

# Music Licensing

Background and Economic Issues

**PRESENTED TO**

Music Industry Research Association

**PRESENTED BY**

Steven Herscovici

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THE **Brattle** GROUP

# Background on Music Licensing

# Why Music Licensing?

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**When we hear music in a commercial setting the user of that music needs a license.**

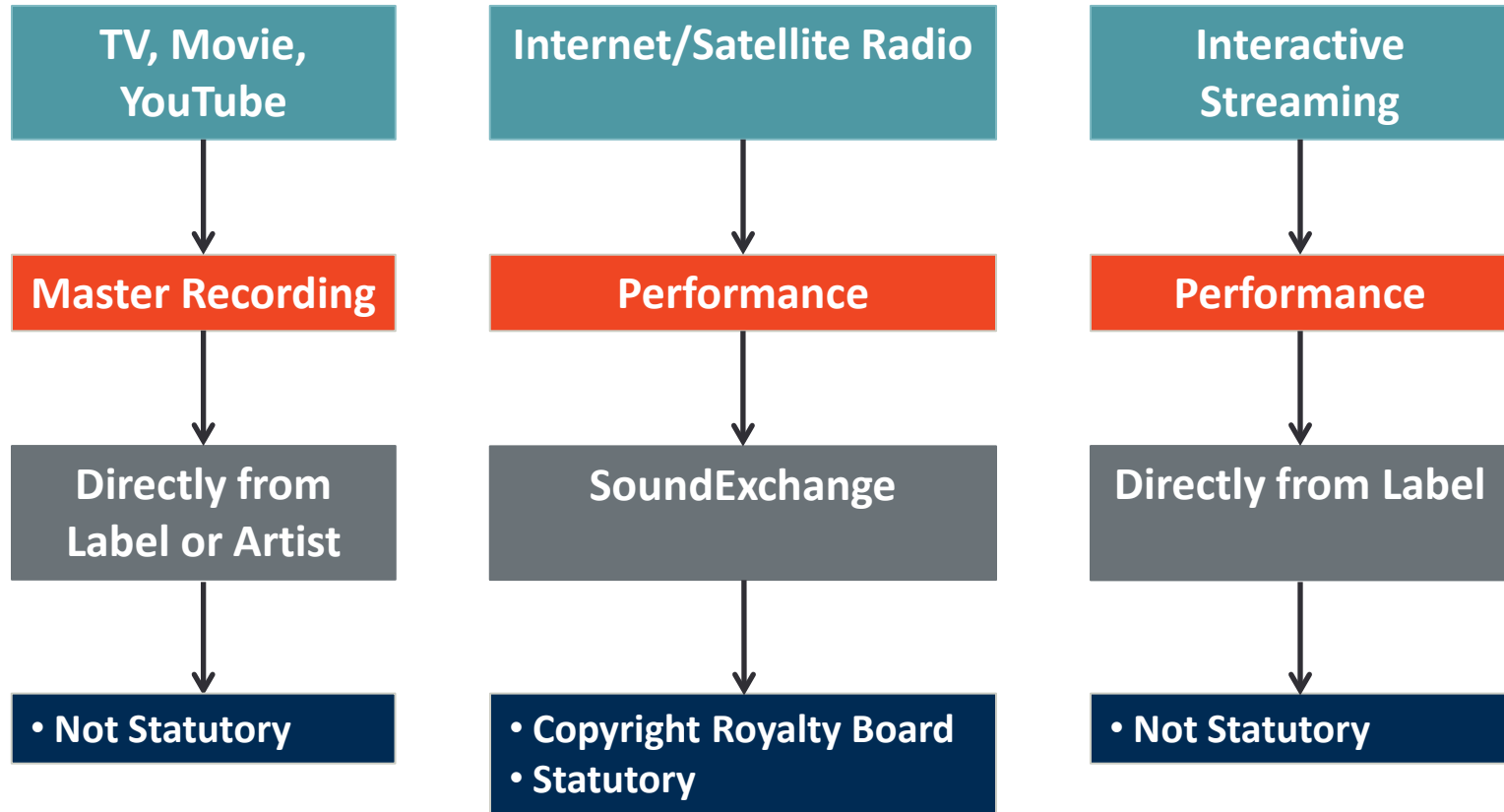
- One or more licenses are needed, depending on the use.

