nytimes.com/2014/02/14/business/media/pandora-suit-may-upend-century-old-royalty-plan.html (last visited July 1, 2022).
[64] *See Antitrust Consent Decree Review - ASCAP and BMI 2019*, THE UNITED STATES DEPARTMENT OF JUSTICE, (January 15, 2021), https://www.justice.gov/atr/antitrust-consent-decree-review-ascap-and-bmi-2019.
[65] *Id.*
[66] *Copyright and the Music Marketplace* at 21.

royalties, in contrast to other CMOs, which collect digital, terrestrial, and live royalties. Digital radio services can opt out of Soundexchange and negotiate directly with each label or distributor.

As discussed in Panel I, Question 3, CMOs for performers such as SAG-AFTRA negotiate basic standards on behalf of their members. SAG-AFTRA's Bargaining Agreement includes provisions that govern how members must be listed in the production's credits. These provisions regarding credit are a contractual way to enforce a pseudo-attribution right.

22. Do these CMOs comply with transparency principles?

The United States has not formally adopted principles of transparency.

However, under the MMA, as part of its statutory duties, the MLC maintains a publicly accessible database containing information relating to musical works such as the identity and location of the copyright owners of such works and the sound recordings in which the musical works are embodied.[67]

In 2020, following legislative pressure, musical works CMOs ASCAP and BMI launched a joint database, Songview.com, that discloses certain information related to their licensed repertoire.[68]

23. Is it possible to find how much income is provided by each type of rights?

There is insufficient data to determine the current level of disclosure on economic returns by each kind of right.

24. What is the current litigation for performers' rights in your Country?

Please see the answer to Panel I, Question 25 for an update on litigation regarding performers.

25. Are there any relevant Court Decisions concerning performers rights?

[67] § 115(d)(3)(E).

[68] The ASCAP repertory is available at *ASCAP Repertory Search*, ASCAP, https://www.ascap.com/repertory#/ (last visited July 5, 2022). The BMI repertoire is available at *Songview*, BMI, https://repertoire.bmi.com/ (last visited July 5, 2022).

The nature of the United States legal system means there are numerous court decisions concerning performers' rights. One of the most important cases of the last ten years is *Garcia v. Google, Inc*., discussed in the context of moral rights in Panel I, Question 4-III. There, an actress attempted to use copyright law as a means to compel the defendant to take down a controversial YouTube video in which she starred by claiming a copyright in her own performance. The Court ruled in favor of the defendant, saying the plaintiff was unlikely to succeed on the merits of a copyright infringement claim because she, as an actress, was not the author and that an actress's performance was not copyrightable. Other cases of note decided in the last couple of years involving performance rights include *Brown v. Netflix, Inc.*, 462 F. Supp. 3d 453 (S.D.N.Y. 2020) and *Flo & Eddie, Inc. v. Sirius XM Radio, Inc.*, 9 F.4th 1167 (9th Cir. 2021).

In *Brown v. Netflix*, the case involved a group of plaintiffs, the creators of the song *Fish Sticks n' Tater Tots*, suing Netflix for the use of the song in a seven second clip of a burlesque dancer performing in a documentary. The court held that Netflix's use of the plaintiffs' song in a seven second clip did not violate the plaintiffs' § 106 rights to control copying and distribution of the plaintiffs' phonogram. Because the children's song played for a short period of time and was specifically played in juxtaposition with a burlesque show, the utilization of the song was "fair use," mainly because of its transformative nature.[69] The Second Court affirmed the fair use decision in 2021.

In *Flo & Eddie, Inc.*, the Ninth Circuit ruled that digital or satellite radio providers do not have a duty to pay for public performance royalties for pre-1972 sound recordings that aired before passing of the MMA despite questions around California state law. Until 2018 and the MMA, extraterrestrial radio stations did not need to pay royalties for songs written before 1972. This case, brought but not adjudicated prior to the enactment of the MMA, discussed whether California state copyright law necessitated extraterrestrial radio companies to pay for public performance rights even if the song originated pre-1972. The appeals court ruled that the district court's reading of a 19th century state law, which involved the phrase "exclusive ownership," was erroneously read to include public performance rights. Because public performance would not have been considered a right in 1872 when the statute was written, no payment was due.[70]

26. Does the Principle of National Treatment apply to all foreign performers?

[69] Brown v. Netflix, Inc., 462 F. Supp. 3d 453 (S.D.N.Y. 2020). For more on fair use, *see* Panel 1, 4-II(c) and corresponding footnote 8.
[70] Flo & Eddie, Inc. v. Sirius XM Radio, Inc., 9 F.4th 1167 (9th Cir. 2021).

