

**ASCAP AT 100**

by MARIA A. PALLANTE\*

We are here today to celebrate the 100th birthday of ASCAP, the American Society of Composers, Authors and Publishers. Birthdays, of course, are an occasion not only for celebration, but also for both reflection and anticipation. As I will explain further, and as I've recently said elsewhere, I think the time has come for Congress to consider how the law might better serve the music marketplace in the digital era. But to understand how we got to where we are today, I will take my cue from Rodgers and Hammerstein's *The Sound of Music* and "start at the very beginning."<sup>1</sup>

As you may know, our first copyright act, in 1790, did not protect music at all. Most songs and other musical compositions in early America were pirated English compositions. To give just the most famous example: the melody of Francis Scott Key's 1814 composition, *The Star-Spangled Banner*, is based closely on the melody of an old English "drinking song."<sup>2</sup>

Then on February 3, 1831, Congress granted to the authors of a "musical composition" the "sole right and liberty of printing, reprinting, publishing, and vending" their works for a period of twenty-eight years.<sup>3</sup> The new law did not give composers — or any other authors, for that matter — the right to prevent others from *performing* their works. At the time, per-

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\*Register of Copyrights and Director of the U.S. Copyright Office. Remarks are from a "Copyright Matters" program on February 25, 2014 featuring award-winning songwriters Jimmy Webb and Paul Williams (also the President of ASCAP) and commentator Dee Dee Myers. My thanks to staff attorney Jessica Sebeok for her assistance. For more information about the program, see *Copyright Matters Lecture Series*, COPYRIGHT.GOV, available at <http://www.copyright.gov/copyrightmatters/copy-ascap.html>.

<sup>1</sup> RICHARD RODGERS & OSCAR HAMMERSTEIN II, *Do-Re-Mi, on THE SOUND OF MUSIC (ORIGINAL BROADWAY CAST RECORDING)* (Columbia Masterworks 1959).

<sup>2</sup> See William Lichtenwanger, *The Music of "The Star-Spangled Banner," from Ludgate Hill to Capitol Hill* 34 Q. J. LIBR. OF CONGRESS 136, 137 (July 1977) (describing the origins of the original English song, *To Anacreon in Heaven*). To hear the melody and original lyrics, see SMITHSONIAN INSTITUTION, *The Star-Spangled Banner: The Flag that Inspired the National Anthem – The Melody*, NATIONAL MUSEUM OF AMERICAN HISTORY, <http://amhistory.si.edu/starspangledbanner/the-melody.aspx> (click on "Listen to the Anacreontic Song (MP3)").

<sup>3</sup> Act of Feb. 3, 1831, ch. 16, 4 Stat. 436.

formances were considered the vehicle by which to spur the sale of sheet music.<sup>4</sup>

In fact, the 1831 law ushered in a productive and lucrative period in American music publishing that lasted at least through the Civil War. As *The Knickerbocker* magazine observed in 1859: “[O]ur sheet-music publishers now do mostly a copyright business. Many of these copyrights are very valuable.”<sup>5</sup> However, the success of music publishers obscured the fact that it remained difficult for professional songwriters to make a living in mid-nineteenth century America. Composers typically transferred their copyrights to their publishers in exchange for royalty payments.

One contemporary composer, John Hill Hewitt, complained that songwriting was not a sustainable profession, “[f]or the simple reason that it does not pay the author.”<sup>6</sup> Another composer, Henry Russell, lamented that reliance on those royalty payments would mean “simple starvation.”<sup>7</sup>

In 1856, Congress enacted America’s first public performance right. As we learned last month when celebrating the 100th anniversary of the Dramatists Guild, it is the dramatists who are responsible for this foundational development. Accordingly, the new right was restricted to dramatic compositions, but it paved the way for the more complete public performance right for musical compositions that would come some forty years later.

