Fordham Intellectual Property, Media and Entertainment Law Journal

Volume 12 *Volume XII*
Number 4 *Volume XII Book 4*

Article 3

2002

Dancing to the Beat of a Different Drummer: Global Harmonization —And the Need for Congress to Get in Step with a Full Public Perforfance Right for Sound Recordings

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Cover Page Footnote
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John R. Kettle III *

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INTRODUCTION

In 1965 a famous duet known as the Righteous Brothers[1] had a number one hit called *You've Lost That Loving Feelin'*. The song was also successfully recorded by Hall and Oates[2] in 1980. It was co-written by Barry Mann, Cynthia Weil, and Phil Spector[3] and has been performed over eight million times on the radio, in live concerts, in films and on television, among other uses.[4] When looking at the remarkable success of the song, one might conclude that the Righteous Brothers and Hall and Oates, as well as their respective record companies, received an ample share of revenue from the broadcasting of the recordings. Interestingly, only the songwriter and music publisher of the song received payments for the millions of times the recordings were publicly performed. This

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[1] The Righteous Brothers consisted of Bill Medley and Bobby Hatfield. They reportedly adopted that name after a fan referred to them as "righteous." They signed with Phillies Records in 1964 where they recorded a number of hit songs, including *Unchained Melody* in 1965 and *Rock and Roll Heaven* in 1974. *See* JON PARELES & PATRICIA ROMANOWSKI, THE ROLLING STONE ENCYCLOPEDIA OF ROCK & ROLL 469 (1983).

[2] Hall and Oates was formed by Daryl Hall and John Oates after competing against each other in a battle of the bands at Philadelphia's Adelphia Ball Room. They had many hit songs while with Atlantic Records (*She's Gone*) and then with RCA Records (*Rich Girl, Kiss on My List*, and *Sara Smile*). *Id.* at 235-36.

[3] *See* JAMES R. HEINTZE & MICHAEL SAFFLE, REFLECTIONS ON AMERICAN MUSIC 297 (Pendragon 2000) (discussing the hit song *You've Lost That Loving Feelin'*).

[4] *Id.*

outcome was not due to an unconscionable recording contract or recording industry tradeoff, but was the result of United States copyright law.

From a business, philosophical, or legal standpoint, it seems illogical that recording artists,[5] like the Righteous Brothers, whose performance made a song popular, and the record company that funded and promoted the recording do not receive equivalent copyright protection to that of the songwriter and music publisher. In the United States, each time a song is broadcast on the radio, heard in a store, or played by a DJ, only the songwriter and music publisher are entitled to receive royalties.[6] This right to control and receive compensation under copyright law arises out of the public performance right.[7] The current Copyright Act,[8] with a narrow exception for certain digital transmissions of music, [9] does not

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[5] For the purposes of this Article, the term "recording artist" (unless otherwise stated) includes the musicians, vocalists, and producers who arrange the recorded performance. It is important to note that many recording artists are not the author or owner of the sound recording due to the employment or contractual relationship with the record company. The recording artist could also be a copyright owner of the musical composition, and this Article is based on dual copyright ownership unless otherwise indicated. This Article also proposes that the recording artist should be compensated for public performance of the sound recording regardless of authorship or ownership interests.

[6] 141 CONG. REC. S945 (January 13, 1995) (statement of Senator Hatch) ("[W]hen only the audio recording is played on the radio or delivered by means of a satellite or other subscription service, only the composer and publisher have performance rights that must be represented . . . the producer's and performer's interests are ignored.") The term "songwriter" when used in this Article also refers to a composer of music.

[7] *See* 17 U.S.C. § 101 (2001) ("To perform or display a work 'publicly' means (1) to perform or display it at a place open to the public or at any place where a substantial number of persons outside of a normal circle of a family and its social acquaintances is gathered; or (2) to transmit or otherwise communicate a performance or display of the work to a place specified by clause (1) or to the public, by means of any device or process, whether the members of the public capable of receiving the performance or display receive it in the same place or in separate places and at the same time or at different times.").

[8] The current Copyright Act (17 U.S.C. §§ 101-803; 1001-1010) is referred to in this Article as the Act of 1976. This Article will also make reference to the Copyright Act of 1909 (17 U.S.C. §§ 1-216) and refers to such Act as the Act of 1909). Unless otherwise indicated, the use of the term "Copyright Act" in this Article refers to the Act of 1976.

[9] *See* 17 U.S.C. § 101 (2001) ("A digital transmission is a transmission in whole or in part in a digital or other non-analog form."); *see also infra* notes 140-43 and accompanying text.

provide the copyright owner of the sound recording[10] with a public performance right, a right that is generally enjoyed by copyright owners of other copyrightable works.[11]

The unequal treatment for owners of recorded music under United States copyright law has been the subject of debate for decades.[12] It is ironic that after years of lobbying by record companies and recording artists, and in light of the ongoing call for international harmony of intellectual property laws, Congress has chosen only to recognize the economic value to performers and record labels of the public performance of sound recordings in a digital world.[13] Although recent efforts of Congress[14] should be applauded, the public performance rights granted to the copyright owner of a sound recording still remains short of the full public performance right that is granted to the owner of the copyright in the underlying musical composition.[15]

This Article argues that granting copyright equality between the sound recording and the musical composition is constitutionally sound, economically fair, and is necessary for the United States to not only meet its obligations under certain international treaties and trade agreements, but also to help move closer to a desirable global harmony.[16] This Article is organized as follows: Section II examines

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[10] *See* 17 U.S.C. § 101 (2001) ("Sound recordings 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 audiovisual work, regardless of the nature of the material objects, such as disks, tapes, or other phonorecords, in which they are embodied."). In most international agreements and treaties, and as found in most record company contracts, the term "phonogram" is commonly used in place of or in addition to the terms phonorecord, or sound recording.

[11] *See* 17 U.S.C. § 114(a) (2001) ("The exclusive rights of the owner of copyright in a sound recording are limited to the rights specified by clauses (1), (2) (3) and (6) of section 106, and do not include any right of performance under section 106(4)."). A sound recording public performance right is generally recognized under the copyright laws of foreign countries but is to no avail to the United States copyright owner for the reasons discussed in this Article.

[12] *See* Goldstein v. California, 412 U.S. 546, 578 (1973).

[13] *See supra* note 9.

[14] *See infra* notes 140-41 and accompanying text.

[15] *See infra* notes 17-19 and accompanying text.

[16] *See generally* Steven V. Podolsky, *Chasing the Future: Has the Digital Performance in Sound Recording Act of 1995 Kept Pace With Technological Advances in Musical*

the inequality between the copyright protection given to a sound recording and a musical composition. It also discusses the competing interests with respect to copyright protection. Section III reviews the development of the United States copyright laws relevant to the protection of music in both print and phonorecord form. Section IV examines the impact of new technologies and recent copyright amendments directed at the protection of music. Section V focuses on the international copyright treaties and trade agreements to which the United States belongs, discusses copyright requirements relating to music and sound recordings, and discusses issues relating to non-compliance. Section VI illustrates how Congress further distanced the United States from international copyright protection by amending the Copyright Act of 1976. Section VII sets forth a solution in the form of a proposed amendment to the United States copyright laws. The amendment is directed at providing sound recording copyright owners with a full public performance right and recording artists with an economic entitlement. Lastly, Section VIII provides the conclusion to the Article and urges Congress to "face the music" by amending the Copyright Act in order to achieve copyright equality both domestically and internationally.

II. THE PROBLEM

A. Unjustified Inequality

The copyright owner of a musical work and the copyright owner of a sound recording each possess the right to reproduce, distribute, and prepare derivative versions of the respective work, or to authorize others to do so.[17] However, under United States copyright laws only

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Performance, Or Is Copyright Law Lagging Behind?, 21 HASTINGS COMM. & ENT. L. J. 651 (1999). "Even though the Clinton Administration supports a full performance right, it could not implement the right in the recent GATT and NAFTA agreements because the United States did not recognize the right, in direct contravention of the recommendations of international experts." *Id.* at 681.

[17] *See* 17 U.S.C. § 106 (2001) (stating that "[s]ubject to sections 107 through 121, the owner of copyright under this title has the exclusive right to do and to authorize any of the following: (1) to reproduce the copyrighted work in copies or phonorecords; (2) to prepare

the copyright owner of a musical composition is entitled to a full public performance right.[18] The copyright owner of the sound recording has a limited public performance right that only applies to certain interactive digital transmissions.[19] This disparity adversely affects the rights and benefits of record companies and recording artists not only in the United States, but in many foreign countries as well.

Under both domestic and international copyright law, "[a]uthors of . . . musical works shall enjoy the exclusive right authorizing . . . the public performance of their [musical] works." [20] The performance right is important since it gives the copyright owner the right to receive royalties when the work is performed publicly.[21] This is one of the most significant sources of income from a musical composition[22] and potentially one of the most lucrative from the sound recording.[23] Public performance royalties for the non-dramatic use of musical compositions are collected primarily by

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derivative works based upon the copyrighted work; (3) 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; (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 works, 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.).

[18] *See generally supra* note 6 and accompanying text.

[19] *See* 17 U.S.C. § 106 (a)(6) and § 114(a)(d) (West Supp. 2001). Interactive digital transmissions are subject to a sound recording public performance right. *See infra* notes 135-38 and accompanying text.

[20] *See* 2 MELVILLE B. NIMMER AND DAVID NIMMER, NIMMER ON COPYRIGHT § 8.17[C], 8-192.4 (1991), *citing* Berne Convention (Paris Text) Art. 11 (1) [hereinafter NIMMER ON COPYRIGHT].

[21] *See supra* note 17 and accompanying text.

[22] *See Copyright Protection on the Internet: Hearing on H.R.2441 Before the House Comm. on the Judiciary*, 104th Cong. (1996) (testimony of Francis W. Preston, President & CEO of Broadcast Music, Inc.).

[23] The public performance right in sound recordings has been recognized by scholars and certain courts as one of the biggest possible sources of income in the recording industry. *See, e.g.*, Woods v. Bourne Co., 60 F.3d 978, 983 (2d Cir. 1995) (citing SIDNEY SCHEMEL & M. WILLIAM KRASILOVSKY, THIS BUSINESS OF MUSIC 196 (6th ed. 1990)).

performing rights societies.[24] The performing rights societies in the United States are the American Society of Composers, Authors and Publishers (hereinafter "ASCAP")[25], Broadcast Music Inc. (hereinafter "BMI")[26] and SESAC, Inc. (hereinafter "SESAC").[27] Each is essential to the royalty collection process since they help "minimize transaction costs for both the copyright owners and users . . . [and] allow copyright owners to enforce their rights and profit from their works without the prohibitive expense of finding and negotiating with multiple users." [28] The use of performing rights societies for collective administration and licensing of public performances of musical works is a business model utilized around the world.[29]

In 1995, the performing rights societies in the United States collected over $800 million in license fees for their members.[30] In

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[24] *See* 17 U.S.C. § 101 (2001) ("A 'performing rights society' is an association, corporation, or other entity that licenses the public performance of nondramatic musical works on behalf of copyright owners of such works, such as the American Society of Composers, Authors and Publishers (ASCAP), Broadcast Music, Inc. (BMI), and SESAC, Inc.").

[25] ASCAP has over 120,000 members consisting of U.S. composers, songwriters and publishers of every kind of music. It is also the oldest and only U.S. performing rights organization created and controlled by composers, songwriters and music publishers with a Board of Directors elected by and from the membership. *See* http://www.ascap.com /lp_about_ascap.html (last visited Jan. 15, 2002).

