

Music & Copyright

A Path Forward

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Outline

- Copyright Infringement
 - Musical Works
 - Sound Recordings – Digital Sampling
- Licensing Music Online
 - Permanent downloads
 - Streaming
 - Interactive (on-demand)
 - Non-interactive (webcasting)
- A Path Forward

Two Separate Works of Authorship

Musical Work

NIGHT AND DAY

French version by EMÉLIA RENAUD
Words and Music by COLE PORTER

Moderato
mp poco a poco cresc.

p Ddim A57 D6

Like the beat, beat, beat, of the tom - tom, When the jun - gle shad - ows
Com-me le rou - le - ment du tam - tam, Quand la jon - gle s'ob - scur -

p Ddim A57 Ddim A57 D6 Ddim

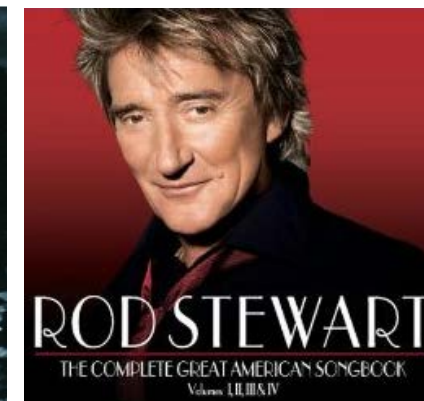
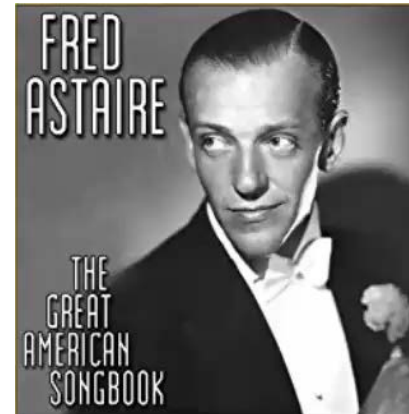
fall, tick, tick, tock of the state - ly clock, as it stands a - gainst the
cit, tic - tac de l'hor - lo - ge ma - jes - tu - eu - se près du

A57 A7 D Bb7

wall, Like the drip, drip, drip, of the rain - drops, When the sum - mer show'r is
mur Com-me la gout - te d'eau qui tom - be Quand un o - rage est fi -

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All Rights Reserved

Sound Recording



Night and Day
Ella Fitzgerald

Copyright Infringement: Musical Works



The Chiffons

Improper copying

Access

Actual access

or

Reasonable opportunity to
have heard

Substantial Similarity

Ordinary observer test

Proof through “common errors”

- The more access, the less substantial similarity you have to show
- No infringement if “independently created”
- Copying must be *improper*: substantially similar to the original, copyrightable elements of the original

Originality

African American Spiritual

We (or I) will overcome
We (or I) will overcome
We (or I) will overcome some day
Oh deep (or down) in my heart, I do believe
We (or I) will overcome some day

We will overcome
We will overcome
We will overcome someday
Oh, down in my heart
I do believe
We'll overcome someday

*We Shall Overcome Found. v. Richmond Org., Inc.,
221 F. Supp. 3d 396 (S.D.N.Y. 2016)*

281 We Will Overcome By FTA-CIO Workers Highlander Students

This simple and moving hymn has become especially thrilling when you consider where the song was first sung. It was learned by Zilphia Horton of the Highlander Folk School, in Tennessee, from members of the CIO Food and Tobacco Workers Union. Many a visitor to the south has never forgotten hearing the rich harmonies of some little band, and the determination in those words, even though surrounded on all sides by hate, [the CIO] and all the forces of power and money.

Zilphia writes: "It was first sung in Charleston, S.C., and...one of the phrases of the original hymn was...we will overcome...At school here they naturally added other verses...Its strong emotional appeal and simple dignity never fails to hit people. In fact it stops them cold silent."