Foreign authors receive equal protection under the Act in the following circumstances:

Any unpublished work that qualifies for copyright protection under §§ 102 and 103 receives all protections available under the Act no matter the nationality or domicile of the author under § 104(a). For the Act to cover publications by foreign nationals or domiciliaries, one or more of the authors must be a national of a treaty party[71] or be stateless; or the work must first be published in the US or, at the time of first publication, in a country that is a treaty party[72]; or be a sound recording first fixed in a treaty party; or be a pictorial, graphic or sculptural work incorporated in a building or other structure located in the US or a treaty party[73]; or published by the United Nations or any of its specialized agencies or by the Organization of American States; or come within the scope of a Presidential Proclamation.

27. Are there "appropriate and proportionate remuneration" provision rights?

The United States has not codified any laws regarding appropriate and proportionate remuneration rights.

28. Are CMO's mandates always exclusive and encompassing rights?

In the US, some collectives operate differently from CMOs in other territories, and the answer depends on the type of collective. We interpret the question as asking 1) whether the CMO representation is mandatory for a rights holder and 2) whether the CMO is able to represent rights holders who have not affirmatively affiliated with the collective. In the US, CMOs hold only non-exclusive rights; the copyright holder retains the right to voluntarily license their works. Below is a short breakdown by type of right administered:

Public Performance of Musical Works: The US has many PROs, as opposed to a single CMO to administer this right, like many other territories. As discussed in Panel I, Question 20 and 21, these include ASCAP, BMI, which are governed by consent decrees by law, SESAC, which is subject to a settlement agreement, and GMR. Litigation regarding interpretation of the ASCAP and BMI consent decrees has clarified that rights holders may not withdraw authorization to license their

[71] Treaty Party is a defined term in § 101 of the Act. It is defined as a country or intergovernmental organization other than the US that is a party to an international agreement.
[72] A work that is published in the US or a treaty party within 30 days after publication in a foreign nation that is not a treaty party shall be considered to be first published in the US or such treaty party, as the case may be per § 104(b).
[73] § 104(b)(4).

songs for particular types of uses, such as for digital streaming.[74] The consent decrees also require licensing an entire repertoire by a rights holder. However, joining a PRO is not obligatory, and rightsholders may also abstain from joining a collective and license directly.

Mechanical Rights: The US has created a CMO to administer a blanket statutory license for mechanical rights called the MLC (for more on the MLC, see the response to Question 13). Rightsholders are encouraged to sign up to be members of the MLC (membership is unavailable to writers if they are not self-administered, unlike ASCAP or BMI). Rightsholders can, however, license their rights directly, and frequently do, especially in bundled or multi-territorial deals. Because it is a blanket license, digital services that use this license are covered for all eligible uses, and so in that sense the license is all-encompassing, even if the rightsholder is unknown or unaware that their works are being licensed via the MLC.

Digital Sound Recordings: As noted above in response to Question 7, SoundExchange administers the § 114 statutory license for digital non-interactive performance rights. Similar to the MLC, SoundExchange licenses this right on a blanket basis and then pays affiliated rightsholders and artists (generally keeping royalties that have not yet been attributed to identified payees until they come forward). Both rightsholders and artists can sign up to be members of SoundExchange and then receive attributed royalties.

The US does not otherwise have CMOs, although private companies such as Copyright Clearance Center, which licenses written materials to corporate or academic users, assist in the bulk licensing of non-musical materials.

In 2015, the Copyright Office proposed a pilot of an extended collective licensing system to address issues related to mass digitization and orphan works; however, it concluded in 2017 that there was a lack of stakeholder consensus on this issue.[75]

29. Are there any partial/global revocation of transfer of rights agreements provisions?

Any author or performer may withdraw from a CMO or PRO at any time.

[74] In re Pandora, 2013 WL 5211927, at *11; BMI v. Pandora, 2013 WL 6697788, at *5.

[75] *See Mass Digitization Pilot Program*, US COPYRIGHT OFFICE, https://www.copyright.gov/policy/massdigitization/ (last visited July 5, 2022).

30. Are there any provisions on contractual remuneration adjustments?

The US does not have any specified legal provisions on contractual remuneration adjustments. Any such agreements can be codified in private contracts.

PANEL II-- PHONOGRAM PRODUCERS' RIGHTS

1-(a-i). Which rights are awarded to phonogram producers?

Authors' Note: We have consolidated our responses to questions 1-(a-i) below:

Record labels'[76] rights are the product of contractual relationships between recording artists and the record label. Typical recording agreements involve the record label owning the physical recordings as well as the sound recording copyright. Record labels generally have the right of fixation which includes the exclusive right to reproduce, distribute, and license the sound recording. In return, the record labels compensate artists in the form of royalties and advances, which are usually recoupable against royalties.