## **Types of licenses include**

- *Performance License*: A license for the right to publicly perform the musical work
  - Uses include: Television, Radio, Streaming; Live performances; Restaurants, Malls, etc.
- *Synchronization License*: A license to use the music “in timed relation” with visual content
  - Uses include: Television programs and ads; Film; Internet videos; video games
- *Master Recording License*: A license to use musical recording in a media project
  - Uses include: Television programs and ads; Film
- *Mechanical License*: A license to mechanically reproduce sound
  - Uses include: CDs and digital downloads; Interactive streaming services (e.g., Spotify, Apple Music, Tidal, Amazon Unlimited, etc.)

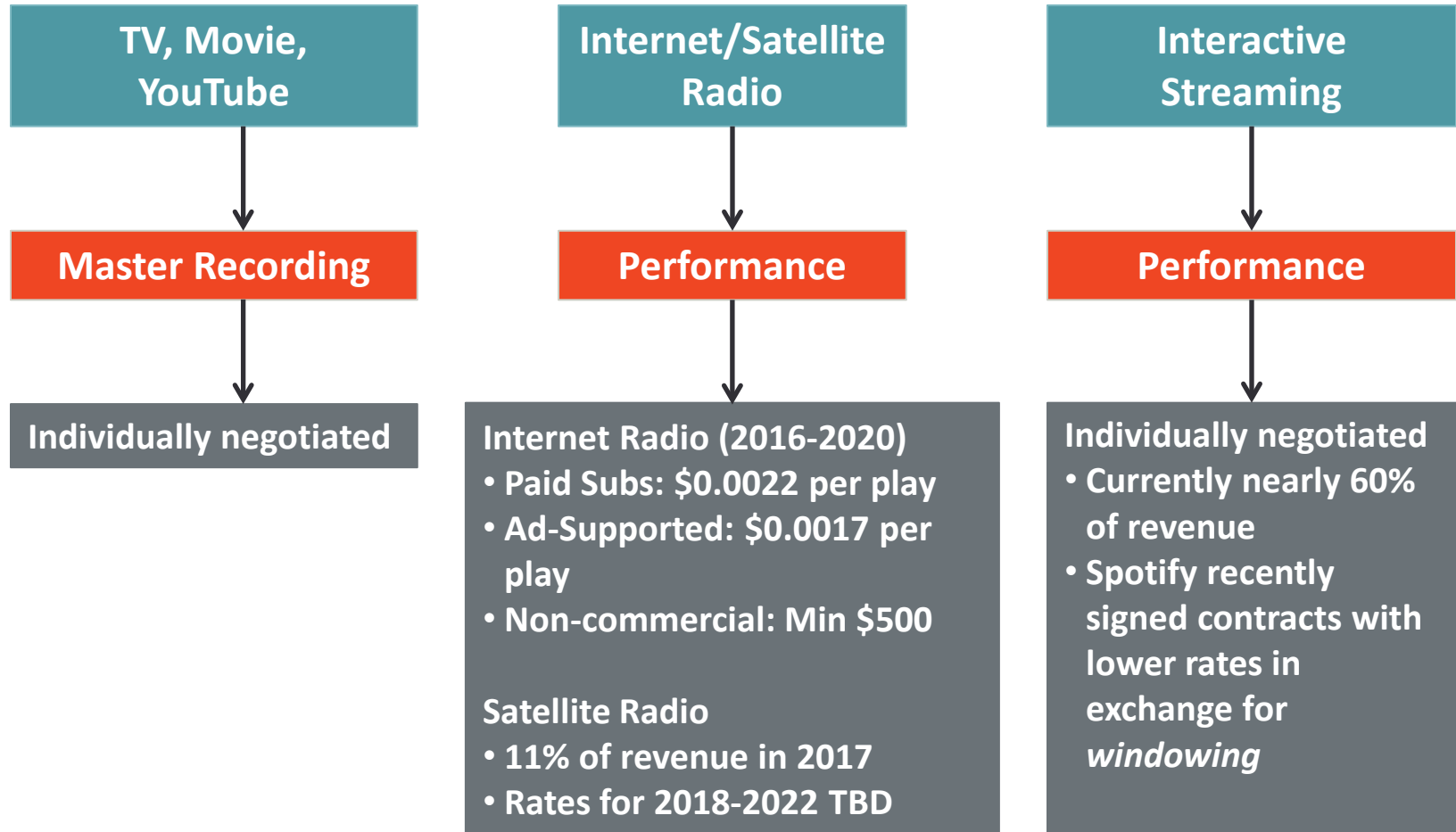
**Many of these licenses are *compulsory* or *statutory*, meaning that the copyright owner cannot exclude others from exploiting work so long as the user pays the appropriate royalty.**