We Shall Overcome

• New Words and Music Adaptation by:
ZILPHIA HORTON, FRANK HAMILTON,
GUY CARAWAN and PETE SEEGER

Moderately slow with determination (J. 66)



We shall overcome
We shall overcome
We shall overcome some day
Oh deep in my heart, I do believe
We shall overcome some day

Copyright Infringement: Sound Recordings

The Same Standard?

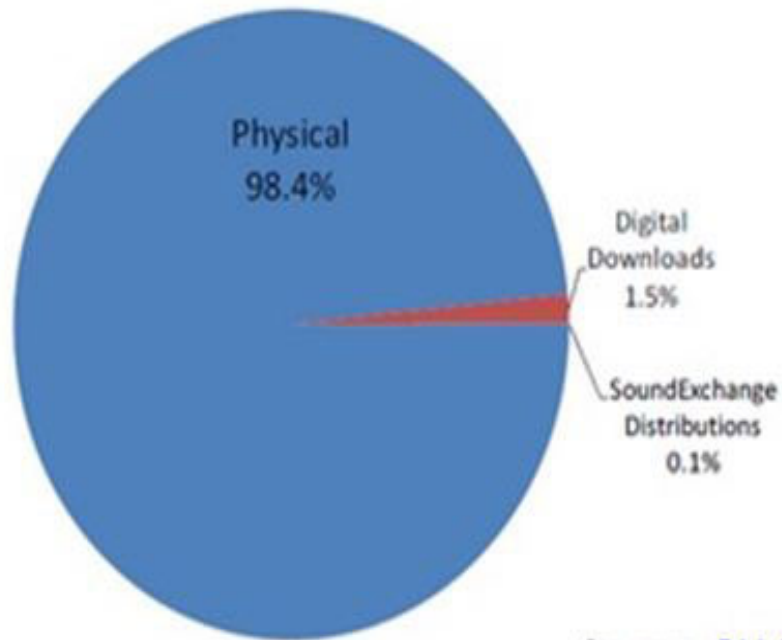
- Digital sampling: the physical copying of sounds from an existing recording for use in a new recording.
 - Musical work
 - Sound recording
- Is there a *de minimus* exception?
 - 6th Circuit (Bridgeport, 410 F.3d 792, 2005): No
 - 9th Circuit (Ciccone, 824 F.3d 871, 2016): Yes
- Section 114: The rights of sound recording copyright holders “do not extend to the making or duplication of another sound recording that consists entirely of an independent fixation of other sounds, even though such sounds imitate or simulate those in the copyrighted recording.”