Record labels typically handle the licensing for sound recordings they own, the exception being statutory licenses under § 114.

2. What is the nature of those rights? Statutory? Contractual?

The rights that phonogram producers hold usually come from their arrangements with original artists (such as a contractual agreement that grants the producers ownership of the copyright).[77] However, once a producer *does* own the copyright, those rights are ensured by statutory protections within the act such as the § 106 and § 114 rights detailed in Panel I.

[76] While a "music producer" in the US normally refers to a person that assists an artist in recording and creating a song's sound, we are assuming the term "phonogram producer" is referring to record labels. Although music producers may be deemed co-authors of songs in the US, they do not typically own the rights to the sound recording due to contractual agreements detailed above.

[77] *Copyright and the Music Marketplace* at 22.

3. Which of them are exclusive/remuneration rights

While the US generally does not provide remuneration rights, copyright owners have the right to royalties under § 114. The copyright holder has a reserved right to half of the royalties, and the copyright holder is typically the phonogram producer.[78] See Panel 1, Question 7 and Panel 2, Question 1 for more information on exclusive/remuneration rights.

4. Which exceptions/limitations generate remuneration rights for phonogram producers?

No exceptions or limitations directly generate remuneration rights for producers. However, a collective, SoundExchange, administers the § 114 license for non-interactive digital streams. Payment and reporting are made to SoundExchange, and the Act specifies the ratios in which royalties must be distributed. 50% of the royalties go to the copyright owner of the sound recording, which is usually a record label, 45% go to the featured recording artist or artists, 2½% go to an agent representing non featured musicians who perform on sound recordings; and 2½% to an agent representing non featured vocalists who perform on sound recordings.[79]

Under the 2018 MMA, the MLC must pay the musical work copyright owner (typically a record label) for mechanical uses.

5. Are there any legal presumptions of transfer or is it voluntary/contractual?

Unless the work is done in the scope of someone's employment (see the Work Made for Hire discussion in Panel I, Question 8), all transfers or assignments are voluntary and contractual. While typically producers have rights transferred to them, that is an industry standard done through voluntary contract and not a legal presumption.

6. What type of compensation is paid in exchange? How is it set? For how long?

There are many types of record deals which can affect the amount of compensation that an artist receives. Some of the deals include a Standard Record Deal, a Major Record Deal, a 360 Deal, an Anti-360 Deal, a Single Deal Recording Contract, a Profit Split Record Deal, a 50/50 Deal, Artist

[78] § 114(g)(4).
[79] *Id.*

Deals, Licensing Deals, an EP Deal, and a Production Deal.[80] These deals all have differing royalty splits, assignments of ownership, and other terms that may change compensation. For example, a Major Record Deal means that the label will pay for everything involved with the recording, sale, performing, etc. of the song. While the record label has higher costs, most times they retain the copyright to the music and receive a higher percentage of royalties.[81]

7. How is producer's compensation determined for each business model?

The producer's compensation depends on the deal agreed to by both parties. See the answer above to Panel II, Question 6.

8. Are there minimum amounts due? Any other economic benefits?

There are no minimum amounts due or other economic benefits. As stated above, compensation will depend on the individual contract/record deal.

9. Is digital piracy/stream ripping still a major concern for phonogram producers?

Digital piracy and stream ripping are still concerns for phonogram producers. For the music industry, stream ripping is the dominant concern. For example, in 2021, a Magistrate Judge recommended an $82.9 million award in statutory damages after a default judgment in favor of several recording labels against defendants who owned stream ripping sites.[82]

While stream ripping is a source of litigation, this concern may not be as prominent for the music industry as it is for TV and film where most piracy occurs. Only 8.15% of piracy was attributed to music piracy in 2021.[83]

10. Which rights are currently being collected via CMOs?

SoundExchange collects certain digital revenues from non-interactive audio public performances under the § 114 license.

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[80] Jaron Lewis, *10 types of Record Deals Every Musician Needs to Know*, OMARI, https://www.omarimc.com/10-types-of-record-deals-every-musician-needs-to-know/ (last visited June 23, 2022).
[81] *Id.*
[82] UMG Recordings, Inc. v. Kurbanov, No. 1:18-cv-957 (E.D. Va October 1, 2021).
[83] Andy Chatterley, *2021 Muso Discover Piracy by Industry Data Review*, (6th ed. 2022).