# Licensing Sound Recordings

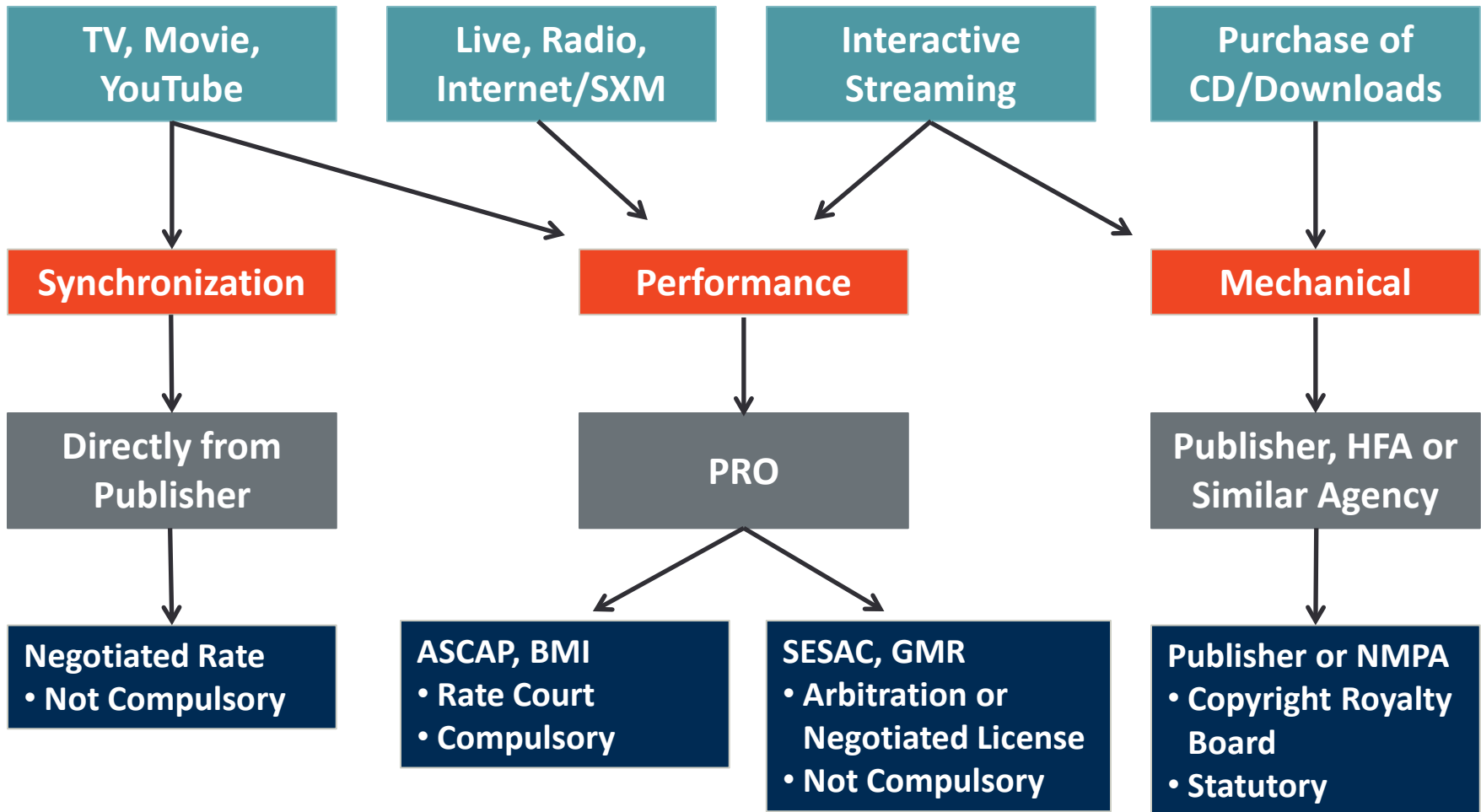


\* Terrestrial radio does not pay performance right

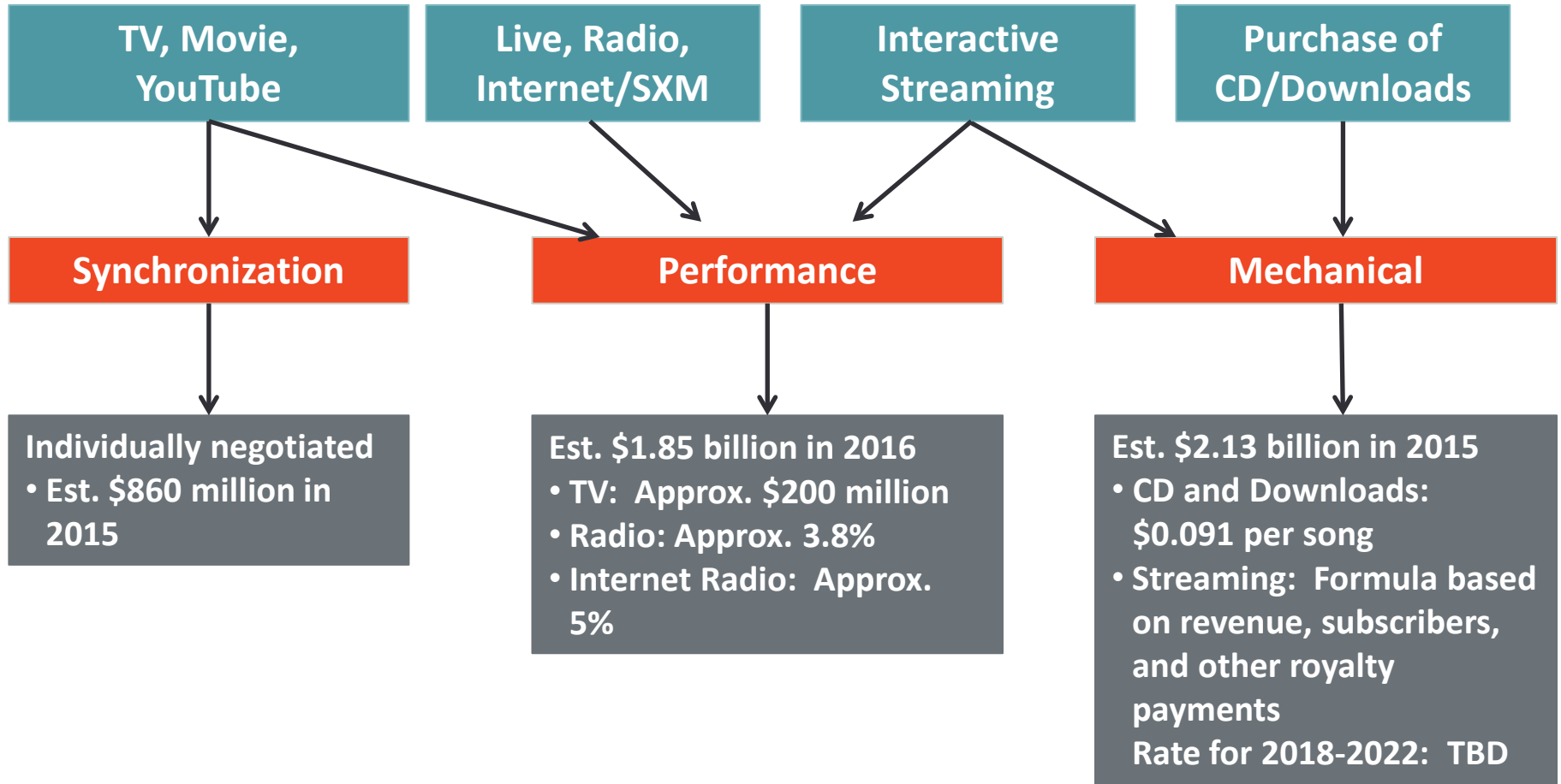
# Current Royalty Structure for Sound Recordings



# Licensing Musical Works



# Current Royalty Structure for Musical Work



# What is a PRO?

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## What is a PRO

- ASCAP, BMI, SESAC, GMR
- Performing Rights Organization acts as agent for writers and publishers:
  - Negotiate licenses with music users
  - Collect and distribute royalties to writers and publishers
  - Monitor for infringing use
- Performing Rights Organizations are two-sided platforms:
  - Composers, songwriters, and music publishers are one side of the platform.
  - Licensees (TV and Radio stations; streaming services; arenas; restaurants; fitness centers; etc.) are on the other side of the platform
- Writers are generally represented by one PRO.
- ASCAP and BMI operate under Consent Decrees with Justice Department.
  - SESAC and GMR do not.



# Why Consent Decrees?

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**DOJ was concerned that ASCAP had undue market power.**

- DOJ sued ASCAP and entered into Consent Decree in 1941.
- DOJ sued BMI in 1964 and entered into Consent Decree in 1966.