[26] BMI is an American performing rights organization that represents approximately 300,000 songwriters, composers and music publishers in all genres of music. BMI is a non-profit-making company founded in 1940. There are approximately 4.5 million compositions in its repertoire for which it collects public performance royalties. *See* http://www.bmi.com/about/backgrounder.asp (last visited Jan. 15, 2002).

[27] SESAC was founded in 1930 making it the second oldest public performing rights organization in the United States. SESAC is the smallest of the public performance rights organizations, and was once limited to European and gospel music. Today its repertoire includes today's most popular music, including dance, Latino music, jazz, country and Christian music. *See* http://www.sesac.com/sesac.html (last visited Jan. 15, 2002).

[28] Statement of Marybeth Peters, Register of Copyrights, Before the House Subcommittee on Courts and Intellectual Property, *available at* http://lcweb.loc.gov/copyright /docs/regstat97.html (last visited Jan. 15, 2002).

[29] *Id.*; *see also infra* note 34. The performing rights societies in the United States have established reciprocal relationships with foreign counterparts to facilitate the collection and disbursement of public performance royalties for the musical compositions in their respective repertoires.

[30] *See generally* Ted Johnson, *Net Throws New Curve Into Music Royalty Conundrum*, DAILY VARIETY, July 16, 1996, at 5.

order to receive the applicable royalty from a performing rights society, the music publisher, who generally owns all or part of the copyright in the musical composition, and the songwriter, must affiliate with and license the musical work to one of the societies on a non-exclusive basis.[31] Each performing rights society offers the musical work user, typically a broadcast station, bar, restaurant, store or other business, a license to publicly perform any or all of the musical compositions in its repertoire. Such a license allows for the playback of a recording of the song or authorizes its performance by a live band, as long as the use is for non-dramatic purposes.[32] Using the musical composition or sound recording for dramatic purposes, or in connection with an audiovisual work, like a movie or television show, will require a license from the copyright owner or copyright administrator of the work. The performing rights societies are not authorized to grant licenses for dramatic use.

The money collected from public performance licensing is distributed between the songwriter and music publisher.[33] A band that performs the songs live, or the artists that recorded the songs played over the sound system, do not receive any of the public performance license fees unless they also wrote the songs.[34] This inequality is not found in most foreign countries since recording artists and record companies are granted a portion of public

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[31] ASCAP was the first performing rights society to be formed. Nathan Burkan and Victor Herbert and fellow composers created the society in 1914 to assist fellow composers with collecting money for the use of their songs. ASCAP, and subsequently BMI, and SESAC, offered licenses to dance halls, taverns and theaters allowing them to play music publicly. *See* Nancy A. Bloom, *Protecting Copyright Owners of Digital Music—No More Free Access to Cyber Tunes*, 45 J. COPYRIGHT SOC'Y U.S.A. 179, 195 (1997) (citing Buffalo Broadcasting Co. v. ASCAP, 546 F. Supp. 274, 277 (S.D.N.Y. 1982).

[32] A performing rights society offers a blanket license or single event license to the user of the music in order to prevent infringement of the copyright in each song publicly performed. This one-stop process greatly simplifies the otherwise more difficult process of seeking permission from each copyright owner. *Id.* at 196. If a music user publicly performs songs from each of the repertoires of ASCAP, BMI, and SESAC, then a separate license is required for each organization. *See* http://www.sesac.com/licensing/general_licensing_faq1.htm (last visited Jan. 17, 2002); *see also infra* note 65.

[33] *See infra* note 37 and accompanying text.

[34] *See, e.g.*, PAUL C. WEILER, ENTERTAINMENT, MEDIA AND THE LAW: TEXT, CASES, PROBLEMS, 350-52 (1997).

performance license fees when their recordings are heard publicly.[35] The discriminatory treatment in the United States is not constitutionally supported[36] and is an economic injustice, especially since it is the recorded performance that drives the playing of the musical work on radio and television, and in other public places for society's enjoyment.[37]

B. Competing Interests and Arguments

As mentioned, the performing rights societies in the United States collect fees for the use of musical compositions and split the monies collected between the music publisher and the songwriter(s) even if the music publisher owns the entire copyright.[38] Paying a portion of the fees to a songwriter who may no longer maintain copyright ownership interest in the song is an interesting custom and practice, especially since the Copyright Act does not require it. It should be no surprise, therefore, that recording artists and record companies look at this practice and argue that they, too, should be included in the distribution. While they may not be owners of the musical composition copyright like many songwriters, a large portion of the royalties are derived from playing the recorded song on the radio. Therefore, the recording artists and record companies should be compensated as well. This form of economic discrimination has been cited as legally unfair.[39] As one commentator stated "[it] would

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[35] Public performance license fees are collected in other countries like Austria, Belgium, Denmark, Finland, France, Germany, Iceland, the Netherlands, and the United Kingdom. *See* RIAA/Licensing & Royalties-Introduction, *at* http://www.riaa.com/licensing-AARC-1.cfm (last visited Jan. 15, 2002).

[36] *See infra* note 55.

[37] *See infra* note 41 and accompanying text.

[38] The payment of royalties to the songwriter or composer by the public performance organizations (ASCAP, BMI, SESAC) is not required by the copyright laws, but is an industry custom and practice. The money collected is split between the songwriter/composer and the music publisher. *See* http://www.ascap.com/musicbiz/money-payments.html (last visited Jan. 17, 2002).

[39] *See generally Intellectual Property and The National Information Infrastructure: The Report of the Working Group on Intellectual Property Rights*, 50 BNA PAT., TRADEMARK AND COPYRIGHT J. 567 (1995). "The lack of a public performance right in sound recordings under U.S. law is an historical anomaly that does not have a strong policy justification . . .

be at odds with the basic tenets of copyright law to allow broadcasters to use the recording industry's product to generate revenues without payment for that use."[40] Allowing for such inequality is not consistent with the copyright philosophy that recognizes economic incentives as a key tool to encourage authorship and investment in new works for the benefit of society.[41]

There is little doubt that the recording artist and record company are vital to a musical work's success. Each contributes to the popularity of a song, arguably even more than the songwriter or music publisher. This is generally proven true when a musical work recorded by one artist substantially out-sells the same song recorded by another artist.[42] Those that support the current law and oppose change point to the fact that a record company with a superstar recording artist will receive a considerable amount of income from record sales and other uses of the sound recording, such as in a motion picture. Therefore, there is no need to compel payment for the public use of the recording. Contrary to popular belief, very few recording artists sell enough albums or generate sufficient income from other sources, for the record company to recoup its investment.

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and certainly not a legal one. Sound recordings are the only copyrighted works that are capable of being performed that are not granted that right." *Id.*

[40] William H. O'Dowd, Note, *The Need For A Public Performance Right In Sound Recordings*, 31 HARV. J. ON LEGIS. 249, 268 (1994).

[41] *Id.* at 267. In order to provide society with the greatest variety of art, entertainment, literature, and technology, a proper balance of our intellectual property laws must be maintained. When the appropriate balance is achieved, the creator will create, the investor will invest, and the public will be enriched at a fair price. *See generally* Paul Goldstein, *Copyright, Patent, Trademark and Related State Doctrines*, 6-7 (4th ed. 1999); *see also* JOHN R. KETTLE III, ART LAW BASICS, Chpt. 1 NEW JERSEY INST. CONTINUING LEGAL EDUC. (1993).

[42] *See* Jeffrey A. Abrahamson, *Tuning Up For A New Musical Age: Sound Recording Copyright Protection In A Digital Environment*, 25 AIPLA Q. J. 181, 203 (1977).

According to one industry expert, approximately two out of every ten albums is successful from an economic standpoint.[43]

For the recording artist, it is very difficult to earn money from record sales, even if the album sells gold.[44] Although there are other sources of income available to a recording artist as well, such as merchandising and live performances, this may not be sufficient to recoup the investment. At some point a recording artist's ability to command a live audience will diminish, record sales will decline, and the merchandising value will fall off. Therefore, allowing the record company and recording artist to be compensated for airplay is well deserved.[45] After all, radio stations, songwriters, and music publishers will continue to enjoy revenues from the broadcast of the hit recordings for years to come, especially when the songs reach the oldies but goodies stage![46]

The National Association of Broadcasters (hereinafter "NAB") criticizes the arguments raised by the recording industry. The NAB points out that record companies provide radio stations with free promotional copies of recordings.[47] Such promotional activity is

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[43] Telephone interview with Emio F. Zizza, Esq., Vice President, Business & Legal Affairs, J-Records, New York, New York (July 31, 2001). Mr. Zizza is also Adjunct Professor of Law at Seton Hall University School of Law, Newark, New Jersey. *See* http://law.shu.edu/faculty/adjunct_faculty/adjunct_faculty_00_01.htm (last visited Mar. 14, 2002).

[44] *See generally* DONALD S. PASSMAN, ALL YOU NEED TO KNOW ABOUT THE MUSIC BUSINESS, 113-14 (2000). Mr. Passman discusses the breakdown of monies received from record sales and illustrates how sales of a gold album (500,000 units) may produce a credit to the artist's account of $96,000, but no income for the recording artist on at least the first accounting statement. He also comments on a survey taken of people on the street that wrongfully estimated that a recording artist would likely earn between $500,000 and $2,000,000 for the sales of a gold album. *Id.* at 113.

[45] *See Digital Performance Right in Sound Recordings Act of 1995: Hearings on H.R. 1506 Before the House Comm. on the Judiciary, Subcomm. on Courts and Intellectual Property,* 104th Cong., (June 21, 1995) (Testimony of Edward O. Fritts, National Association of Broadcasters).

[46] *See* O'Dowd, *supra* note 40, at 276.

[47] *See Digital Performance Right in Sound Recordings Act of 1995: Hearings on H.R. 1506 Before the House Comm. on the Judiciary, Subcomm. on Courts and Intellectual Property,* 104th Cong., (June 21, 1995) (Testimony of Edward O. Fritts, National Association of Broadcasters). Mr. Fritts states: "The extraordinary benefits the current system provides the record industry are unquestionable. Exposure of musical recordings to the buying public through free broadcasting is a critical part of the promotion of records, tapes, CDs, music

critical to the sale of records, and NAB members should not have to pay to promote the sale of a record given to the broadcast stations voluntarily and with the hope of airplay.[48]

In response to the NAB arguments, record companies claim that radio stations make a considerable profit from the use of the sound recordings and that there is no evidence that any amount of airplay causes a corresponding increase in record sales.[49] And even if record sales increased due to airplay, that should not justify discriminatory copyright treatment. There is no justifiable rationale for granting the songwriter and music publisher a public performance royalty while denying an equivalent royalty payment to recording artists and record companies for use of the sound recording.[50]

Advocates for a full public performance right also argue that royalties are necessary to help offset the lost sales due to consumer uses of the digital technologies. The United States Copyright Office agrees that technological developments could lead to the decline in sales of physical copies of sound recordings, especially in light of the new forms of music distribution that rely on digital transmission.[51]

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videos and concert tickets, not to mention "spin off" goods and services marketed under the names of star performers." *Id.*

[48] *See* O'Dowd, *supra* note 40, at 265-66 (citing *Copyright Law Revision: Hearings on H.R. 2223 Before the Subcomm. on Courts, Civil Liberties, and the Administration of Justice of the House Comm. on the Judiciary,* 94th Cong.., (1975)). One commentator observed that the logic advanced by the broadcast industry is as absurd as the notion that a novelist not being entitled to compensation resulting from a movie based on the book simply because the movie could help increase sales of the book. *Id.* at 264.

[49] *See* O'Dowd, *supra* note 40, at 267.