11. Which CMOs represent phonogram producers in your country?

The International Federation of the Phonographic Industry ("IFPI") represents record labels globally. In the US, the Recording Industry Association of America ("RIAA") and the American Association of Independent Music ("A2IM") are the two main trade organizations that represent the interests of record labels. SoundExchange represents the interests of record labels in relation to § 112 and § 114 statutory licenses.[84]

12. Do these CMOs comply with transparency principles?

The United States has not formally adopted principles of transparency. However, the music industry has adopted standard identifiers recognized by the International Organization for Standardization ("ISO") to aid in the management of reliable and up-to-date copyright information for musical works.[85] The ISO has established two standard identifiers: the International Standard Music Work Code ("ISWC") for musical works and the International Standard Recording Code ("ISRC") for sound recordings.[86] These identifiers are unique, permanent, and internationally recognized reference numbers.

In the US, ASCAP is the appointed agency that assigns ISWCs, while IFPI is the appointed agency that assigns IRSCs.[87] The ISRC agency in the US is RIAA. RIAA authorizes record labels to assign IRSCs to their recordings, which is required for many digital platforms.[88]

Another identifier used in the music industry is a Universal Product Code ("UPC"), which is a set of numbers and corresponding barcode that identifies a music product.[89] A UPC is used to distinguish among multiple versions of a music product, such as an album, digital single, or a remixed version. Record labels obtain UPCs from GS1 US, a non-profit organization.[90] Generally, UPCs are required for both physical retailers and digital platforms.

13. Is it possible to find out how much income is provided by each type of rights?

[84] Sound Exchange was established by the RIAA in 2000, but became an independent entity in 2003.
[85] *Copyright and the Music Marketplace* at 59.
[86] *Copyright and the Music Marketplace* at 59–60.
[87] *Id.*
[88] *Copyright and the Music Marketplace* at 60.
[89] *Copyright and the Music Marketplace* at 62.
[90] *Id.*

We do not have access to sufficient data to answer how much income is provided by each type of rights. However, in the US, three main record labels dominate the music industry: Universal Music Group ("UMG"), Sony Music Entertainment, Inc. ("SME"), and Warner Music Group ("WMG").[91] As publicly traded companies, these record labels publish fiscal reports, which categorize revenue derived from different sources, such as mechanical royalties, synchronization, or digital sales.[92]

14. What is the current litigation level for phonogram producers in your Country?

Phonogram producers are involved in much litigation in the US. See the answer to Question 15 for one example. below.

15. Are there any relevant Court Decisions concerning phonogram producers rights?

In *UMG Recordings, et. al. v. Kurbanov*, the court ordered the defendant, a Russian national who operated a stream ripping site, to pay $82.9 million in statutory damages for copyright infringement.[93] Kurbanov's site allowed visitors to download videos from websites such as YouTube without permission of the videos' copyright owners. Plaintiffs, a group of record labels, brought suit against Kurbanov. The case never went to trial, however, because the defendant did not comply with discovery and the plaintiffs won by default.[94]

16. Are there any revocation of transfer of rights' agreement provisions?

Please see our previous discussion of termination rights in response to Panel I, Question 10 where we discuss the termination right accorded to the original copyright owner. This provision is not, however, traditionally used by record labels as record labels do not normally assign their rights in their catalog to another party

17. What is considered a "phonogram published for commercial purposes"?

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[91] *Copyright and the Music Marketplace* at 23.

[92] *E.g.*, *Warner Music Group Corp's Reports Results For Fiscal Second Quarter Ended March 31, 2022*, WARNER MUSIC GROUP, https://investors.wmg.com/news-releases/news-release-details/warner-music-group-corp-reports-results-fiscal-second-quarter-10 (last visited June 23, 2022).

[93] Civil Action No. 1:18-cv-957, 2021 U.S. Dist. LEXIS 250741 (E.D. Va. Oct. 1, 2021).

[94] UMG Recordings v. Kurbanov, Civil Action No. 1:18-cv-957 (CMH/TCB), 2021 U.S. Dist. LEXIS 250668 (E.D. Va. Sep. 15, 2021).

In United States law, there is no difference between a phonogram published for commercial purposes and one published for non-commercial purposes.

18. What is considered a "phonogram published for non-commercial purposes"?

In United States law, there is no difference between a phonogram published for commercial purposes and one published for non-commercial purposes.