Still there were challenges. The copyright law that had worked well to protect against the infringement of sheet music was not equipped to deal with new forms of reproduction. Fortunately, a succession of significant amendments strengthened the resolve of composers, offering a more modern copyright law. In 1891, again mostly at the urging of the dramatists, Congress enacted the International Copyright Act, which extended copyright protection to foreign authors and demanded reciprocal protection for U.S. authors. In 1897, it enacted the “Cummings Bill.” The Cummings fix was important because it both extended the public performance right to musical compositions and gave it teeth — imposing liability with attendant criminal penalties and injunctive relief. It would have a particularly profound effect on American composers and the American music

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<sup>4</sup> See KEVIN PARKS, *MUSIC & COPYRIGHT IN AMERICA: TOWARD THE CELESTIAL JUKEBOX*, 40 (American Bar Association, 2012) (stating that “[f]or pure ‘musical compositions’ (popular songs and ballads) . . . performance was merely a method of creating demand, a means to the end of selling hard goods-sheet music”).

<sup>5</sup> *Editor’s Table*, 54 *THE KNICKERBOCKER OR N.Y. MONTHLY MAG.*, Dec. 1859, at 668.

<sup>6</sup> JOHN H. HEWITT, *SHADOWS ON THE WALL OR GLIMPSSES OF THE PAST: A RETROSPECT OF THE PAST FIFTY YEARS*, 66 (AMS Press Inc. 1971) (1877).

<sup>7</sup> PARKS, *supra* note 4, at 13.

business. Public performance was no longer just a means of promoting compositions — it was now a source of income.

By 1909, things had really become interesting. Technology was moving fast, and innovations such as the newfangled player piano and the phonograph were soon ubiquitous in American homes, concert venues, restaurants, stores, saloons, and penny arcades. Congress completed and enacted a major revision of the Copyright Act, the first since 1790. And music was a star of the proceedings.

Several famous composers, including Victor Herbert and John Philip Sousa, offered frank testimony in support of the proposed bill. Sousa protested that “[w]hen these perforated-roll companies and these phonograph companies take my property and put it on their records they take something that I am interested in and give me no interest in it. When they make money out of my pieces I want a share of it.”<sup>8</sup> Herbert declared that he and Sousa were testifying “for many hundreds of poor fellows who have not been able to come here . . . brother composers whose names figure on the advertisements of these companies who make perforated rolls and talking machines . . . and who have never received a cent . . . . Morally, there is only one side to it.”<sup>9</sup>

The 1909 Act had a major impact on American composers. Among other things, it expressly provided for the exclusive right to publicly perform musical works for profit.<sup>10</sup> Congress also clarified that mechanical reproductions were covered under copyright and created a compulsory mechanical license for the manufacture and distribution of mechanical embodiments of musical works. More than a century old, this license is codified today in Section 115 of Title 17.

Unfortunately, the Act did not define the terms “performance,” “public performance,” or public performance “for profit.” The ambiguity led many to conclude that licenses were not required unless admission fees were charged. Composers began to realize that even if they were legally entitled to collect for performances of their works in restaurants and other venues, it would be impossible in practice to police every such occasion.

In October 1913, Victor Herbert and his attorney, Nathan Burkan, and a number of other notable composers and music publishers braved heavy rains to gather at Lüchow’s, the New York restaurant where Herbert and Burkan were regulars, to discuss how they might solve the public performance problem. On February 13, 1914, a second meeting was held

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<sup>8</sup> *Arguments Before the Comm.’s on Patents of the S. and H.R., Conjointly, on the Bills S. 6330 and H.R. 19853, to Amend and Consolidate the Acts Respecting Copyright*, 59th Cong. 23 (1906) (statement of John Philip Sousa, composer).

<sup>9</sup> *Id.* at 25-26 (statement of Victor Herbert, composer).

<sup>10</sup> Copyright Act of 1909, ch. 320, § 1(e), 35 Stat. 1075, 1075.

at the Hotel Claridge in Times Square and this time more than 100 composers crowded the meeting room. Here, ASCAP was born. (As an aside, it is beyond question that Victor Herbert deserves enormous credit for his vision and commitment in launching ASCAP. However, at this juncture in my remarks, before this audience, I would be remiss if I did not underscore the considerable contributions of his equally talented copyright lawyer.)