**Key Features of Consent Decrees:**

- PROs may license **Performance Rights** only.
  - May not license other rights (e.g., Sync, Mechanical).
- PROs must offer **non-exclusive** licenses.
  - Users may license directly from composer.
  - Important for decision of CBS v. BMI (1979), which determined that aggregating musical works under blanket license is not anticompetitive.
- PROs must offer license to any party requesting a license (**compulsory**).
  - License to comparable users must be on comparable terms.
- If parties cannot agree on a license, rate and terms are determined by a **Rate Court**.
  - Federal judge oversees each Consent Decree and adjudicates all controversies.

# DOJ Review of Consent Decrees

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- Consent Decrees were last amended in 1994 (BMI) and 2001 (ASCAP).
- Beginning in 2011, major publishers wanted to withdraw their compositions from ASCAP and BMI for certain uses.
  - Withdraw for certain new media
  - Remain for traditional media
- Rate Courts ruled that Consent Decrees did *not* allow partial withdrawals.
- DOJ reviewed whether Consent Decrees should be amended.
- Review considered:
  - Whether copyright owners should be allowed to affiliate with ASCAP and BMI to license rights to certain types of users, but not others
  - Whether ASCAP and BMI should be allowed to offer other rights

# Outcome of DOJ Review

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- In 2016, DOJ decided not to amend Consent Decrees:
  - Copyright owner must offer works to all users, or withdraw completely.
  - ASCAP and BMI may *only* offer performance rights.
- DOJ also interpreted Consent Decrees to require *100 Percent Licensing*.
- DOJ interpreted Consent Decrees as not allowing *Fractional Licensing*.
  - BMI asked Rate Court for clarification on whether Consent Decrees allow fractional licensing.
  - Rate Court agreed with BMI.
  - DOJ is appealing.

# Economic Issues

# Pricing of License Royalties

	Sound Recording	Musical Work
TV, Film, YouTube – Sync/Master & Performance Rights	Master: Individual Negotiation	Sync: Individual Negotiation Performance: Rate Court
Terrestrial Radio – Performance Right	No Payments in US	Consent Decree/Rate Court
Satellite Radio – Performance Right	CRB Statutory Rate	Consent Decree/Rate Court
Webcast – Performance Right	CRB Statutory Rate	Consent Decree/Rate Court
CD/Digital Download – Mechanical Right	n.a.	CRB Compulsory Statutory Rate
Interactive Streaming – Mechanical & Performance Rights	Performance: Individual Negotiation	Mechanical: CRB Statutory Rate Performance: Consent Decree/Rate Court

\* Copyright owners and licensees may license directly, outside of Rate Court/CRB rate

# Future Developments

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## Pre-1972 Sound Recording Right Legislation

- Sound recordings made prior to February 15, 1972 are not protected by federal copyright laws.
  - They are protected by various state laws
- Artists have sued SiriusXM and Pandora for nonpayment of pre-1972 royalties.
  - California case settled for up to \$100 million; New York and Florida cases dismissed (appeals pending).
- CLASSICS Act: would extend the performance right to pre-1972 recordings

## Fair Pay Fair Play Act Legislation

- AM/FM radio is exempt from paying sound recording royalties.
- Congress has introduced legislation over the years to require radio to pay royalties.

# Presenter Information

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## **STEVEN HERSCOVICI**

Principal | Boston

[Steve.Herscovici@brattle.com](mailto:Steve.Herscovici@brattle.com)

+1.617.864.7900

Steven Herscovici is an economist specializing in the application of economics, finance, and data analysis to litigation and other complex business issues. He has served as an expert witness in antitrust, employment discrimination, and commercial damages litigation. He has also testified on the valuation of music copyrights on behalf of performing rights organizations, music publishers, and record companies.

Dr. Herscovici has significant experience working on matters involving the music industry. He has provided economic analyses and supported academic and industry experts in numerous music licensing and copyright infringement cases. He has been involved in proceedings to determine appropriate license fees in front of the Copyright Royalty Board involving satellite radio, internet radio, and streaming music services, as well as in Rate Court and arbitration proceedings. He has also consulted to record companies, music publishers, performing rights organizations, and industry associations.

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**We are distinguished by our credibility and the clarity of our insights, which arise from the stature of our experts, affiliations with leading international academics and industry specialists, and thoughtful, timely, and transparent work. Our clients value our commitment to providing clear, independent results that withstand critical review.**



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Our experts offer deep experience in the telecommunications, media, internet and information technology, and sports and entertainment sectors. We support clients in matters related to litigation, regulation and policy, and private advisory analyses.

The combination of our industry expertise and functional skills in areas such as antitrust, intellectual property, and tax allows us to provide our clients with the best possible combination of consulting services.

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- Telecommunications
- Media
- Internet & Information Technology
- Sports & Entertainment