19. Which rights are involved in audiovisual synchronization ("production music")

Synchronization licenses, while not explicitly mentioned in the Act, are generally understood to be an aspect of musical composition copyright owners' reproduction and/or derivative rights under § 106. To incorporate a musical composition and a sound recording into an audiovisual work, a user needs to obtain licenses from both copyright owners. ASCAP is barred from licensing synchronization rights, and while BMI does have the right to license synchronization rights, in practice the organization licenses only public performance rights. In licensing synchronization rights, potential users negotiate directly with the owner of the musical work and the owner of the sound recording for a master license if the user wishes to use a specific performance of the song.[95] This market is unregulated and thus potential users must agree on a fee with both parties.[96]

20. Which rights are involved in mood music/sound branding licensing?

Generally, one needs a blanket license from a CMO. There are exceptions for smaller venues in § 110(5)(B); for instance, there are exceptions for playing the radio in an establishment that does not serve food or drink under 2,000 square feet with less than six loudspeakers, or for playing the radio in a food or drink establishment less than 3,750 square feet with less than six loudspeakers.

PANEL III- broadcast film/audiovisual producer rights

1-(a-i) Which rights are awarded to broadcasters in your country?

[95] *Copyright and the Music Marketplace* at 55.
[96] *Id.* at 56.

Fixation? Reproduction? Communication to the public with/without admission fees)? Distribution? Simultaneous retransmission by wire or wireless means? Deferred retransmission by wire or wireless means? Making available to the public by wire or wireless means? Pre broadcast program carrying signal protection? Any other rights?

Broadcasters in America have no distinct rights in broadcast signals. We have thus not answered any of the questions in this section related to the rights of broadcasters.

2. Which rights are transferred to audiovisual producers? For how long?

Producers in their role as overseers of a production have no inherent rights in the work. Often, however, they are the copyright holders of the work produced through the work made for hire doctrine (see the answer to Panel 1, Question 8) and, thus, have all the rights bestowed on any copyright holder. These include the bundle of rights guaranteed under § 106, as well as many of the other rights discussed herein.

3. Which of them are exclusive/remuneration rights?

As mentioned above, the US has no specific remuneration rights. Whether a license is exclusive is up to private contract.

4. Which exceptions/limitations generate remuneration rights for broadcasters?

This question is not applicable to American law.

5. Are there any legal presumptions of transfer or is it voluntary/contractual?

Since broadcasters generally have no rights in the programs they air, this question is not applicable.

6. What is the relevance of copyright infringement in relation to broadcasters' rights?

This question is not applicable to American law.

7. Is digital piracy/stream ripping still a major concern for broadcasters?

Digital piracy is a great concern to broadcasters not because of the copyright concerns involved in piracy (which are of concern to the producer or other copyright holder of the audiovisual work) but because revenue is lost if the public can view pirated works either earlier than the work would be broadcast over mainstream channels or for a cheaper price.[97] For example, if a pirated version of the new season of "Hacks" is made available before the series is aired on HBO, HBO will be concerned that viewership will be lower (which will upset advertisers and lead to lower advertising rates in the future) or that people will no longer subscribe to the cable channel because they can obtain the work elsewhere for cheaper than an HBO subscription costs.

8. Do UGC platforms contribute to broadcasters' rights? How?

Since broadcasters have no copyrights in the works they broadcast (unless they are the producer of said work), UGC platforms have no effect on broadcaster rights.

9. What is the current litigation level for broadcasters' rights in your Country?

There are no current cases of which we are aware.

10. Are there any relevant Court Decisions concerning broadcaster's rights in your country?

There are no past cases of which we are aware.

11. Are broadcasters acting as One-Stop Shop in relation to retransmission operators?

We do not use the term One Stop Shop in the US in this context, and, therefore, are not able to answer this question.

12. Which rights are awarded to audiovisual producers in your country?

Producers in their role as overseers of a production have no inherent rights in the work. The original author of the work may assign the rights to the producer. Many times, however, producers are the copyright holders of the work through the work made for hire doctrine (see Panel 1, Question 8) or through assessment and, thus, have all the rights given to any copyright holder. These include

[97] *See* Brian Feldman, Piracy is Back, N.Y. MAG. (June 26, 2019), https://nymag.com/intelligencer/2019/06/piracy- is-back.html.

the bundle of rights guaranteed under § 106, as well as any of the rights due a copyright holder of that type of work.

13. What is the nature of those rights? Statutory? Contractual?

No rights are automatically awarded to audiovisual producers under US law.

14. Which of them are exclusive rights? Which of them are remuneration rights?

Producers in the US have no specific remuneration rights.

15. Which exceptions/limitations generate remuneration rights for audiovisual producers?

No exceptions or limitations generate remuneration rights for audiovisual producers under US law.

16. Which rights are transferred to audiovisual producers? For how long?

No rights are automatically transferred to audiovisual producers under US law. Any rights transferred through contract are subject to the §§ 203, 304 termination right as described above with the exception of works made for hire.