[50] *See Intellectual Property and the National Information Infrastructure: The Report of the Working Group on Intellectual Property Rights, supra* note 39, 572-73. By analogy a commentator reasoned that the rationale of non-payment advanced by the broadcasters would be as ridiculous as allowing movie theaters to show movies free of charge since showing the movie could help sell movie-related merchandise. *See* Abrahamson, *supra* note 42, at 217.

[51] The 1978 Copyright Office Report contained the following statement of Marybeth Peters, Register of Copyrights:

> Our investigation has involved legal and historical research, economic analysis, and also the answering of a great deal of information through written comments, testimony at hearings, and face-to-face interviews. We identified, collected, studied, and analyzed material dealing with a variety of constitutional, legislative, judicial, and administrative issues,

Joining the NAB's position against a full public performance right for sound recordings are songwriters, music publishers, and performing rights societies. They claim it is the songwriter and music publisher who will lose a substantial portion of income. Their theory is that "the total royalties from performance rights would remain the same" and as such, they would be left "to battle the recording industry over the slice of the pie that remains."[52] The broadcasters not only support this claim, but also caution that if they are forced to pay additional royalties to compensate the record companies and recording artists, their fiscal standing will be adversely affected as well.[53] Moreover, they argue that if copyright owners of sound recordings are granted the rights they seek, they could prevent the use of musical works by simply denying broadcasters a license to play the recordings.[54] To address this concern and to prevent such an event from occurring, this Article proposes a statutory license scheme that would prohibit denial of the public performance if the requirements under the statute were met.

> the views of a wide range of interested parties, the sharply contested arguments concerning economic issues, the legal and practical systems adopted in foreign countries, and international considerations, including the International Convention for the Protection of Performers, Producers of Phonograms, and Broadcasting Organizations (adopted at Rome in 1961).

See infra note 116, at 740. The report also noted that technological developments could well cause substantial changes in existing systems for public delivery of sound recordings and that the performance right could become the major source of income, and a major incentive for continued creation of sound recordings. *Id.*

[52] Paul Goldstein, *Commentary on "An Economic Analysis of Copyright Collectives,"* 78 VA. L. REV. 413-15 (1992). The broadcasters complain that they cannot afford to pay more than the amounts currently allocated for the use of music.

[53] *See* Testimony of Fritts, *supra* note 47; *see also* JAMES R. HEINTZE & MICHAEL SAFFLE, REFLECTIONS ON AMERICAN MUSIC, 176 (Pendragon 2000). Ms. Hall states that most American radio stations either have no budgets for recordings or spend their limited budgets on CD subscriptions to Sony, BMG and other major labels. *Id.*

[54] *See generally* O'Dowd, *supra* note 40, at 266-67.

III. COPYRIGHT LAW: MUSICAL COMPOSITIONS AND SOUND RECORDINGS

A. The Early Years

"Copyright law in the United States had begun with state copyright laws passed pursuant to the Continental Congress. Dissatisfaction with the lack of uniformity . . . made the argument for a federal copyright law sufficiently strong, [so] the Framers adopted the Copyright Clause."[55] Congress is granted the power under the Copyright Clause of the United States Constitution[56] to enact laws to promote the sciences[57] and useful arts[58] by providing authors and inventors with certain limited protections to their respective writings[59] and discoveries. To help accomplish this, Congress enacted our federal Copyright Laws[60] and Patent Laws.[61] Although

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[55] *See* Marci A. Hamilton, *Copyright At The Supreme Court: A Jurisprudence of Deference*, 47 J. COPYRIGHT SOC'Y OF U.S.A. 317, 317-18 (2000) (citations omitted).

[56] *See* U.S. CONST. Art. I, § 8, cl. 8. The power granted Congress is to "[p]romote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries." *Id.* The rationale behind granting a form of property right to authors and inventors to encourage production for the benefit of society was validated by the U.S. Supreme Court in Mazer v. Stein, 347 U.S. 201, 219 (1954) ("[t]he economic philosophy behind the clause empowering Congress to grant patents and copyrights is the conviction that encouragement of individual effort by personal gain is the best way to advance public welfare through the talents of authors and inventors in 'Science and useful Arts.' Sacrificial days devoted to such creative activities deserve rewards commensurate with the services rendered.").

[57] When the framers of the Constitution used the term "Science" it referred to the work of authors, and as such the copyright clause is balanced to read as "To promote the Progress of Science . . . by securing for limited Times to Authors . . . the exclusive Right to their . . . Writings." *See* Karl B. Lutz, *Patents and Science: A Clarification of the Patent Clause of the U.S. Constitution*, 18 GEO. WASH. L. REV. 50-51 (1949).

[58] When the framers of the Constitution used the term "useful Arts" it referred to the work of inventors, and as such the copyright clause is balanced to read as "To promote the Progress of . . . useful Arts, securing for limited Times to . . . Inventors the exclusive Right to their . . . Discoveries." *Id.*

[59] Sound recordings of artistic performances constitute "writings" in the constitutional sense. *See* 1 NIMMER ON COPYRIGHT § 1.08(B), 1-66.35-36 (2001) (citing Goldstein v. California, 412 U.S. 546 (1973)).

[60] *See infra* note 64. The first U.S. copyright laws, the Act of 1790, was modeled after the Statute of Anne, which was the world's first copyright law, passed by the British Parliament in 1709. President George Washington signed the Act of 1790 on May 31 of that year. Nine days later author John Barry registered the very first claim to federal copyright, which

musical compositions and sound recordings are capable of being embodied in a patentable invention, the discussion of patent law is not within the scope of this Article.

Copyright law has as its ultimate aim the stimulation of artistic creativity for the general public good.[62] This by its very nature will require that a balance be struck "[b]etween a copyright holder's legitimate demand for effective . . . protection of the statutory monopoly, and the rights of others to engage freely in substantially unrelated areas of commerce."[63] As proclaimed by a national recording industry trade organization:

Before free speech, before freedom of assembly, before freedom of religion, there was copyright protection in our Constitution. . . . [C]opyright is more than a term of intellectual property law that prohibits the unauthorized duplication, performance or distribution of a creative work. To [all artists] 'copyright' means the chance to hone their craft, experiment, create, and thrive. It is a vital right, and over the centuries artists have fought to preserve that right. . .[64]

With the constitutional power to enact copyright laws, Congress established the first copyright statute for the United States by adopting the Copyright Act of 1790.[65] This act provided protection for books, charts, and maps, but not musical compositions. Musical compositions received federal copyright protection starting in 1831.[66] By definition, musical compositions consist of musical

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was in his book THE PHILADELPHIA SPELLING BOOK. *See* http://www.riaa.com/Copyright-What.cfm (last visited Jan. 15, 2002).

[61] *See* 35 U.S.C. §§ 101-356 (2001).

[62] *See* Twentieth Century Music Corp. v. Aiken, 422 U.S. 151, 156 (1975).

[63] *See* Sony Corp. of Am. v. Universal City Studios Inc., 464 U.S. 417, 442 (1984).

[64] The Recording Industry Association of America [hereinafter RIAA] is the trade group that represents the recording artist, producers, and other people and companies that make creative works in the recording industry. It works to protect intellectual property rights on a worldwide basis, as well as the First Amendment rights of recording artists. *See* http://www.riaa.com/Copyright-What.cfm. (last visited Jan. 15, 2002).

[65] *See* Hamilton, *supra* note 55, at 320 (citing Copyright Act, 1 Stat. 124 (1970)).

[66] *See generally* White-Smith Music Publishing v. Apollo, 209 U.S. 1 (1908). Justice Day's opinion of the Court stated:

> Musical compositions have been the subject of copyright protection since the statute of February 3, 1831, c., [sic] 4 Stat. 436, and laws have been passed including them since that time. When we turn to the

notes and accompanying lyrics, if any, usually written in sheet music form.[67] Under current United States copyright laws a musical composition is referred to as a "musical work."[68] The rights granted to the copyright owner of the musical work in 1831 did not include a public performance right. Copyright owners in general did not obtain the right to prohibit the public performance of a work until some twenty-five years later.

It was through amendment to the copyright laws in 1856 that a copyright owner obtained a public performance right. The right, however, only covered the performance of dramatic works,[69] for instance stage plays, not musical compositions.[70] Control of nondramatic public performance of musical compositions would not be within the protective rights of a copyright owner until 1891.[71] Under this amendment, the copyright owner could now demand a fee for, or prevent, another's public performance of the musical work.[72] With Congress paying more attention to the protection of music, it was no surprise that a decade later composers would be granted

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> consideration of the act it seems evident that Congress dealt with the tangible thing, a copy of which is required to be filed with the Librarian of Congress, and wherever the words are used (copy or copies) they seem to refer to the term in its ordinary sense of indicating reproduction or duplication of the original. Section 4956 (U.S. Comp. Stat. 3407) provides that two copies of a book, map, chart or musical composition, etc., shall be delivered at the office of the Librarian of Congress.

Id. at 15-16; *see also* Abrahamson, *supra* note 42, at 188 (citing *Congressional Research Service Report For Congress, Public Performance Right in Digital Audio Transmission of Sound Recordings*, 1-2 (Feb. 1996)).

[67] *See* Jay L. Bergman, *Digital Technology Has the Music Industry Singing the Blues: Creating a Performance Right for the Digital Transmissions of Sound Recordings,* 24 SW. U. L. REV. 351, 354 (1995) (citing 1 PAUL GOLDSTEIN, COPYRIGHT PRINCIPLES, LAW AND PRACTICE, § 2.8 (1989)).

[68] *See* 17 U.S.C. § 102 (a)(2) (2001). The term "musical composition" is used interchangeably in this article with the term "musical work."

[69] The Copyright Act does not specifically define a "dramatic work." *See* 1 NIMMER ON COPYRIGHT § 2.06 [A] (1978).

[70] *See* Allen Edward Molnar, Comment, *Performance Royalties and Copyright: A Question of "Sound" Policy*, 8 SETON HALL L. REV. 678, 684-85 (1978).

[71] Copyright Act of 1891, ch. 565, § 4952, 26 Stat. 1107 (1981)) (current version at 17 U.S.C. § 101).

[72] *See* O'Dowd, *supra* note 40, at 251.

copyright protection for their particular arrangements of music.[73] This change of focus by Congress arose at an important time in history for the music industry. Thanks to Thomas Edison, performances of musical works could now be fixed as a sound recording[74] in phonorecord form.[75]

B. The Act of 1909

Amendments made to the copyright laws of the United States since the Act of 1790[76] were piecemeal. The piecemeal approach used by Congress did not set a proper foundation for determining copyrightability of the many new types of artistic and creative works developed during the Industrial Revolution. Significant uncertainty existed at the turn of century regarding the application and scope of copyright protection for the new works. This uncertainty was especially true as it related to the newly invented sound recording that embodied copyrighted music. To help address the growing demand by copyright owners, publishers and the public, for clarity in the application of the awkward compilation of copyright laws, Congress took President Theodore Roosevelt's lead, and in 1905

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[73] Music composers received protection for their arrangements under an amendment to the federal copyright law in 1897. *Id.* A musical arrangement constitutes a form of derivative work, which is a work based on one or more preexisting works. *See* 17 U.S.C.A. § 101 (2001).

[74] *See* 17 U.S.C.A. § 101 (2001) ("Sound recordings 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."); *see also* 17 U.S.C.A. § 102 (a)(7) (2001).

[75] *See* 17 U.S.C.A. § 101 (2001) ("Phonorecords are material objects in which sounds, other than those accompanying a motion picture or other audiovisual work, are fixed by any method now known or later developed, and from which sounds can be perceived, reproduced, or otherwise communicated, either directly or with the aid of a machine or device. The term "phonorecords" includes the material object in which the sounds are first fixed."). Thomas Edison invented the technology of phonograph records in 1877. *See* Abrahamson, *supra* note 42, at 188.