Licensing Music Online

Increasing Business & Legal Complexity

Increasing Number of Transactions

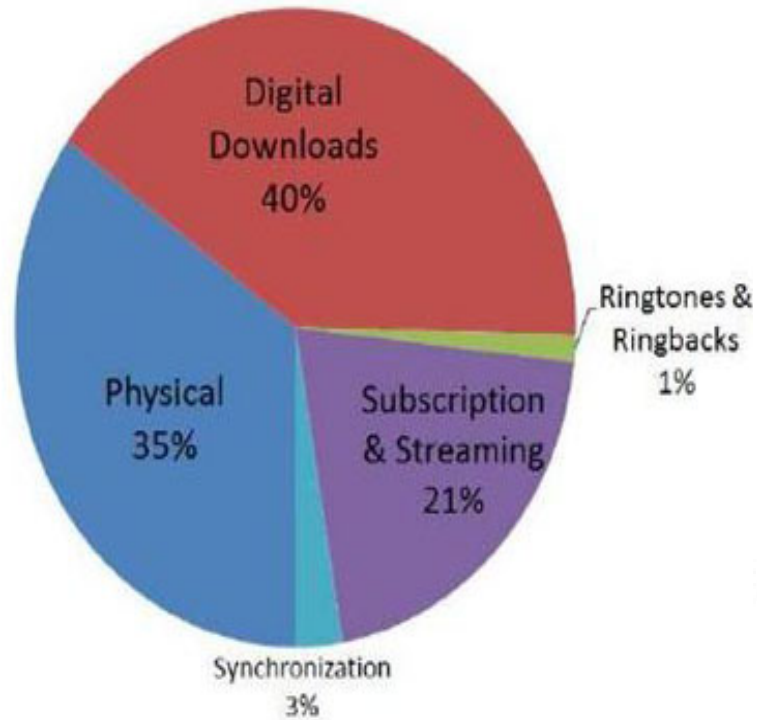
US Music Industry Revenues 2004



Source: [RIAA](#)