17. Are there any legal presumptions of transfer towards audiovisual producers?

There is no legal presumption of transfer for audiovisual producers. However, there is an industry practice that all copyright interests held by contributors to the work (writers, actors, directors, film score composers, etc.) are either owned by the producers as a work-made-for-hire or by assignment.

18. What type of compensation is paid in exchange? How is it set? For How long?

Since there is no automatic transfer of rights, no compensation is paid except as part of a negotiated contract between the producer and contributors.

19. How is audiovisual producer's compensation determined for each business model?

Producers typically negotiate production deals with production companies and studios. These deals can take many forms but often include up-front payments and a back-end share of profits. If the question is referring to the compensation for motion picture studios, they make it by licensing their works for public performance in movie theaters, television broadcast and streaming online; and by selling copies of these works for home viewing. All of these arrangements are subject to private contracts, and they differ by business model and form.

20. Are there minimum accounts due? Any other economic benefits?

There are industry standard agreements for every kind of business model, but all are subject to negotiation through private contract.

21. Do UGC platforms contribute to such compensation schemes? How?

Please refer to Panel I, Question 18 regarding compensation schemes on UGC platforms.

22. Is digital piracy/stream ripping still a major concern for audiovisual producers?

Continuing our assumption that the term producers refers to companies/studios rather than individuals, piracy is a major concern of the audiovisual sector, especially the practice of stream ripping. Please refer to Panel III, Question 23 (below) for more information on current levels of piracy.

23. What is the most recent estimation of rights' loss on account of digital piracy in your country?

The US Chamber of Commerce published a study reporting the losses from piracy in 2017. It found approximately 26.6 billion viewing of US-produced movies and 126.7 billion viewing of US-produced TV episodes were digitally pirated that year. The total losses were between $29.2 and $71 billion in lost revenue.[98] The losses have only accelerated during the pandemic.[99]

24. What is the current rule in terms of audiovisual exploitation windows in your country?

[98] Blackburn, David et al., *Impacts of Digital Video Piracy on the U.S. Economy* at 12 (Jun. 2019), https://www.theglobalipcenter.com/wp-content/uploads/2019/06/Digital-Video-Piracy.pdf.
[99] *Film & Tv Piracy Surge During Covid-19 Lockdown*, MUSO, https://www.muso.com/magazine/film-tv-piracy-surge-during-covid-19-lockdown (last visited July 20th, 2022).

The US has no regulation regarding release windows. Windows are set by each studio for its own works.

25. Which CMCs represent audiovisual producers in your country?

We are assuming CMC stands for "Collective Management of Copyright" (the US uses the term CMO which stands for Collective Management Organizations). CMCs/CMOs generally refer to royalty licensing and collecting societies. A useful guide to American public performance organizations can be found here: https://libguides.williams.edu/copyright/PPR-video. Collective management organizations in the audiovisual sector are prominent as they are in the music sector.

Unlike in the music industry, CMOs do not play a major role in the audiovisual sector. The Motion Picture Licensing Corporation (MPLC), Swank Motion Pictures, Inc., and Criterion Pictures USA are some of the agencies that manage public performance rights.[100]

26. Do these CMCs comply with transparency principles?

We are unable to answer this question.

27. Is it possible to find out how much income is provided by each type of rights?

We were unable to find an answer to this question.

28. What is the current litigation level for audiovisual producers rights in your country?

There is always litigation regarding copyright in audiovisual works, assuming you mean copyright holders' rights (as audiovisual producers have limited rights if they do not own the copyright in the work at issue).[101]

29. Are there any relevant court decisions concerning audiovisual producer's rights?

[100] *Copyright: Public Performance Rights*, WILLIAMS (Mar 3, 2022), https://libguides.williams.edu/copyright.
[101] *See, e.g.*, SOFA Entm't, Inc. v. Dodger Prods., Inc., 709 F.3d 1273 (9th Cir. 2013); Brownmark Films, LLC v. Comedy Partners, 682 F.3d 687 (7th Cir. 2012); Bain v. Film Indep., Inc. No. CV 18-4126 PA (JEMx), 2020 U.S. Dist. LEXIS 141859 (C.D. Cal. Aug. 6, 2020).

30. Are audiovisual producers acting as One Stop Shop in relation to retransmission operators?

We do not use the term One Stop Shop in the US in this context, and, therefore, are not able to answer this question.

PANEL IV database producers and publishers rights

1. Are databases legally protected in your country? How?

United States law protects databases eligible for copyright protection in the same manner it protects any copyrightable work. There is no *sui generis* right, and databases must meet minimum copyright originality requirements.