[76] *See supra* note 66.

initiated a three-year study with the goal of rewriting the copyright act.[77]

During the drafting stage of the Copyright Act of 1909,[78] some legislators sought to convince the drafters of the bill that composers of music should have total control over the use of their musical works.[79] This lobbying effort set the stage for a long road of compromises that would ultimately place limitations on the scope of rights granted to both the copyright owners of musical works and the owners of sound recordings.

Although Congress was in favor of providing broader protection for music, the actual protections and exclusive controls given to the copyright owner would be limited. Most notably, the copyright owner of a musical work could only prohibit the unauthorized use of the musical work when used for profit.[80] This limitation was criticized by music publishers as being too restrictive. The strongest criticism, however, came from the record companies and recording artists since Congress chose not to extend federal copyright protection to the sound recording, and to leave such protection to the states. It would take nearly sixty years for this to change.

Recognizing the growing need to keep an economic incentive in place for the copyright owners of music, while maintaining the general principles supporting public access to creative works, Congress created under the Act of 1909 a compulsory licensing scheme for musical compositions.[81] Under compulsory licensing certain for-profit uses of the musical work, such as the manufacturing of phonorecords for public sale, could be made without the express approval of the copyright owner. However, in order to do so without being deemed a copyright infringer, statutory

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[77] *See* Goldstein, *supra* note 52, at 562. As recorded in the House Report "amendment was required because the reproduction of various things which are the subject of copyright has enormously increased." (quoting Samuel J. Elder) H.R. REP. NO. 60-2222, at 2 (1909).

[78] Copyright Act of 1909, Ch. 320, 35 Stat. 1075 (1909) (effective July 1, 1989) (codified as amended at 17 U.S.C.A. §102 (2001) [hereinafter Act of 1909].

[79] *See* Molnar, *supra* note 70, at 686-87.

[80] *See id.*

[81] *See* Act of 1909, §1(e); *see also* 17 U.S.C.A. § 115 (2001). *See generally* NIMMER ON COPYRIGHT, *supra* note 20, at 8.04[C] (1989).

formalities had to be observed. For example, the music user would have to notify the copyright owner and Copyright Office of the intent to manufacture sound recordings embodying the musical work, affix proper copyright notice to the work, and account for and pay the statutory royalty set by law.[82] Alternatively, if one felt that a better deal could be obtained by negotiating directly with the copyright owner, then the music user could seek a voluntary license. The advantage to the music user under compulsory licensing is the copyright owner could not prevent the use if the statutory formalities were followed properly.

As new recording and broadcasting technologies were being developed in the 1950s and 1960s, it became apparent that the Act of 1909 would need revision to deal effectively with societal and technological changes.[83] During this period in history performances by live musicians had been replaced by sound recordings played in jukeboxes, phonorecords, and radio broadcasting.[84]The performances of recording artists could be "captured on records and cassettes, which were easily played, stored and reproduced in the home" making it simple to reproduce and exploit "an individual's unique rendition of a particular song. . . ." [85] The birth of home recording had arrived, accompanied by the music industry's uncertainty and

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[82] The copyright owner does not grant a license since the license is conferred on the manufacturer of the sound recording by statutory compulsion. The statutory license only applies to non-dramatic recordings since a dramatic recording is registered as part of the dramatic work. *See* NIMMER ON COPYRIGHT, *supra* note 20, at § 8.04[A], 8-53 n.4 (1991). The current royalty payment per each sound recording of a musical work distributed in the United States is the greater of 1.45 cents per minute or 7.55 cents. The rate increases to the greater of 1.55 cents per minute or 8 cents starting with the year 2002. *See* 37 C.F.R. § 255.3 (2001).

[83] The Act of 1909 remained unchanged for over sixty years, making it the longest unmodified copyright statute. *See* Goldstein, *supra* note 52, at 562; the Act of 1909 was challenged, however, on numerous occasions. For instance, in 1936, the entertainment industry sought statutory protection for all renditions of musical works. During the same period bills were introduced to address the complaints that advertisers were using works associated with various recording artists without compensating them. *See* Molnar, *supra* note 70, at 693 n.94.

[84] *See* Kamesh Nagarajan, *Public Performance Rights in Sound Recordings and the Threat of Digitalization*, 77 J. PAT. & TRADEMARK OFF. SOC'Y 721, 725 (1995).

[85] O'Dowd, *supra* note 40, at 252.

concern about the impact the new technology would have on revenue.

The popularity of recorded music increased significantly after the invention of the phonorecord. But despite technological developments, prior case law,[86] and pressure from the recording industry to recognize sound recordings as copyrightable subject matter, it would not be until February 15, 1972 that federal copyright protection would first embrace the sound recording.[87] The recognition of sound recordings as protectable subject matter under federal copyright law was a welcome development, but not surprisingly it would only apply to recordings first published after the effective date of the amendment. Sound recordings published prior to February 15, 1972 remain under state statutory and common law protection, which is set to expire on February 15, 2067.[88]

C. Early Case Law

The root of the inequity between the copyright protection given to a sound recording and a musical composition is partially the result of the Supreme Court. In *White-Smith Music Publishing Co. v. Apollo Co.*, [89] the Court held that the Constitutional meaning of "writings" for purposes of copyright protection included only works that could be seen, and not those that could be heard.[90] This was a blow at that time to the manufacturers of piano rolls, since the perforated paper rolls were an integral part of the reproduction of music for public

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[86] *See infra* notes 88-100 and accompanying text.

[87] *See* Act of Oct. 15, 1971, Pub. L. No. 92-140, 85 Stat. 391 (1971) (effective Feb. 15, 1971) (codified as amended in scattered sections of 17 U.S.C.). The Act took effect on February 15, 1972.

[88] *See* 17 U.S.C.A. § 301(c) (2001).

[89] 209 U.S. 1 (1908). This case made the first legal distinction between musical compositions and sound recordings. Interestingly, Justice Holmes opined "On principle anything that mechanically reproduces that collocation of sounds ought to be held a copy, or if the statute is too narrow ought to be made so by further act." *Id.* at 20. This observation in Justice Holmes' concurring opinion would seem to support the recognition of protection for sound recordings (piano rolls), but the court held otherwise. This position of not recognizing piano rolls as musical works was short-lived as it was effectively overturned by the passage of the 1909 Copyright Act.

[90] *Id.* at 18; *see also* WEILER, *supra* note 34, at 350.

enjoyment. Even though they were part of a mechanical system, the paper rolls embodied the equivalent of the written musical composition, which many felt deserved copyright protection. Even Justice Holmes, despite the Court's holding, voiced his opinion that piano rolls should be recognized as protectable copies under copyright.

With the view that piano rolls were mechanical devices and not copyrightable subject matter, most courts and Congress chose to extend this rationale to phonorecords. This would remain unchanged until Congress amended the copyright laws in 1972.[91] The reasoning used by the courts prior to the copyright amendment was that the phonorecord was not directly perceptible by humans without the aid of a machine, and therefore it was not a writing to which copyright protection could attach.[92] Therefore, until federal copyright protection arrived, sound recordings received protection only to the extent provided for under common law.

With common law as the only source of protection for sound recordings, the parameters of protection needed to be delineated, and this occurred in a case that drew national attention. In *Waring v. WDAS Broadcasting Station, Inc.*,[93] the Pennsylvania Supreme Court confirmed the general view that under common law, sound recordings are protectable property.[94] The court also verified that the sale of the physical phonorecord would not divest the common law property right in the sound recording,[95] nor would the broadcasting

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[91] *See supra* note 86 and accompanying text.

[92] *See* Abrahamson, *supra* note 42, at 188-89.

[93] 194 A. 631 (Pa. 1937). Fred Waring was the conductor of a nationally known orchestra. He filed suit to enjoin a radio station from broadcasting sound recordings of his orchestra's rendition of a non-original song claiming he has a controllable property right in the sound recordings. *Id* at 455-56.

[94] *Id.* at 637. The rationale for protecting Mr. Waring's interest in the sound recordings and his ability to enjoin the radio broadcasting of the phonorecords was that akin to unfair competition. *Id* at 641-42; and in a concurring opinion found to be privacy based right. *Id.* at 643.

[95] *Id.* at 638. Justice Stern stated, "The title to the physical substance and the right to the use of literary or artistic property which may be printed upon or embodied in it are entirely distinct and independent of each other" (citing Stevens v. Gladding, 58 U.S. 447 (1854), Stephens v. Cady, 55 U.S. 528 (1952), and Werckmeister v. American Lithograph Co., 142 F. 827, 830 (1905)).

of the phonorecord.[96] One of the most important observations made in *Waring* was the court's recognition that there are protectable differences between the musical composition and the sound recording that embodies the musical composition.[97] This recognition added fuel to the call for federal copyright protection for sound recordings.

As the broadcasting of music grew in popularity, so did the need for protection.[98] With common law as the basis of protection for sound recordings, a lack of uniformity in the scope of protection was becoming more apparent. Approximately twenty years after the *Waring* decision, a New York federal court added reinforcement to *Waring*. The court reached the same conclusion that phonorecords are protectable under common law, and that protection is not lost when the sound recording is published or sold.[99] Unfortunately for the advocates seeking federal protection, the majority of the court also favored common law, and declined to justify protection of the sound recordings on a federal copyright basis.[100] Interestingly, Judge Learned Hand, in his dissenting opinion, stated:

> [N]ow that it has become possible to capture these contributions of the individual performer upon a physical

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[96] *Id.*

[97] *Id.* at 635. Justice Stern, writing for the majority, stated:

> A musical composition in itself is an incomplete work; the written page evidences only one of the creative acts which are necessary for its enjoyment; it is the performer who must consummate the work by transforming it into sound. If, in doing so, he contributes by his interpretation something of novel intellectual or artistic value, he has undoubtedly participated in the creation of a product in which he is entitled to a right of property, which in no way overlaps or duplicates that of the author in the musical composition.

Id.

[98] *See, e.g.*, RCA Mfg. Co. v. Whiteman, 114 F.2d 86, 88 (2d Cir. 1940) (the court refused to grant protection to the creator of a record album once the record was purchased and broadcast on the radio).

[99] *See* Capitol Records, Inc. v. Mercury Records Corp., 221 F.2d 657 (2d Cir 1955) (holding that New York common law prohibits the free copying of a performance recorded for reproduction and sale, a reversal of its holding in RCA Mfg. Co. v. Whiteman, 114 F.2d 86 (2d Cir. 1940)).

[100] *Id.* at 662.

> object that can be made to reproduce them, there should be no doubt that this is within the copyright Clause of the Constitution. . . . I cannot find in the language of the [House] report [on the Act of 1909] anything even to intimate that the record of a performer of a "musical composition" should not be copyrighted. . . .[101]

Despite a growing recognition by the courts that sound recordings should receive federal copyright protection like that given to musical compositions, Congress continued to drag its heels.[102] With the absence of federal protection, unauthorized copying of phonorecords increased substantially and caused a significant threat to the music industry, a problem which clearly called for Congressional attention.[103] In response to the increased pressure from the music industry and the growing support of the courts, Congress amended the Act of 1909 prospectively to include sound recordings within the scope of federal copyright protection.[104] The amendment, however, was challenged as unconstitutional soon after its enactment.[105] To the satisfaction of the record companies, the challenge was defeated and the amendment was validated by the United States Supreme Court in 1973.[106]

D. The Act of 1976

During the two decades preceding the enactment of the Copyright Act of 1976, the Copyright Office commissioned thirty-five studies focusing on various aspects of copyright law in need of apparent revision.[107] The focus of the studies included the limitations on performing rights and the unauthorized duplication of sound recordings.[108] As a result of the studies and numerous hearings,

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[101] *Id.* at 664-65 (emphasis added).
[102] *See* Abrahamson, *supra* note 42, at 190-91.
[103] *See id.*
[104] *See* O'Dowd, *supra* note 40, at 252 n.11.
[105] In *Shaab v. Kleindienst*, the court determined that the Copyright Clause of the Constitution must be broadly interpreted to allow for protection of creative works, including sound recordings, in new and unknown technologies. 345 F. Supp. 589, 590 (D.D.C. 1972).
[106] *See Goldstein*, 412 U.S. at 562.
[107] *See* Molnar, *supra* note 70, at 693.
[108] *See id.* at 693-94.