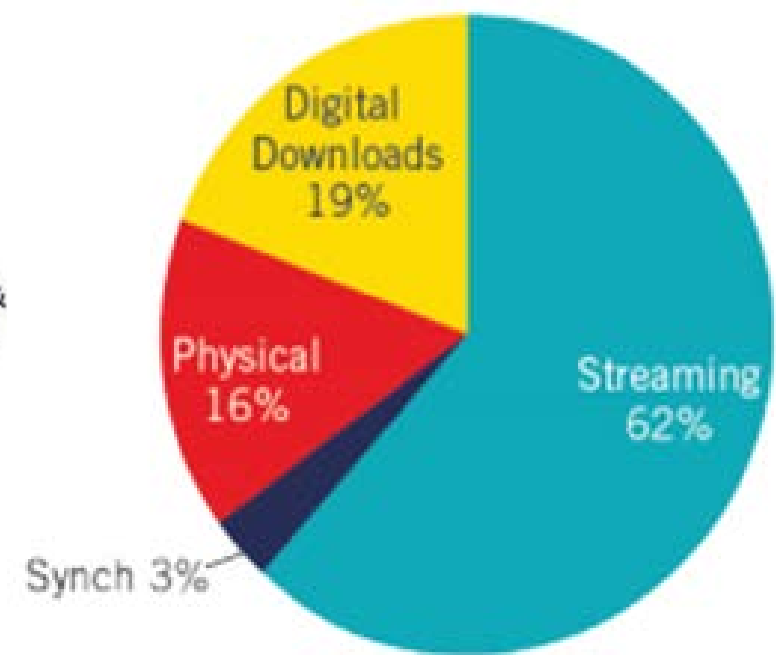
US Music Industry Revenues 2013

Source: RIAA

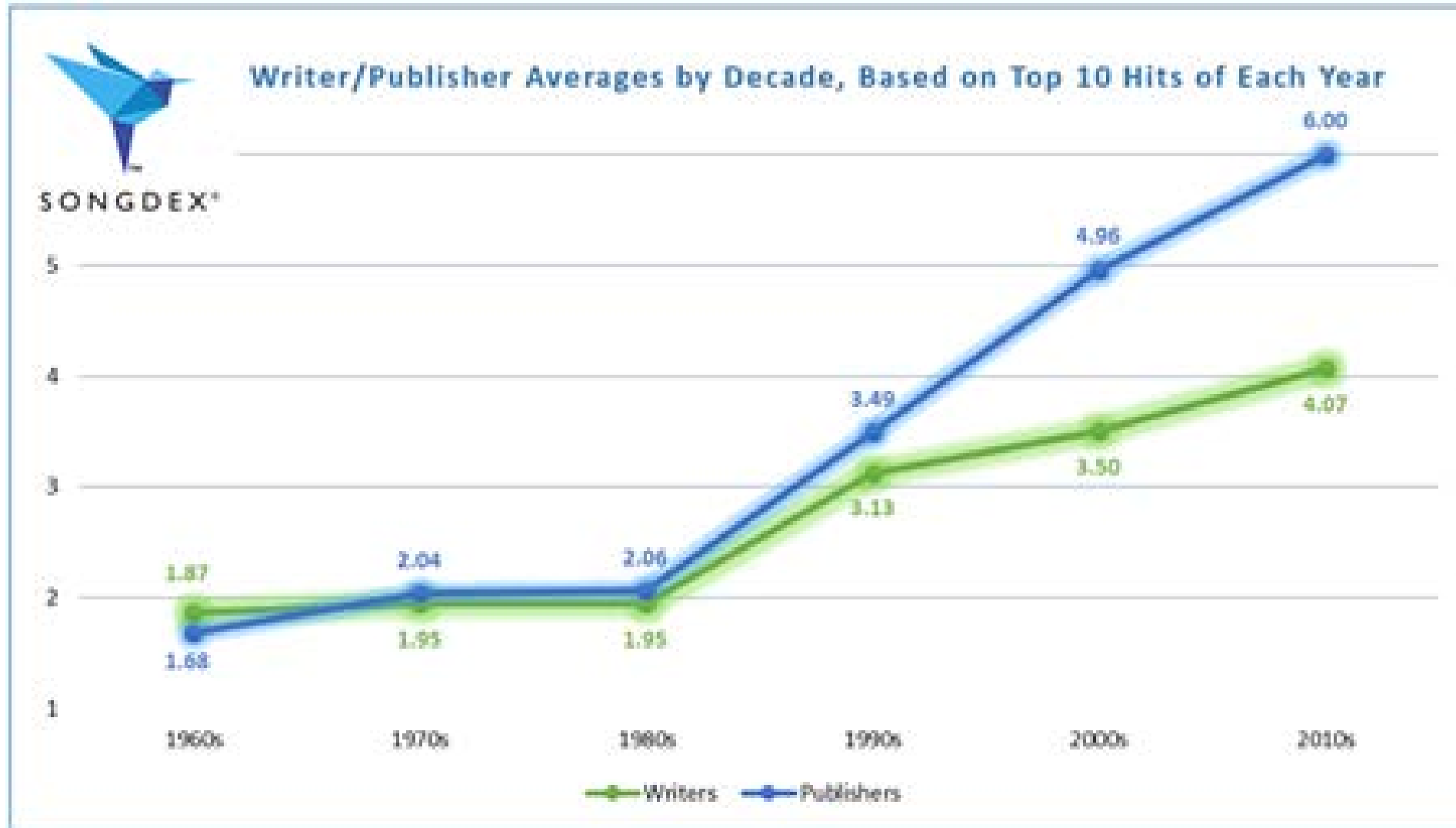


US Music Industry Revenues 2017

Source: RIAA



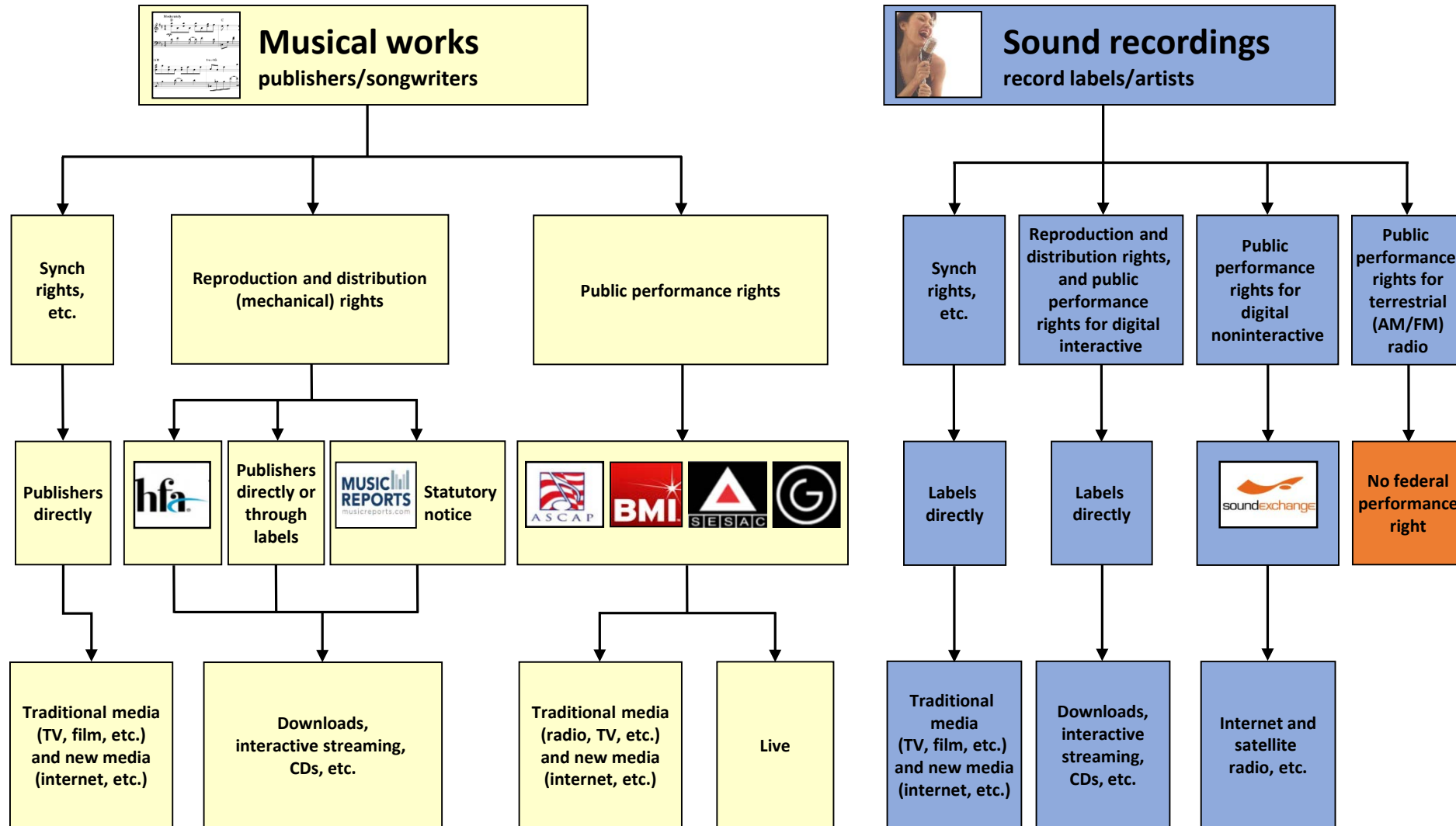
Increasing Number of Payees



Increasing Legal & Regulatory Complexity

- Distinction between Musical Works v. Sound Recordings
 - Sound recording embodies a copyrighted musical work
- Voluntary v. Compulsory licenses
 - i.e., freely negotiated or rate set by government (Copyright Royalty Board, Rate Court)
- Permanent download v. Streaming
 - Permanent download: “digital phonorecord delivery”
 - Streaming: “digital audio transmission”
 - on-demand or webcasting
- Reproduction v. Public Performance
 - Exclusive right to reproduce the work in copies and phonorecords
 - Exclusive right to publicly perform the work
 - generally (applies to musical works)
 - by means of a digital audio transmission (applies to sound recordings)