In *Feist Publications v. Rural Telephone Service*, a Supreme Court case about the copyrightability of a telephone directory listing all local subscribers in alphabetical order, the court wrote "...copyright in a factual compilation is thin. Notwithstanding a valid copyright, a subsequent compiler remains free to use the facts contained in another's publication to aid in preparing a competing work, so long as the competing work does not feature the same selection and arrangement."[102] In *Feist*, the directory did not have copyright protection because the structure of the directory and the data within were so unoriginal that it could not be copyrighted. Databases that do qualify for copyright may receive copyright protection, but only in those aspects of the database that are original (such as a choice on presenting only certain baseball pitching statistics or a phonebook that makes a choice to divide up its entries by categories such as accountants, bridal shops, and bean shops).[103]

In the United States, database owners who have unoriginal compilations rely on contractual protections and licensing in order to protect their databases. For example, in the case of *ProCD v. Zeidenberg*, ProCD maintained an alphabetical directory and had contractual copying protections. While the originality of the compilation method was not enough to enforce copyright, the user agreement inside the box and the one that flashed on the screen was deemed enough to be an enforceable contract preventing the copying of the data contained in the database.[104] Contractual

[102] Feist Publications, Inc. v. Rural Tel. Serv. Co., 499 U.S. 340, 349 (1991).
[103] U.S. Copyright Office, *Report on Legal Protections of Databases* (1997) at 10–11.
[104] ProCD v. Zeidenberg, 86 F.3d 1447 (7th Cir. 1996).

agreements, as part of terms of use, are generally enforceable, and can give database owners contractual rights over use of their product.[105]

2. Is there a sui generis database producers' right or equivalent protection in your country?

There is not a *sui generis* database producer's right in the United States. Database creators are not granted rights in a database if the structure is unoriginal, even if they made substantial investments in the underlying data. As discussed above, a database producer who wants *sui generis*-like rights must contract privately to obtain legal protections on underlying data.

3. Is it possible to evaluate its efficiency and level of enforcement?

Due to the lack of specific database producers' rights, it is not possible to estimate the efficiency or level of enforcement.

4. Is there any different form of protection for Database producers or for ownership of data?

A database would receive protection only as an original compilation (see *Feist*) and underlying data are not copyrightable under § 103(b). The form of protection most companies use is private contracts.

Since there are no *sui generis* database producer's rights in the United States, and facts are not copyrightable, there is no difference between the protections for producers of databases and for owners of data.

5. How does it work? Is it effective?

Due to the lack of specific database producers' rights, it is not possible to estimate their efficiency.

6. How do the courts of your country balance the sui generis right with freedom of information and freedom of competition

There is not a sui generis database producer's right in the United States, and therefore, we cannot answer the question.

[105] *Report on Legal Protections of Databases* at 22–24.

7. Is there a sui generis right protected against circumvention of TPM designed for controlling access?

There are rights preventing the circumvention of standard technical measures, although they do not apply strictly to databases. Section 1201 of the Act specifically addresses the circumvention of technical protection measures used in connection with works of authorship (there is no protection of TPMs used in connection with non original databases). It prohibits the manufacture, import, offering to the public, provision or trafficking in any technology, product, service, device or component that is designed to circumvent technological protection measures and has limited other commercial uses.[106]

8. Is there a special protection against online uses of press publications in your Country?

In the United States, there are no special protections against online uses of press publications (like the ones in Article 15 of the Directive on Copyright in the Digital Single Market), but the US does protect publisher's copyright in their original news publications. As such, press publishers are afforded the exclusive rights outlined in § 106, including distribution and reproduction online.

However, there are certain limitations to these rights that make copyright protection an inefficient means for protecting press publishers from online uses, specifically news aggregation.[107] Websites that pull facts from publications and summarize them in their own words are not infringers because the news and facts used in articles are just ideas and, thus, unprotectable.[108] There is also a potential fair use defense to summarized articles that contain hyperlinks that redirect to the publication.[109] However, fair use may not be an applicable defense for news aggregation.[110] Publishers also may have rights under state tort laws for hot news misappropriation if the time-sensitive news is copied without credit,[111] but most news aggregation does not involve time-sensitive content. Therefore,