Congress passed the Copyright Act of 1976.[109] One of the key features of the 1976 Act is that the rights granted to a copyright owner are separable and delineated for each work.[110] Unfortunately, the theme of the past continued and Congress failed to grant the full range of rights for sound recordings that it gave to the musical composition.[111]

When the 1976 Act was in the draft stage, support for granting a full public performance right was not only provided by the Copyright Office,[112] but also from recording artists[113] and the record industry.[114] The initial draft of the Senate bill included a full public performance right for sound recordings, and the proposed royalty entitlement was based on a system similar to that used to compensate songwriters and

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[109] 17 U.S.C.A. §§ 101-803, 1001-1010 (2001) (effective Jan. 1, 1978) [hereinafter 1976 Act].

[110] *See* 17 U.S.C.A. § 106 (2001) ("Subject to sections 107 through 121, the owner of copyright under this title has the exclusive right to do and to authorize any of the following: (1) to reproduce the copyrighted work in copies or phonorecords; (2) to prepare derivative works based upon the copyrighted work; (3) 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; (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 works, to display the copyrighted work publicly; (6) in the case of sound recordings, to perform the copyrighted work publicly by means of a digital audio transmission.")

[111] *Id.* at §§ 106 (1)-(3),(6).

[112] *See, e.g.*, Abrahamson, *supra* note 42, at 200-04; *see also* O'Dowd, *supra* note 40, at 253; Rebecca F. Martin, Note, *The Digital Performance Right In The Sound Recordings Act of 1995: Can It Protect U.S. Sound Recording Copyright Owners In A Global Market?*, 14 CARDOZO ARTS & ENT. L. J. 733, 737-38 (1996). Assistant Secretary of Commerce and Commissioner of Patents and Trademarks, Bruce Lehman, also recommended that sound recordings receive a full performance right. *See also Copyright Protection for Digital Audio Transmissions: Hearings on S.227 before the Senate Judiciary Committee*, 104th Cong. 31 (Mar. 9, 1995).

[113] The recording artists included musicians and vocalists, and their representative organizations, the American Federation of Musicians [hereinafter AFM], and the American Federation of Television and Radio Artists [hereinafter AFTRA]. *See* Abrahamson , *supra* note 42, at 203.

[114] The record industry, which consisted of many major record companies like CBS Records, Motown Records, RCA Records, to name a few, was represented by the Recording Industry Association of America [hereinafter RIAA]. *See id.*

music publishers.[115] Despite the early Senate position, Congress bowed to the pressure of the broadcast industry and performing rights societies.[116] Not surprisingly, broadcasters, performing rights societies, and music publishers[117] used their collective lobbying power in opposition, and successfully prevented the inclusion of a public performance right.[118]

Congress subsequently approved the House version of the copyright bill that excluded a full public performance right for sound recordings.[119] As an apparent compromise, the bill required the Copyright Office to revisit the sound recording public performance issue and report back to Congress.[120]

Responding to the Congressional mandate, the Register of Copyrights' 1978 report stated that sound recordings should receive the same protection as other works, and that there was no justification for allowing the creator of sound recordings to be

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[115] *See Performance Royalty: Hearings on S. 1111 Before the Subcomm. On Patents, Trademarks, and Copyright of the Senate Comm. on the Judiciary*, 94th Cong. 1st Sess. 1-4 (1975) (statements of Sen. Hugh Scott) (noting that payments would be statutorily required for the commercial exploitation of music, principally radio broadcasters and royalty payments would be determined by advertising revenue and paid to both recording artists and their record labels); *see also* Molnar, *supra* note 70, at 698-700.

[116] *See* Martin, *supra* note 112, at 738.

[117] The broadcasters were represented by the National Association of Broadcasters [hereinafter NAB]; the performing rights societies by ASCAP, BMI, and SESAC; and the music publishers, by the National Music Publishers Association [hereinafter MPA]. *See* Abrahamson , *supra* note 42, at 202.

[118] *See* Molnar, *supra* note 70, at 680-81. *See generally Performance Royalty: Hearings on S. 1111 Before Subcomm. On Patents, Trademarks, and Copyrights of the Senate Comm. on the Judiciary*, 94th Cong. 5 (1975).

[119] *See* 17 U.S.C.A. § 114(a) (2000).

[120] "[T]he Register of Copyrights, after consulting with representatives of owners of copyrighted materials, representatives of the broadcasting, recording, motion picture, entertainment industries, and arts organizations, representatives of organized labor and performers of copyrighted materials, shall submit to the Congress a report setting forth recommendations as to whether this section should be amended to provide for performers and copyright owners of copyrighted materials any performance rights in such material. The report should describe the status of such rights in foreign countries, the views of major interested parties, and specific legislative or other recommendations, if any." 17 U.S.C. § 114(d); *see also* Martin, *supra* note 112, at 738.

without a full public performance right.[121] Although Congress anticipated the report would call for change to the protections given to sound recordings, it "refused to take any action at that time."[122] The inaction by Congress sent an all too familiar signal to the recording industry, but the advocates for the public performance right would not be dissuaded from continuing the fight for copyright equality.[123]

IV. THE ACT OF 1976 IN THE DIGITAL AGE

A. The Birth of New Technology

With the growth of the Internet and digital technology, it became evident that copyright protection for both musical compositions and sound recordings would require further enhancement by Congress.[124] Although the scope of protection would be broadened for sound recordings, the enhancement failed to recognize the need for full protection in the non-cyberspace world.[125]

It was not until the early 1990s that the big push came for expanded copyright protection. With sound recording technology moving into the digital age, the concern for unauthorized use and copying of recorded music reached an all-time high.[126] The

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[121] *See Register of Copyrights, House Subcomm. on Courts, Civil Liberties, and the Performance Rights in Sound Recordings*, 95th Cong., 2d Sess. 1062-63 (Comm. Print 1978). ("Sound recordings fully warrant a right to public performance. Such rights are entirely consonant with the basic principles of copyright law generally, and with the 1976 Copyright Act specifically. Recognition of these rights would eliminate a major gap in this recently enacted general revision legislation by bringing sound recordings into parity with other categories of copyrightable subject matter.").

[122] *See* Podolsky, *supra* note 16, at 670; *see also* Martin, *supra* note 112, at 740; O'Dowd, *supra* note 40, at 254.

[123] *See* Martin, *supra* note 112, at 740.

[124] *See* The Digital Millennium Copyright Act, Pub. L. No. 105-304, 112 Stat. 2860 (1998). The RIAA provides an explanation of the protections afforded sound recordings in a digital world. *See* http://riaa.com/copyright-laws-4.cfm (last visited Feb. 15, 2002).

[125] *See supra* notes 38-41 and accompanying text.

[126] The music compact disc ("CD") was introduced in the early 1980s. *See* Nagarajan, *supra* note 84, at 725; *see also* Bergman, *supra* note 67, at 360-61. "[D]igital technology

development of digital audio tape recorders (hereinafter "DATs") made it feasible for more people to make copies of sound recordings without any deterioration in audio quality.[127] This advancement in technology led to a study by the United States Office of Technology Assessment. The study indicated nearly one billion recorded musical works were copied each year using digital technology, resulting in an estimated 22% sales displacement rate for the record industry.[128]

In light of the many capabilities of digital technology, and in response to the cries of economic harm from the copyright owners of musical works and sound recordings, Congress agreed to amend the Act of 1976.[129] The Audio Home Recording Act of 1992[130] (hereinafter "AHRA") was passed to address the many issues and concerns and to settle the debate as to whether home audio recording is legal.[131] The AHRA was crafted to protect not only the copyright owners, but also consumers, hardware manufacturers and distributors.[132] Copyright owners would now receive protection against possible loss of retail sales of their music through a royalty payment imposed on the manufacturers and importers of digital

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enables information (including copyrighted works of authorship) to be stored and transmitted electronically encoding the information into a series of bits . . . which form unique combinations to produce a series of sounds and silences when read." Martin, *supra* note 112, at 741.

[127] *See* JOHN R. KETTLE III & TRACEE A. GRAUBART, The On-line Entertainment Industry: Update 2000 *Disintermediation & Music: Refashioning the Industry Model*, NEW JERSEY INST. CONTINUING LEGAL EDUC. 217 (2000).

[128] *See* U.S. CONGRESS, OFFICE OF TECHNOLOGY ASSESSMENT, COPYRIGHT AND HOME COPYING, OTA-CIT-422, TECHNOLOGY CHALLENGES THE LAW, 154, 158 (1989).

[129] *See generally* PASSMAN, *supra* note 44, at 187-88 (2000); *see also* RIAA/Licensing & Royalties-AHRA Royalties, *at* http://www.riaa.com/licensing-AARC-2.cfm (last visited Feb. 15, 2002).

[130] Pub. L. No. 102-563, 106 Stat. 4237 (codified at 17 U.S.C. §§ 1001-1010); *see also* RIAA/Digital Music Laws, *at* http://www.riaa.com/copyright-Laws-4.cfm (last visited Feb. 15, 2002); PASSMAN *supra* note 44, at 250-53.

[131] Although the record companies and equipment manufacturers from around the world reached an accord in 1989, it took until June 1991 to obtain the agreement of the music publishers, songwriters/composers and performing rights societies. Formal hearing in Congress followed and the AHRA was passed on October 28, 1992. *See* Heather D. Rafter, William Sloan Coats, Vickie L. Freeman, John G. Given, *Streaming Into The Future: Music and Video On The Internet*, 547 PLI/PAT 605, 621 (Feb.-Mar. 1999).

[132] *Id.*

audio recording devices and blank digital audio recording media.[133] The AHRA also addressed the home recording question by allowing consumers to make both analog and digital copies of lawfully obtained sound recordings, as long as the copy is for the individual's private noncommercial use.[134] Lastly, the manufacturers, importers, and distributors of both analog and digital audio recording devices (like DAT recorders and MiniDisc recorders) and blank recording media would not be deemed infringers if they complied with the provisions of the AHRA.[135]

This was an important step by Congress in recognizing not only the value of the musical composition, but also the value of the sound recording copyright. To help facilitate the collective interests of the copyright owners of sound recordings, the applicable royalties under the AHRA[136] are collected by a not-for-profit organization called the Alliance of Artists and Recording Companies (hereinafter "AARC").[137] This organization, which started to collect the royalties for its members in 1995,[138] is patterned after similar foreign organizations that collect royalties for home recording or public

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[133] *See* 17 U.S.C.A. §§ 1003(a) and 1006 (2000). Under the AHRA, the manufacturer, distributor and importer of digital and analog recording devices and recording medium, are immune from copyright infringement if they comply with the provisions of the AHRA; *see also* PASSMAN, *supra* note 44, at 251-53.

[134] *See* 17 U.S.C.A. § 1008 (2001).