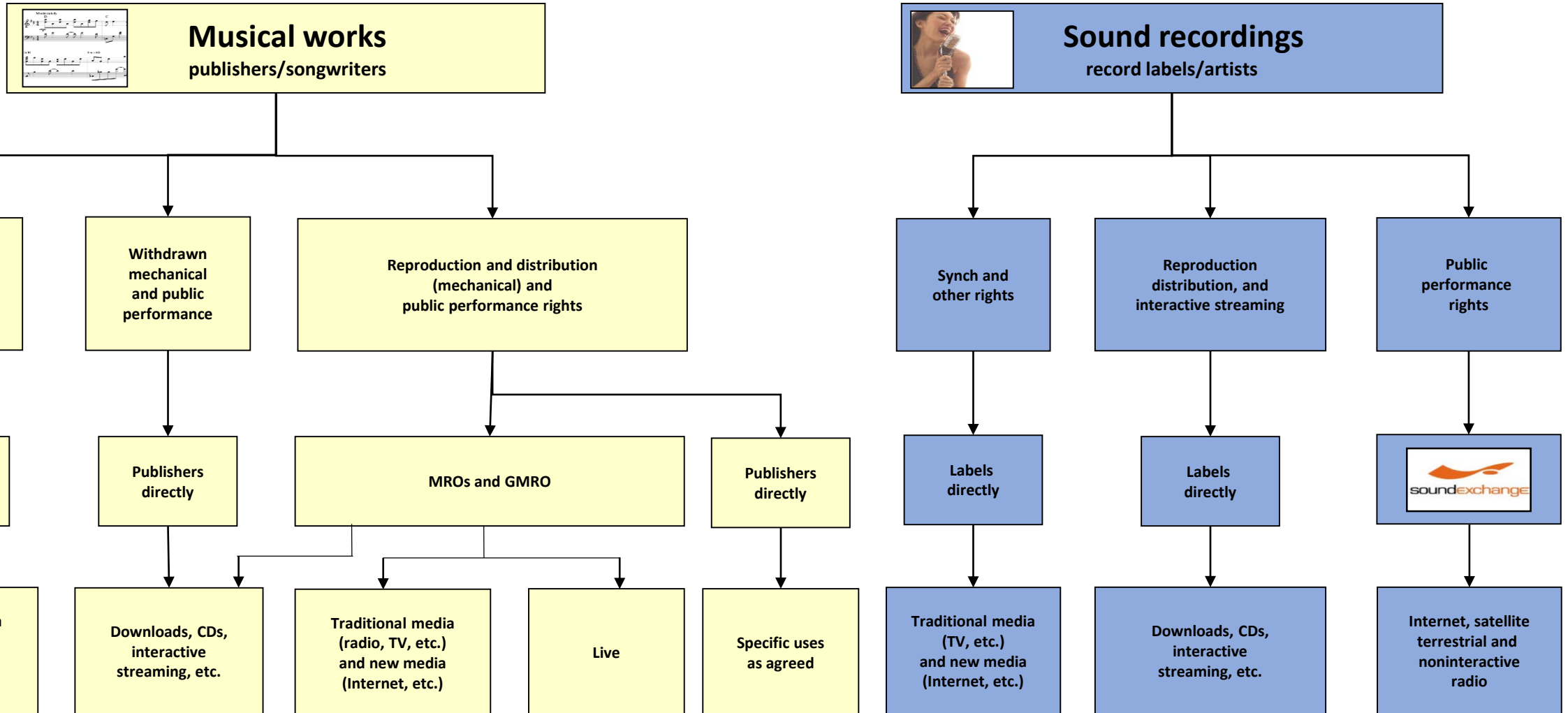
Existing Licensing Framework



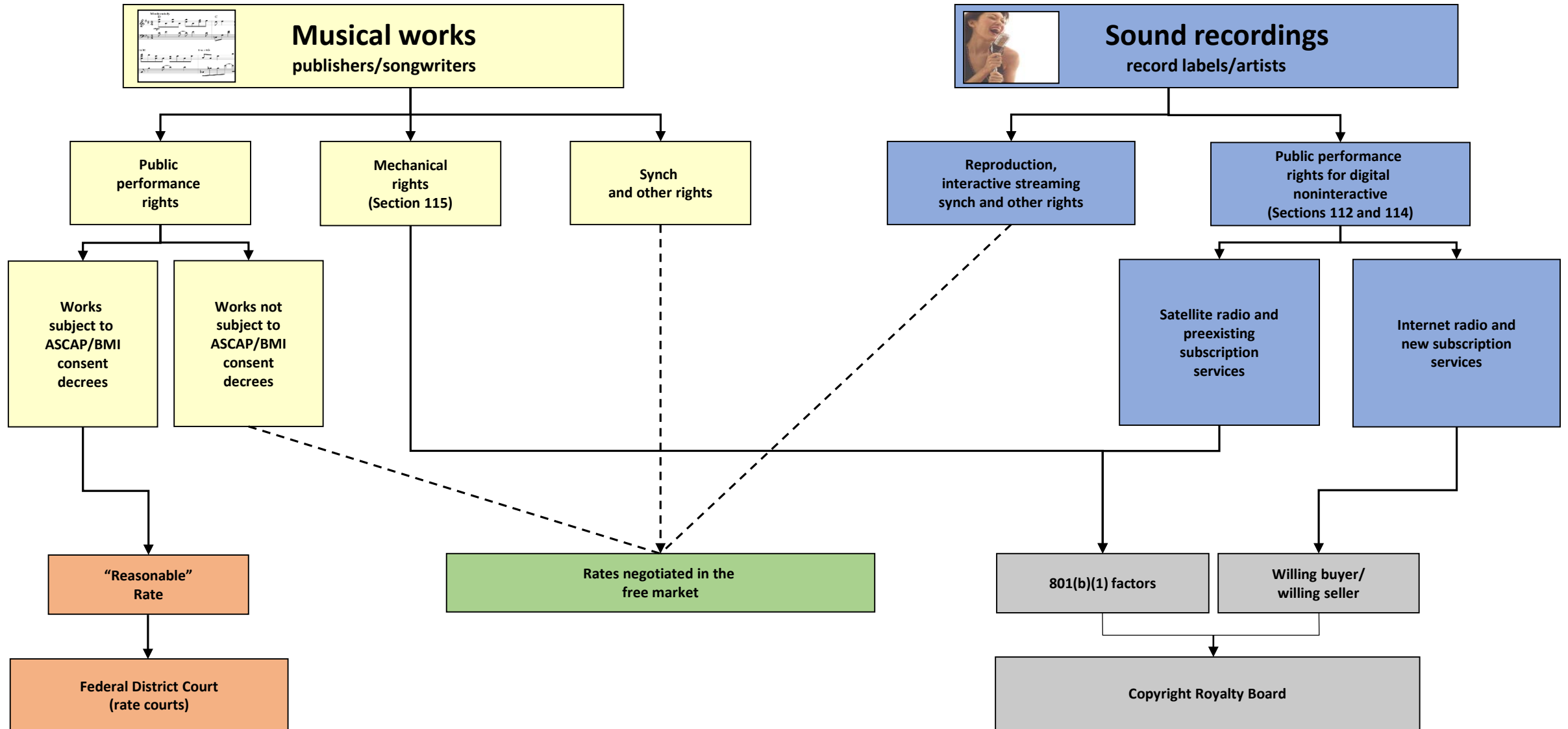
Existing Licensing Framework

Audio-only		Musical Work	Sound Recording
Reproduction		Compulsory, rate set by CRB	Negotiated (with record companies)
Performance	Interactive (on-demand)	ASCAP & BMI: Negotiated, subject to rate courts	Negotiated (with record companies)
		SESAC & GRM Negotiated, subject to arbitration	
	Non-Interactive (webcasting)	ASCAP & BMI: Negotiated, subject to rate courts	Compulsory, rate set by CRB
		SESAC & GRM Negotiated, subject to arbitration	
	Terrestrial Radio (AM/FM)	ASCAP & BMI: Negotiated, subject to rate court	No public performance right
		SESAC & GMR : Negotiated, subject to arbitration	
Audiovisual		Musical Work	Sound Recordings
Reproduction & performance (e.g., YouTube)		Negotiated (with music publishers)	Negotiated (with record companies)