By the end of 1914, ASCAP had signed approximately eighty-five licensees, at rates of between five and fifteen dollars per month. A few years later (with some timely assistance from Oliver Wendell Holmes and the Supreme Court), ASCAP would distribute its first royalty payments to its members, amounting to approximately \$82,000<sup>11</sup> (which is \$961,026 in today's dollars).

Chief Justice Holmes was crucial because in 1917 ASCAP found itself before the Supreme Court in the seminal case *Herbert v. Shanley Co.*<sup>12</sup> Victor Herbert had sued Shanley's, a New York restaurant, for an unauthorized performance of his song, *Sweethearts*, the license to which was controlled by ASCAP. Shanley's countered that because it did not charge a fee for admission to its premises and only charged for the food, the performance of *Sweethearts* was not "for profit." Holmes disagreed with Shanley's, observing that "[i]f music did not pay it would be given up."<sup>13</sup> In what has since become a rather famous opinion, he observed that if a restaurant was in the business of making a profit — and music was a component of the overall ambience and service that conduced to making that profit — then the performance of the music was "for profit."<sup>14</sup>

In a second landmark decision in 1923 — *M. Witmark & Sons v. L. Bamberger & Co.* — a federal court held that performances by radio broadcast were "for profit" and required a license, even if the broadcast was free.<sup>15</sup> Unsurprisingly, this decision exacerbated simmering tensions between ASCAP and radio broadcasters.

In 1939, the National Association of Broadcasters (NAB) created Broadcast Music, Inc. (BMI) as an alternative to ASCAP, but this fledgling competitor did little to prevent ASCAP from raising its rates. The tension came to a boil on New Year's Day in 1941, when NAB demonstrated its opposition to ASCAP's new pricing structures by "banning" ASCAP music from the airwaves.

Enter the Department of Justice. On December 26, 1940, the DOJ filed suit against ASCAP *and* BMI, as well as both national radio net-

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<sup>11</sup> See PARKS, *supra* note 4, at 82 n.38.

<sup>12</sup> 242 U.S. 591 (1917).

<sup>13</sup> *Id.* at 595.

<sup>14</sup> *Id.* at 594-95.

<sup>15</sup> 291 F. 776, 780 (D.N.J. 1923).

works, accusing them of violating the Sherman Antitrust Act. In late February 1941, ASCAP and BMI entered into consent decrees — still operative today — designed to protect licensees from price discrimination or other anti-competitive behavior.<sup>16</sup>

Under the terms of the consent decrees, ASCAP and BMI administer the public performance right for their members' musical works on a non-exclusive basis and offer the same terms to similarly situated licensees. In addition, as of 1950, prospective licensees may seek determination of a reasonable license fee for ASCAP and BMI works in the federal court for the Southern District of New York. (The Society of European Stage Authors and Composers (SESAC), a smaller third performing rights organization created in 1930 in an effort to help European publishers retrieve their American performance royalties, operates without a consent decree.)

The Copyright Act was enacted in 1976. But in the nearly forty years since President Gerald Ford signed it into law, the business of reproducing and performing music has evolved dramatically — from vinyl records to 8-tracks and cassette tapes to CDs to digital downloads, MP3s, music lockers, and peer-to-peer file sharing. Music has never been so abundantly available — from so many different sources and with so much interactivity — as it is today.

But the basics haven't changed at all. Consider the words of singer-songwriter Lyle Lovett, who writes that amidst the “evolution of the many and various vehicles for delivery of music, what remains remarkably constant is the struggle to convince music users and our lawmakers that songs still need to be safeguarded and songwriters still need to get paid fairly for what they do.”<sup>17</sup>

All of these new music technologies and services have raised critical copyright questions and have prompted urgent calls for a comprehensive evaluation of our music licensing regimes. Good-faith actors in the music marketplace are in agreement that songwriters and recording artists, as well as the music publisher and record label intermediaries who invest in their careers, deserve to be compensated for the value of their creative contributions.