[135] *See* 17 U.S.C.A. § 1002(a) (2000) (explaining that one of the key provisions of the AHRA requires the manufactures, distributors and importers of digital recording devices to install a "serial copyright management technology (SCMS) to prohibit unauthorized copying of digital recordings already made. This would prohibit the making of a copy from a copy."); *see also* PASSMAN, *supra* note 44, at 251.

[136] Under the AHRA, royalty payments (currently 2% of the revenue of each subject manufacturer) are paid to the Copyright Office, which places it in two separate funds. The Sound Recording Fund receives two-thirds of the monies collected, and the Musical Works Fund receives the remaining one-third. From the Sound Recording Fund, the non-featured artists receive 4% and the remaining balance is split with 40% going to the featured artist and 60% to the copyright owner of the sound recording. *See* RIAA/Licensing & Royalties-AHRA Royalties, *at* http://www.riaa.com/licensing-AARC-2.cfm (last visited Feb. 15, 2002).

[137] *See* RIAA/Licensing & Royalties, Introduction, *at* http://www.riaa.com/licensing-AARC-1.cfm (last visited Feb. 15, 2002). The AARC represents nearly 2000 claimants, and has as its managing board 15 featured artist representatives and 15 record company representatives.). *See* PASSMAN, *supra* note 44, at 250-53.

[138] *See* http://www.riaa.com/licensing-AARC-2.cfm (last visited Feb. 15, 2002).

performance of sound recordings in their respective countries.[139] To the satisfaction of recording artists and record companies, they collectively receive under the AHRA approximately two-thirds of the royalty payments received from the manufacturers of digital audio recording devices and recording media.[140]

While it was helpful in offsetting losses relating to DATs, it soon became apparent that the AHRA did not provide sufficient protection against other developments in the digital world.[141] Digital technology, which made it possible to transmit music into one's home via cable, satellite, and interactive Internet technology, not only struck fear into the hearts of copyright owners of sound recordings, but also alarmed songwriters and music publishers.[142] Both interests expressed their concern that if left without regulation, digital transmissions would "do tremendous damage" to the music industry as a whole.[143]

B. Digital Transmissions and the Public Performance Right

In response to the increased concerns about digital technologies,[144] in 1993, Congress proposed adoption of the Digital Performance in Sound Recording Act.[145] During debate over the proposed bill, the Clinton Administration's Working Group on Intellectual Property Rights (hereinafter "Working Group") prepared two position papers that argued for greater protection for the music industry.[146] Despite

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[139] *See* http://www.riaa/Licensing&Royalties.Introduction, *infra* note 157.

[140] *See* 17 U.S.C.A. § 1006 (b)(1) (2001); *see also* AHRA Royalties, *supra* note 129, *at* http://www.riaa.com/licensing-AARC-2.cfm (last visited June 22, 2001).

[141] *See Performance Rights for Sound Recordings Urged*, 5 J. PROPRIETARY RTS. 25 (May 1993).

[142] *See id.*

[143] *See id.*

[144] During the hearings, Jerold Rubinstein, Chairman and CEO of International Cablecasting Technologies, Inc. stated "I have heard across Capitol Hill that it is politically impossible to impose a performance right on the broadcasters." *The Digital Performance Right in Sound Recordings Act of 1995: Hearings on H.R. 1506 Before the House Subcomm. on Courts and Intellectual Property,* 104th Cong., 768 (June 21, 1995) (statement of Jerold Rubinstein, Chairman and CEO, International Cablecasting Technologies, Inc.).

[145] Copyright Royalty Tribunal Reform Act of 1993, H.R. 2576, 103d Cong. § 142 (1993).

[146] Podlosky, *supra* note 16, at 672.

the findings of the Working Group and the White House report, the opposition from the broadcast industry once again won out, as the report and proposed bills were rejected and Congress would nevertheless continue to hold hearings on the subject of digital technology and its impact on the music industry. [147]

1. Digital Performance Right in Sound Recordings Act of 1995

Finally, after decades of lobbying, a sound recording public performance right made its way into United States copyright law with compromise.[148] In November of 1995, President Clinton signed into law the Digital Performance Right in Sound Recordings Act of 1995 [149] (hereinafter "DPRA"). Sound recordings were now granted a long-overdue public performance right, but with critical limitations.[150] For instance, the DPRA only applies to certain interactive digital transmissions and does not apply to public performances on analog radio, in dance halls, bars, restaurants, stores, and the like. Moreover, a radio or television station that broadcasts in digital form would not violate the performance right if the broadcast is free, nor would the performance right be violated by a retransmission by cable systems of the free program in a 150-mile radius, as long as it is a non-interactive broadcast. [151] The DPRA

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[147] *Id.* at 671.

[148] *See* Howard Siegel, *Digital Transmissions and Sound Recording Performance Rights: The Latest Legal Challenge in Emerging Technologies*, 7 N.Y.S.B.A. ENT., ARTS & SPORTS L.J. 1 (Winter 1995) (noting that the 1995 Digital Performance Rights In Sound Recordings Act of 1995 "reflects . . . several areas of compromise between the interests of broadcasters, record companies and music publishers.").

[149] Digital Performance Right in Sound Recordings Act of 1995, Pub. L. No. 104-39, 109 Stat. 336 (codified as amended in scattered sections of 17 U.S.C.1995) (effective Feb. 1, 1996).

[150] *Id.*

[151] *See* 17 U.S.C. § 114 (d)(1) (2001) The DPRA also requires the payment of a statutory royalty which must be shared between the record company, featured artist, background musicians, and background vocalists. (Record companies receive 50%, the featured artists 45%, and the background musicians and background vocalists each receive 2.5% of the statutory royalty). *See* Martin, *supra* note 112, at 745; *see also* Podolsky, *supra* note 16, at 673-74. "Among its primary distinctions, the Act excused broadcast radio from the royalty requirement for public performance of sound recordings; non-subscription services are also excused, regardless of their digital nature. The Act also ensures that the royalties payable to

also provides an exemption for audio that is part of a music video or movie, even if broadcast digitally.[152]

Although the DPRA is a positive step toward providing equality to all music copyright owners,[153] the sound recording is still at an economic disadvantage.[154] One commentator claims that few recording artists have received royalties under the DPRA because the public performance right is too narrowly defined.[155] Despite its shortcomings, the DPRA is nevertheless an important step forward in expanding the protection for sound recordings. Pursuant to its provisions, the collection of applicable royalties for the benefit of sound recording copyright owners and recording artists could be delegated to the Recording Industry Association of America (hereinafter "RIAA").[156] In response to receiving the authority to act on behalf of its constituents, the RIAA would utilize a performance

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the copyright owners of musical compositions shall not be diminished as a result of the new royalty." *Id.* at 672 n. 170 (citing the 1995 Act.). *See generally* Abrahamson, *supra* note 42, at 204-16.

[152] *See generally* PASSMAN, *supra* note 44, at 297.

[153] The DPRA also amended the compulsory license section of the copyright laws to recognize "digital phonorecord delivery" as a reproduction and distribution of the musical composition. *See* 17 U.S.C. § 115 (c)(3)(A) (2001). This change will allow for the copyright owner of the musical composition to receive a statutory mechanical royalty under the compulsory licensing provisions for such digital phonorecord delivery. *Id.*

[154] The Register of Copyrights (Marybeth Peters) recognized the economic injury resulting from the lack of protection and stated:

> the lack of copyright protection for performers since the commercial development of phonorecords has had a drastic and destructive effect on both the performers and the recording arts....Broadcasters and other users of recordings have performed them without permission or payment for generations. Users today look upon any requirement that they pay royalties as an unfair imposition in the nature of a 'tax.' However, any economic burden on the users of recordings for public performance is heavily outweighed, not only by the commercial benefits accruing directly from the use of copyrighted sound recordings, but also by the direct and indirect damage done performers whenever recordings are used as a substitute for live performance.

Register of Copyrights, House Subcomm. On Courts, Civil Liberties and the Administration of Justice of the House Judiciary Comm., Performance Rights in Sound Recordings, 95th Cong., 2d Sess 1062-63 (Comm. Print 1978).

[155] *See* PASSMAN, *supra* note 44, at 296.

[156] Digital Performance Right in Sound Recordings Act of 1995, Pub. L. No. 104-39, 109 Stat. 336 (codified as amended in scattered sections of 17 U.S.C. 1995) (effective Feb. 1, 1996).

right program called "Soundexchange."[157] This RIAA program is also used to collect other fees for record companies and recording artists, as explained below.[158]

2. Digital Millennium Copyright Act

In 1998, the DPRA was amended by passage of the Digital Millennium Copyright Act [159] (hereinafter "DMCA"). This revision to the United States copyright law is an outgrowth of the World Intellectual Property Organization (hereinafter "WIPO") meeting in Geneva in 1996, where two treaties were negotiated.[160] The two treaties are discussed in the next section of this article. The DMCA is hailed as an important step forward in addressing and protecting copyrights in cyberspace.[161] For instance, the DMCA contains provisions that provide protection against the circumvention of copyright protection systems.[162] The DMCA also amends the copyright laws to delineate the responsibilities of Internet Service Providers ("ISPs") when an alleged copyright infringement occurs on the Internet.[163] But, most importantly, as it pertains to music, the DMCA sets forth important provisions regarding recorded music offered by web-casters and satellite delivery services.[164]

The DMCA, along with the DPRA, makes it easier to obtain statutory licensing for digital transmission of music for non-interactive purposes.[165] The monies collected are split 50/50

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[157] *See* RIAA Licensing & Royalties, *at* http://www.riaa.com/Licensing-RIAA-1.cfm. (last visited Jan. 15, 2002). The program is used by the RIAA to collect and administer royalty payments under the DMCA and DRA for the benefit of the copyright owner of the sound recording. *Id.*

[158] *Id.*

[159] *See* 17 USC §§ 1201-1205 (2001).

[160] *See* Digital Music Laws, *at* http://www.riaa.com/Copyright-Laws-4.cfm (last visited Jan. 15, 2002).

[161] *Id.*

[162] *See* 17 U.S.C. § 1201 (2001).

[163] *See* 17 U.S.C. § 512 (2001).

[164] *See supra* note 159. The DMCA provisions reflect an important agreement between the RIAA and a coalition of web casters and satellite audio delivery services.

[165] *Id.*

between the record company and recording artist.[166] The same Soundexchange program used by the RIAA for collection and disbursement of royalties under the DPRA is used to collect and disburse statutory royalties payable under the DMCA.[167]

When a digital audio transmission does not qualify for a statutory license, a voluntary license must be negotiated with the record company, although the recording artist usually does not even receive half of the amount of a recording artist and is subject to the terms of the recording contract entered into between the recording artist and record company.[168] Given the custom and practice of record companies toward owning the entire copyright in the sound recordings, it is unlikely that recording artists will receive a portion of public performance royalties under voluntarily negotiated public performance licenses unless it were mandated by statute.[169] Such a mandate is recommended.

V. INTERNATIONAL HARMONY

A. Treaties

"Most countries that export and import [copyrighted works] are linked by copyright treaties. Many of [the relationships] began as bilateral arrangements in the 19th century. . . . Today all sorts of special arrangements exist, dealing with everything from satellite broadcasts to phonograms." [170] It was not until the end of the 19th century that the United States first took steps to recognize the need to

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[166] *See* Bloom, *supra* note 31, at 200 (citing Lisa E. Davis & Rhonda Adams Medina, *The Piper Must Be Paid: New Law Grant Performance Rights For Digital Age*, N.Y.L.J., Apr. 8, 1996, at S1.)

[167] *See supra* note 150 and accompanying text.