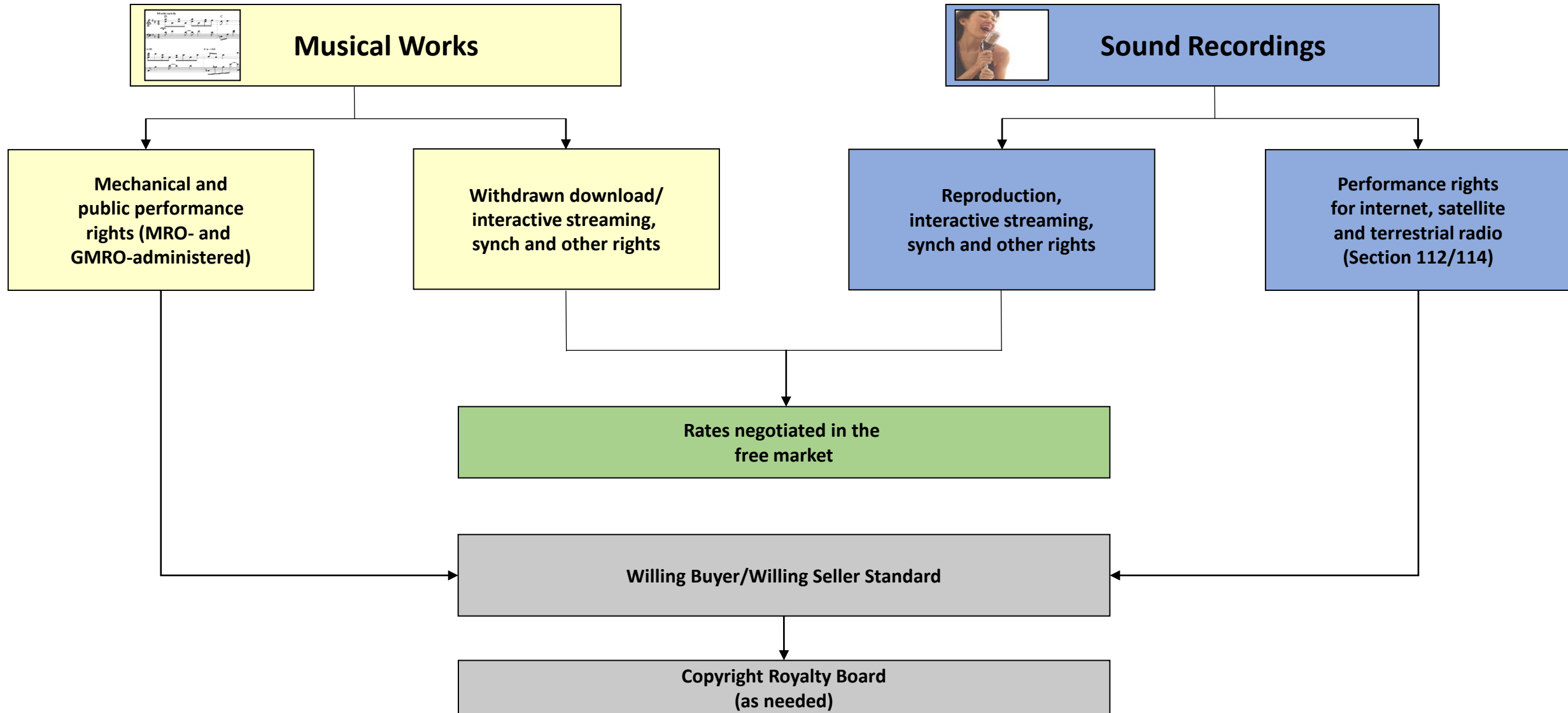
Updated Licensing Framework



Existing Ratesetting Framework



Updated Ratesetting Framework



A Path Forward



Q & A