In the past decade, however, as the market for CDs and other physical formats has declined, songwriters and recording artists have increasingly expressed frustration that the royalties they receive from new, legal digital services fail to make up for the loss in income from the sale of physical goods. Accordingly, we need to take a close look at the impact of the various ratesetting standards, within and across different music deliv-

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<sup>16</sup> See generally *United States v. Broad. Music, Inc.*, 275 F.3d 168, 171-72 (2d Cir. 2001) (describing the history).

<sup>17</sup> Lyle Lovett, *Preface to BRUCE POLLOCK, A FRIEND IN THE MUSIC BUSINESS: THE ASCAP STORY*, at xii (2014).

ery platforms, to see if they further the goals of the copyright system — one of the most fundamental of which is to ensure fair returns to creators.

At the same time, those seeking to bring music-related products to the marketplace struggle with the complexity of, and obstacles in, the music licensing process. An online music service typically must offer access to millions of songs in order to be a viable player in the digital market place. And many music services are required to obtain both performance and reproduction rights for use of the same works.

Today, some frustrated music publishers — especially larger ones — are choosing to license their public performance rights directly to digital services instead of through third-party administrators such as ASCAP, BMI or SESAC.<sup>18</sup> The fact that everyone — from creators to consumers to licensees — is frustrated suggests that the system simply isn't working. There isn't anything wrong with the direct licensing of rights on the open marketplace, but many authors, smaller publishers, and music lovers prefer and rely on the advantages offered by collective licensing.

For these reasons, I believe the time has come to review the role of the consent decrees governing ASCAP and BMI and their impact on the music marketplace — to assess whether, in the digital marketplace, they are facilitating or hindering a robust exchange of transactions. Certainly the government has responsibilities in this space. The challenge is how to reconcile or rationalize issues of competition, with respect to which the government has a very serious role, with the beneficial aspects of collective management, the purpose of which is no less relevant than it was in 1914.

Looking at all of these challenges, it is clear there will always be an important role for the collective licensing paradigm, which was innovative when ASCAP was founded 100 years ago and remains innovative today. As the Copyright Office suggested in 2011's discussion document, *Legal Issues in Mass Digitization*, voluntary collective licensing — adapted ap-

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<sup>18</sup> The U.S. District Court for the Southern District of New York recently issued conflicting decisions as to whether withdrawals of this type affect the scope of the repertoires subject to licensing under the consent decrees. *Compare Broad. Music, Inc. v. Pandora Media, Inc.*, Nos. 13 Civ. 4037, 64 Civ. 3787, 2013 WL 6697788, at \*4 (S.D.N.Y. Dec. 19, 2013) (“When portions of [the public performance] right are withdrawn, the affected compositions are no longer eligible for membership in BMI’s repertory, and it cannot include them in a blanket license or license them at all.”), with *In re Pandora Media, Inc.*, Nos. 12 Civ. 8035, 41 Civ. 1395, 2013 WL 5211927, at \*1 (S.D.N.Y. Sept. 17, 2013) (“[T]he language of the consent decree unambiguously requires ASCAP to provide Pandora with a license to perform all of the works in its repertory, and . . . ASCAP retains the works of ‘withdrawing’ publishers in its repertory even if it purports to lack the right to license them to a subclass of New Media entities . . .”).

propriately and perhaps complemented by micro-licensing systems and other voluntary mechanisms — remains a vital option for clearing rights in the digital era.<sup>19</sup>

The experience of other countries supports this view. In many other countries, collective management organizations license both the public performance right *and* the reproduction and distribution right for musical compositions, which allows for “one-stop-shopping” for music licensees and more streamlined royalty processing for copyright owners.