[168] *Id.* at 298.

[169] *See* PASSMAN, *supra* note 44, at 333. Mr. Passman states "As soon as any of you [recording artists] receive any money based on this public performance, please send me a letter so we can celebrate the occasion. But do it only if your distribution exceeds the price of the postage stamp. I don't expect to hear from you for awhile." *Id.*

[170] *See* RICHARD WINCOR, COPYRIGHTS IN THE WORLD MARKETPLACE 12 (1990).

protect works of authors from other countries.[171] Under the International Copyright Act of 1891,[172] the United States provided protection to nationals of other countries if they complied with the registration, notice, deposit, and manufacturing requirements under the new Act.[173] This step helped provide authors from the United States with reciprocal protection in foreign countries.[174] To strengthen the protection in foreign countries, the United States either joined a multi-lateral or bilateral treaty, or obtained protection by the signing of a proclamation by the President.[175] It is important to note that under the Supremacy Clause of the United States Constitution, treaties are exalted as binding law.[176]

The number one export of the United States is entertainment, with American music making up a substantial portion of the export dollar.[177] It is therefore important for Congress to exercise its powers in a manner that will properly assure compliance with treaty obligations, especially those that affect commerce.[178] In light of the very lucrative entertainment export, it remains questionable as to why Congress has not exercised its powers to maximize the economic benefits of the music export. World trade is the impetus

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[171] *Id.* at 15.

[172] Chase Act of 1891, 26 Stat. 1106. The act was referred to as the "Chase Act of 1891." *See* Hanish R Sandison, *The Berne Convention and The Universal Copyright Convention: The American Experience*, 11 COLUM.-VLA J.L. & ARTS 89, 91 (1986).

[173] *See* 4 MELVILLE B. & DAVID NIMMER ON COPYRIGHT § 17.01[C][1][a] 17-12, 13 (2001). The copyright laws of the United States do not have any extraterritorial operation. *Id.* at §§ 17-19.

[174] *See* Sandison, *supra* note 172.

[175] *See* NIMMER ON COPYRIGHT, *supra* note 173, at § 17.01[c][1][a]. In 1891 the United States entered into bilateral agreements with Belgium, France, Switzerland, and the United Kingdom, in 1892 with Germany and Italy, in 1893 with Denmark, and in 1896 with Chile and Mexico. *Id.* at n.62.

[176] *See* David Nimmer, *The End of Copyright*, 48 VAND. L. REV.1385, 1409 (1995) (citing U.S. CONST., art. VI, § 2).

[177] The RIAA estimated that approximately $4 billion, which is about forty percent of total record sales is from sound recordings sold outside the USA. *See* RIAA/Market Data-The World Sound Recording Market, *at* http://www.riaa.com/MD-World.cfm (last visited Feb. 2, 2002). The RIAA currently states that it does not have worldwide sales figures because it conducts research music sales in the United States only. *Id.*

[178] Congress has the authority under the Commerce Clause to enact whatever necessary and proper provisions are required to carry out its enumerated powers. *See* Nimmer, *supra* note 176 n.155 and accompanying text.

for the United States joining many of the international intellectual property treaties.[179] Unfortunately, as discussed below, Congress has not exercised its world trade powers in the manner most beneficial to the United States under its intellectual property trade agreements and treaty obligations.[180]

The absence of a full public performance right for sound recordings in the United States is exacerbated by the fact that over seventy-five foreign countries grant such a right.[181] Many of the countries are also signatories to the same international intellectual property treaties and trade agreements as the United States.[182] The foreign countries that collect public performance royalties under their local laws only make such royalties available to nationals of member countries that provide an equivalent right.[183] Since the United States does not provide a full public performance right for sound recordings, American recording artists and record labels are not entitled to receive the millions of dollars in foreign royalties collected that would otherwise be payable.[184]

B. The Berne Convention and Universal Copyright Convention

Failing to provide a full public performance right for copyright

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[179] *Id.* Prof. Nimmer opines that the Commerce Clause could serve as an alternative basis for enforcing and justifying rights akin to copyright in a world marketplace, and that the law of trade is the new master of copyright. *Id.* at 1412.

[180] *See infra* notes 177-84 and accompanying text.

[181] According to the RIAA, "[a]pproximately seventy-five nations, including at least nine European . . . states, grant public performance rights in sound recordings." *See* O'Dowd, *supra* note 40, at 261 (citing RIAA Chart of Sound Recording Performance Rights Around the World (1993)).

[182] The United States is a member of numerous copyright treaties, including the Universal Copyright Convention, the Berne Convention, and two Pan-American multi-lateral treaties. *See* NIMMER ON COPYRIGHT, *supra* note 173, at § 17.01[B].

[183] *See* PASSMAN, *supra* note 44, at 188 ("In many countries, the record company is paid a royalty every time a recording is played on the radio. This is different from public performance royalties that are paid to a songwriter/composer and publisher of the musical composition when a recording is played on the radio."). *Id.*

[184] *See* Rebecca F. Martin, *The WIPO Performances and Phonograms Treaty: Will the U.S. Whistle A New Tune?*, 44 J. COPYRIGHT SOC'Y U.S.A. 157 (1997) (citing David Laing, *The Importance of Music In the European Union*), *available at* http://www.europmusic.com /emo/eumusic/perfmech.html. (last visited Jan. 15, 2002).

owners of sound recordings runs counter to the protections given other copyrightable works protected in the United States and in foreign countries. The two major international copyright treaties that the United States belongs to for the purpose of international copyright protection are the Berne Convention,[185] and the Universal Copyright Convention.[186] When the United States joined each treaty, granting a public performance right for sound recordings was not mandated and would be imposed at a later date.[187]

The Berne Convention, the oldest and largest international method for the protection of literary and artistic works, created copyright law in countries where none existed.[188] The convention helped create copyright systems that provided "national treatment" whereby nationals of member countries received the same protection afforded citizens of that nation.[189] Until the United States agreed to make certain changes to American copyright law, membership to the Berne Convention would not be permitted.[190]

In order to obtain the desired international copyright protection, the United States joined the Universal Copyright Convention.[191] This multilateral copyright treaty was an alternative to Berne, and did not require the United States to change its formalities or requirements for registration.[192] However, with Congress under

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[185] The Berne Convention for the Protection of Literary and Artistic Works is administered by the World Intellectual Property Organization [hereinafter WIPO]. The Berne Convention was first signed in 1886. *See* NIMMER ON COPYRIGHT, *supra* note 173, at § 17.01[B] (discussing the Berne Convention and its formation).

[186] *See infra* note 188 and accompanying text.

[187] *See id.*

[188] *See* INTERNATIONAL COPYRIGHT LAW AND PRACTICE, MELVILLE B. NIMMER and PAUL EDWARD GELLER (2000).

[189] *See* William F. Patry, *Developments in International Copyright from the U.S. Perspective*, 318 PLI 349, 377-78 (Oct. 1991); *see also* Martin, *supra* note 184, at 166.

[190] *Id.*

[191] The effective date of joining the Universal Copyright Convention [hereinafter UCC] is September 16, 1955. The United Nations Educational, Scientific and Cultural Organization is the permanent secretariat for the UCC. *See* NIMMER ON COPYRIGHT, *supra* note 173, at 17-14. The copyright symbol © indicates adherence to the international convention. A foreign author's work will be protected in the United States under the U.S. Copyright Laws if the work is first published in a country that is a member of the UCC on or after the effective date that the United States joined the UCC. *See* 17 U.S.C. § 104(b) (2001).

[192] *See* NIMMER ON COPYRIGHT, *supra* note 173, at 17-10.

increased pressure from American authors and publishers for broader international copyright protection, the United States would be forced to join the Berne Convention as well.[193] In joining Berne, which became effective March 1, 1989,[194] works created under United States copyright laws would now be eligible for broader reciprocal protection in foreign countries. The quid pro quo, as mentioned earlier, would force the United States to make changes to its copyright law formalities. Two of the major changes made were that copyright notice could no longer be required, although it could remain optional, and registration of copyright could not be imposed as a prerequisite to suit in the United States if filed by nationals of Berne Convention member countries.[195] This change and accommodation by the United States was an important step toward global harmonization of intellectual property laws.

Although the Berne Convention recognizes the need to protect the rights of authors of musical works,[196] it does not require member countries to grant public performance rights to sound recordings.[197] Pressure under the Berne Convention therefore has not been a major factor to date in the move to recognize a full public performance right for sound recordings.[198] Moreover, the Act of 1976 expressly provides that "[a]ny rights in a work eligible for protection under this title that derive from this title . . . shall not be expanded or reduced by virtue of, or in reliance upon, the provisions of the Berne Convention, or the adherence of the United states thereto."[199]

Since a number of foreign countries that belong to Berne grant a public performance right for sound recordings,[200] the objective of

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[193] *Id.*

[194] Berne Convention Implementation Act of 1988, Pub.L. No. 100-568, § 13, 102 Stat. 2853.

[195] The United States is required to recognize the works of Berne country nationals as protectable under the U.S. Copyright laws without need of formalities. *See* NIMMER ON COPYRIGHT, *supra* note 173, at 17-17.

[196] *See* NIMMER ON COPYRIGHT, *supra* note 173, at § 8.17 [c], n.78 and accompanying text. "[A]uthors of . . . musical works shall enjoy the exclusive right authorizing . . . the Public Performance of their musical works." *Id.*

[197] *See* WILLIAM F. PATRY, 2 COPYRIGHT LAW AND PRACTICE 877-78 (1994).

[198] *Id.*

[199] 17 U.S.C. § 104(c) (2001).

[200] *See supra* notes 188-89 and accompanying text.

global harmonization and the spirit of the Berne Convention would be better served if the United States were to provide such a right. Because the "reciprocal treatment doctrine" is followed by many foreign countries, and the United States does not grant a public performance right for sound recordings, such foreign countries that grant such rights to its citizens decline to do so for American copyright owners.[201] This continues to cause substantial economic loss for United States copyright owners.[202]

All in all, even though the Berne Convention has contributed significantly to the present level of global harmony of intellectual property laws, many countries feel it does not go far enough. As a result of the call for greater uniformity and protection, other treaties and trade agreements surfaced to help fill the void.[203]

C. GATT, WIPO and NAFTA

The most important forum where discussions took place seeking uniformity and protection of intellectual property rights on an international basis was the Uruguay Round of the Multilateral Trade Negotiations to Amend the General Agreement on Tariffs and Trade (hereinafter "GATT").[204] A major problem the United States faced at the GATT meetings was the call for reciprocal treatment by

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[201] *See The Digital Performance Right in Sound Recordings Act of 1995: Hearings on H.R. 1506 Before the House Subcomm. On Intellectual Prop. and Judicial Admin. of the House Comm. on the Judiciary Hearing on the Digital Performance Right in Sound Recordings Act of 1995*, 104th Cong. 768 (1995) (statement of Dennis Breith, President, Recording Musicians' Association of the United States and Canada), *available at* http://hourse.gov/judiciary/1414.htm (last visited on Feb. 15, 2002); *see also* PATRY, *supra* note 197, at 1236 n.4 and accompanying text.

[202] *See Performers' and Performance Rights in Sound Recordings: Oversight Hearing Before the Subcomm. on Intellectual Property and Judicial Administration of the House Comm. on the Judiciary,* 103d Cong. 2-3 (1993).

[203] *See* Ralph Oman, *Berne Revision: The Continuing Drama*, 4 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 139, 139-40 (1993).