[106] § 1201(a)(1)(E)(2).
[107] United States Copyright Office, *Copyright Protections for Press Publishers: A Report of the Register of Copyrights*, 52–56 (June 2022) https://copyright.gov/policy/publishersprotections/?loclr=eanco.
[108] § 102(b).
[109] Neil Weinstock Netanel, *Mandating Digital Platform Support for Quality Journalism*, 34, HARVARD J.L. & TECH, 474, 497 (2021).
[110] *See* Jane C. Ginsburg, *Written Comments in Response to U. S. Copyright Office's Publishers' Protection Study: Notice and Request for Public Comment*, 86 Fed. Reg. 56721 (Oct. 12, 2021).
[111] *See, e.g.*, Barclays Cap. Inc. v. Theflyonthewall.com, Inc., 650 F.3d 876, 898-901 (2d Cir. 2011); Nat'l Basketball Ass'nv. Motorola, Inc., 105 F.3d 841, 852 (2d Cir. 1997); Agora Financial LLC v. Samler, 725 F.Supp.2d 491 (D. Md. 2010).

the rights that are afforded by the US. under copyright law and hot news misappropriation claims are not comparable with the special protection afforded in Article 15 of the EU Directive.

On June 30, 2022, the United States Copyright Office released a report on ancillary copyright protections of press publishers.[112] It recommended against the adoption of new copyright protections for press publishers noting that any such laws would most probably narrow US copyright limitations such as fair use and the First Amendment. They suggested changes to antitrust policy as a more appropriate means to deal with the challenges faced by the press publishing industry.

9. Does it apply to scientific journals and hyperlinks? How does it work?

Similar to the lack of protections against online use of press publications, there is also no special protection for scientific journals or hyperlinks, but US copyright law still affords standard protections through the exclusive rights in § 106.

Depending on the type of linking, the use of hyperlinks may constitute a violation of a copyright owner's exclusive right to display.[113] Using a URL to redirect users to a specific third-party website has not been considered copyright infringement.[114] However, when the hyperlink is embedded, the outcome is less certain. The Ninth Circuit established in *Perfect 10 v. Amazon.com, Inc*. that in-lining (also called "framing" or "embedding"), where an image from another site is displayed and seamlessly incorporated into another webpage, was not considered copying because the information was not stored on the defendant's server.[115]

However, in 2018, the District Court of the Southern District of New York denied the application of the Perfect 10 "server test" in *Goldman v. Breitbart News Network, LLC.*[116] Instead, the court held that an infringer does not need to physically possess a copy of the image on the server; the court awarded the copyright owner partial summary judgment because the defendants infringed on the exclusive right to display by using HTML code to embed a twitter image on the defendants' websites.[117] The court reaffirmed this decision in *Nicklen v. Sinclair Broad. Grp., Inc.* (stating the

[112] United States Copyright Office, *Copyright Protections for Press Publishers: A Report of the Register of Copyrights* (June 2022) https://copyright.gov/policy/publishersprotections/?loclr=eanco.
[113] § 106(5).
[114] Ticketmaster Corp. v. Tickets.com, Inc., 54 U.S.P.Q.2D (BNA) 1344, 1346 (C.D. Cal. 2000).
[115] Perfect 10 v. Amazon.com, Inc., 508 F.3d 1146 (9th Cir. 2007).
[116] Goldman v. Breitbart News Network, LLC, 302 F. Supp. 3d 585, 595 (S.D.N.Y. 2018).
[117] *Id.* at 596.

Perfect 10 test "is contrary to the text and legislative history of the Copyright Act" and thus should not bar the plaintiff's copyright infringement claim).[118] Other cases in the Southern District of New York have denied motions to dismiss copyright infringement claims for embedding images without even mentioning the *Perfect 10* test.[119]

In 2019 the *Perfect 10* "server test" was rejected in another case in the Northern District of California, *Free Speech Systems, LLC v. Menzel*.[120] The court cabined the application of *Perfect 10* to the context of search engines.[121] Yet, in 2022, the N.D. Ca. proceeded to dismiss a social media embedding claim, citing *Perfect 10* as binding precedent in the Ninth Circuit.[122] In conclusion, while deep linking is not considered a violation of the Copyright Act's exclusive display right, in-line linking leaves potential infringers in murkier waters with an apparent circuit split between the Ninth Circuit and Second Circuit.

27 July, 2022
New York, NY

[118] Nicklen v. Sinclair Broad. Grp., Inc., 551 F. Supp. 3d 188, 195 (S.D.N.Y. 2021).
[119] *See* McGucken v. Newsweek LLC, 464 F. Supp. 3d 594 (S.D.N.Y. 2020). Sinclair v. Ziff-Davis, 454 F. Supp. 3d 342 (S.D.N.Y. 2020).
[120] Free Speech Systems, LLC v. Menzel, 390 F. Supp. 3d 1162 (N.D. Cal. 2019).
[121] *Id.* at 1172.
[122] Hunley v. Instagram, LLC., No. 21-CV-03778-CRB, 2022 WL 298570 (N.D. Cal. Feb. 1, 2022).