And just this month, the European Parliament adopted a new Directive to modernize collective rights management and develop multi-territorial licensing of musical works for online use. The Directive is structured to ensure that rightsholders have more control over the management of their rights and to “facilitate the entry of smaller innovative suppliers on the European market,” thereby leading to wider availability and more choice in legal online music.<sup>20</sup>

Finally, we should recognize that collecting societies at home and abroad offer their members so much more than just rights management and royalty collection and distribution. They offer legal, political, and logistical services, including enforcement of their rights — a combination of services that is more important than ever as increasing numbers of artists are self-produced and self-managed.

They also offer moral support. “ASCAP is officially the most committed relationship I have ever had,” said country music artist Deana Carter.<sup>21</sup>

Motown’s Valerie Simpson put it this way, “[w]e didn’t have to think about it . . . all we had to do was create.”<sup>22</sup>

Before I leave this topic and introduce our honored guests, I want to highlight that the Copyright Office is currently studying a number of music

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<sup>19</sup> See U.S. COPYRIGHT OFFICE, LEGAL ISSUES IN MASS DIGITIZATION: A PRELIMINARY ANALYSIS AND DISCUSSION DOCUMENT 32 (2011), [http://www.copyright.gov/docs/massdigitization/USCOMassDigitization\\_October2011.pdf](http://www.copyright.gov/docs/massdigitization/USCOMassDigitization_October2011.pdf).

<sup>20</sup> Press Release, European Commission, Commissioner Michel Barnier Welcomes the European Parliament Vote on the Directive on Collective Rights Management (Feb. 4, 2014), *available at* [http://europa.eu/rapid/press-release\\_MEMO-14-80\\_en.htm](http://europa.eu/rapid/press-release_MEMO-14-80_en.htm). The full text of Directive 2014/26/EU can be found at [http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=OJ:JOL\\_2014\\_084\\_R\\_0072\\_01&rid=2](http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=OJ:JOL_2014_084_R_0072_01&rid=2).

<sup>21</sup> ASCAP, *Happy 100th Birthday, ASCAP!*, YOUTUBE.COM (Feb. 13, 2014), [https://www.youtube.com/watch?v=UavL3-bgAZs&feature=player\\_embedded](https://www.youtube.com/watch?v=UavL3-bgAZs&feature=player_embedded).

<sup>22</sup> Jeff Lunden, *Collecting Money For Songwriters, A 100-Year Tug Of War*, NPR.ORG (Feb. 13, 2014), <http://www.npr.org/2014/02/13/275920416/collecting-money-for-songwriters-a-100-year-tug-of-war>.

issues for the benefit of Congress as well as our own work in administering the copyright law.<sup>23</sup> Among our many questions are the following:

- Whether the consent decrees governing the licensing practices of ASCAP and BMI are continuing to function as intended in the era of digital music;
- Whether — and, if so, how — the government might encourage the adoption of universal standards and/or practices with respect to the identification of musical works and sound recordings to facilitate the music licensing process;
- Whether existing ratesetting standards are efficient (and yield fair results); and,
- In the reproduction and distribution context, whether the Section 115 statutory license is effective and whether the music marketplace might benefit if it were updated to permit licensing of musical works on a blanket basis by one or more collective licensing entities.

A final word of reflection. As I was preparing these remarks, I was searching for an elegant and fitting tribute to the work of ASCAP during its first 100 years. Then it occurred to me that Kermit the Frog may have summed it up best performing Paul's beloved song, *Rainbow Connection*:

*Somebody thought of that and someone believed it*

*Look what it's done so far.*<sup>24</sup>

Congratulations ASCAP.

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<sup>23</sup> The Copyright Office published a notice of inquiry a few weeks later, seeking public comments on twenty-four questions about musical works, sound recordings, platform parity, changes in music licensing practices, revenues and investment, and data standards. *See* Music Licensing Study: Notice and Request for Public Comment, 78 Fed. Reg. 14,739 (Mar. 17, 2014).

<sup>24</sup> PAUL WILLIAMS & KENNETH ASCHER, *The Rainbow Connection, on THE MUPPET MOVIE (ORIGINAL SOUNDTRACK RECORDING)* (Atlantic Records 1979).