[204] *See* Martin, *supra* note 112, at 759 (citing General Agreement on Tariffs and Trade, October 30, 1947, 55 U.N.T.S. 187). The relevant discussions took place at Marrakesh on April 15, 1994 during the hearings for the Agreement on Trade- Related Aspects of Intellectual Property Rights, including Trade in Counterfeit Goods [hereinafter TRIPS]. This was a component of the World Trade Organization [hereinafter WTO], which succeeded GATT. The terminology "GATT" is now passé.

member countries.[205] The ongoing refusal of the United States to grant a full public performance rights for sound recordings caused a major roadblock to further discussion with member countries.[206]

GATT did not provide a solution to the problem and as a result, WIPO came to the rescue and approved two treaties on December 20, 1996. [207] The two treaties adopted by WIPO are the Copyright Treaty (hereinafter "WCT")[208] and the Performances and Phonograms Treaty (hereinafter "WPPT").[209] Recording artists receive the greatest international law support for a public performance right under the WPPT.[210] The WPPT protects the performers and producers of sound recordings by recognizing that an unauthorized transmission of a musical work via the Internet could be an infringement of the right of the copyright owner even though a physical copy of the sound recording was not distributed.[211] This recognition was instrumental in leading Congress to amend United States copyright laws with the DPRA to protect sound recordings.

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[205] *See* Martin, *supra* note 112, at 759.

[206] *See* PATRY, *supra* note 197 .

[207] WIPO is headquartered in Geneva, Switzerland and is the permanent secretariat of the Berne Convention. More than 150 countries, including the U.S., attended the WIPO conference in Geneva in 1996 to debate the intellectual property concerns of member countries, especially those related to the Internet and on-line services. *See* Podolsky, *supra* note 16, at 682 (citing Seth Schiesel, *Global Agreement Reached to Widen Law On Copyright*, N.Y. TIMES, Dec. 21, 1996, at A1); *see also* RIAA/International Laws, *available at* http://www.riaa.com/copyright-laws-5.cfm (last visited Jan. 15, 2002).

[208] Congress considered the implementation of the WIPO treaties under bill H.R. 2281, referred to as the Copyright Treaties Implementation Act [hereinafter CTIA]. The CTIA was passed in part and is codified at 17 U.S.C. §§ 1201-05. *See also* Rosemarie F. Jones, *Wet Footprints? Digital Watermarks: A Trail to the Copyright Infringer on The Internet*, 26 PEPP. L. REV. 559, 576-78 (1999). For the benefit of copyright owners, the WCT provides that an on-demand Internet service transmission is a public performance.

[209] The WPPT provides that the receipt and storage of a digital transmission is "fixed" for copyright protection purposes. This would enable a copyright owner to pursue a copyright infringement claim.

[210] Under the WPPT, performers and producers are entitled to receive payment from the broadcaster for the use of the sound recordings, which embody their performances when the broadcaster is doing so for profit, regardless of whether the form of communication is made over wire or is wireless. The copyright owner of the phonogram is also given the same right as that of the owner of the musical composition. See WIPO, Diplomatic Conference on Copyright and Neighboring Rights Questions, adopted 1996, *available at* http://www.wipo.org/en/diplconf/distrib/95dc.htm (last visited Feb. 9, 2002).

[211] *See* Bloom, *supra* note 31, at 187.

However, neither the WPPT nor WCT would lead to any further protection for sound recordings in the United States.[212]

The two treaties are of significant benefit to global harmonization of the intellectual property laws applying to music.[213] They are formulated to address the need for protection of musical works, especially when a non-voluntary license arises in connection with the broadcasting and satellite transmission of the music.[214] They also target the increasing need for national treatment of rights concerning performers and producers of sound recordings.[215] Each treaty by its terms would raise the minimum level of copyright protection required of its signatory countries, however, the United States, which supports the objectives of global harmonization in principal, has not fully embraced the provisions under the two new treaties.[216] The United States also made attempts under the North American Free Trade Agreement (hereinafter "NAFTA") to expand the copyright benefits but, not surprisingly, the attempts to secure royalties for the public performance of American sound recordings in member countries would be rejected since reciprocal treatment was not available in the United States.[217]

When Congress passed the DPRA to provide limited protection to sound recordings, it did so believing that this would place the United States on equal footing with other WIPO countries.[218] But as many expected, since the right was tailored to certain digital transmissions,

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[212] *Id.*

[213] The first treaty was also referred to as "Protocol to The Berne Convention," and the second as "New Instrument for the Protection of the Rights of Performers and Producers of Phonograms."

[214] *See* Martin, *supra* note 112, at 762.

[215] *Id.*

[216] *See* June M. Besek, *Copyright Law and Multimedia Works: Initiatives to Change National Laws and International Treaties to Better Accommodate Works of New Technology*, 428 PLI 69, 76 (Jan. 1996).

[217] *See* Podolsky, *supra* note 16, at 681.

[218] *See supra* note 145 and accompanying text.

the national treatment Congress felt it was obtaining for United States copyright owners would not be granted.[219]

Both the DRPA and DMCA help the United States provide the minimum protection required under WIPO initiatives. However, since both acts fail to grant the full public performance right for sound recordings, national treatment in foreign countries will remain out of reach. Congress must address the fact that United States copyright owners of recorded music, and the recording artists, will only receive the benefits of a WIPO member country's domestic laws when there is parity.[220] Until this is done, American record companies and recording artists will continue to be deprived of substantial rights and economic benefits.

VI. CONGRESS MOVES FURTHER OUT OF STEP

In 1998, under pressure mainly from bar and restaurant associations on both a national and state level, the Act of 1976 was amended by the Fairness In Music Licensing Act (hereinafter "FIMLA").[221] This amendment to the United States copyright law allows bars, restaurants, and stores greater use of music in their establishments on a royalty-free basis.[222] Retail stores smaller than 2,000 gross square feet, and food and drinking establishments smaller than 3,750 gross square feet can play music broadcast from licensed radio, television, cable and satellite sources without the need to pay a royalty to ASCAP, BMI, or SESAC as long as an admission fee is not charged and the music is not retransmitted by the establishment.[223] For stores greater than 2,000 square feet and bars and restaurants greater than 3,750 square feet, limitations are placed on the number of speakers and the number and size of audiovisual devices allowed for the royalty exemption to apply.[224] The practical

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[219] *See supra* notes 145-48 and accompanying text.
[220] *See generally* Martin, *supra* note 184, at 159.
[221] *See* 17 U.S.C. § 110(5)(B) (2001).
[222] *Id.*
[223] *Id.*
[224] The Fairness in Music Licensing Act [hereinafter FIMLA] provides an expanded exemption for music publicly performed in bars, restaurants and stores by allowing for the playback of broadcast music on up to six speakers, but with no more than four speakers in

effect of the amendment, however, is to not only perpetuate the denial of royalties to the copyright owner of the sound recording, but it also reduces the entitlement of royalties for songwriters and music publishers.[225] ASCAP estimates that the FIMLA will result in a "loss of millions of dollars annually for music creators and copyright owners, both those living here across the United States as well as for international songwriters, composers and music publishers."[226] It is this latter result that places the United States in an international dilemma.

During the congressional hearings, the Register of Copyrights, Marybeth Peters, claimed that many of the provisions of the pending FIMLA bill would violate the United States' obligations under international treaties. Ms. Peters stated:

The Copyright Office believes that several of the expanded exemptions, if passed in their current form would lead to claims by other countries that the United States was in violation of its obligations under the Berne Convention for the Protection of Literary and Artistic Works, incorporated in to the Agreement on Trade-Related Aspects of Intellectual Property Rights, Including Trade in Counterfeit Goods ("TRIPs") of the Uruguay Round of GATT.[227]

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one room, and up to four video monitors each up to 55 inches diagonal, but with no more than one video monitor per room. 17 U.S.C. §110(5)(b) (2000). Prior to FIMLA, the limitation for each commercial establishment was a receiver equivalent to that of a home-style broadcast receiver (i.e., two speakers and a video monitor commonly found in one's home).

[225] According to ASCAP, the Congressional Research Service estimates that more than 70% of bars and restaurants will be exempt from paying music licensee fees for the playback of music received from radio and television broadcasts. *See ASCAP Legislative Matters*, *available at* http://www.ascap.com/legislative/legis_qa.html (last visited on Feb. 5, 2002).

[226] *Id.*

[227] *See Technical Amendments to Copyright Laws, Hearings on H.R. 1053 Before the House Subcomm. on Courts and Intellectual Prop.* 105th Cong., 1st Sess. (1997) (statement of Marybeth Peters) (stating that Berne requires member states to provide to authors of musical works exclusive rights of public performance, communication to the public, and broadcasting, including "the public communication by loudspeaker or any analogous instrument transmitting by signs, sounds, or images, the broadcast of the work).

Despite the neutrality and objectivity of the Copyright Office Report, and the position of ASCAP against passage of the bill,[228] Congress once again declined to follow the advice of the Copyright Office and enacted FIMLA. As predicted, the United States is currently facing potential sanctions as a result of FIMLA under a ruling of the World Trade Organization (hereinafter "WTO").[229] Pursuant to the ruling reached by the arbitrator for the WTO Dispute Settlement Body, the United States has until July 27, 2001 to rescind FIMLA.[230]

The ruling by the WTO is an embarrassment to the United States and should be a wake-up call for Congress to begin the harmonization of our copyright laws as they relate to music. From both a public policy and a constitutional standpoint, this is a serious breach of duty. If the United States ignores the WTO ruling, there could be serious cross-sector retaliation, which could for example include punitive tariffs on American wheat and rice.[231]

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[228] *See* ASCAP Legislative Matters, *WTO Rules Against "Fairness In Music Licensing Act"*, *available at* http://www.ascap.com/legislative/legislative.html (last visited Jan. 15, 2002).

[229] On July 27, 2000, the Dispute Settlement Body of the WTO held that the FIMLA violates the Berne Convention and the TRIPS agreement. The decision was based in large part of an action was filed by the Irish Music Rights Organization [hereinafter IRMO] with the WTO since its members were not receiving the full public performance right in the U.S. as a result of FIMLA. The reduced payment of royalties to IRMO members was alleged to violate both the Berne Convention and the TRIPS Agreement.). *See BMI Government Relations: Legislative Newsflash*, (April 15, 1999), *available at* http://bmi.com/legislation /news99/aug1999.asp (last visited Jan.15, 2002). The WTO Dispute Settlement Understanding provides that "the general principle is that the complaining party"—in this case, the European Communities—"should first seek to suspend . . . obligations in the same sector(s) as that in which the panel . . . found a violation." This might mean, for example that the European communities would "suspend" payment of copyright royalties to the United States that the E.C. would have otherwise paid for public performance of American music in the E.C.; *see also International Developments*, ENT. LAW. REP., Feb. 2001, at 9.

[230] *See International Developments*, *supra* note 229, at 8-9. The complaint filed by the European Commission was supported by ASCAP which hopes that "Congress heeds this ruling of the World Trade Organization." *See supra* note 221. ASCAP agrees with the European Commission that its members have lost income as a result of the misguided United States copyright law. *Id.*

[231] *See* Nimmer, *supra* note 176, at 1418 (citing the remarks of Sen. Kempthorne).

VII. THE SOLUTION

The solution to the problem discussed in this Article is rather simple, and will not require much effort by Congress since the statutory framework and business models already exist. A good starting place is found in the DPRA[232] and the DMCA.[233] Both acts provide an economic incentive for recording artists and record companies to create and release sound recordings by requiring the payment of a royalty in connection with the sound recording. Although both acts apply only to certain digital uses and transmissions,[234] the law can be expanded to include other types of public uses of sound recordings as well. A full public performance right would be most effective if established through amendment to the Copyright Act.

The copyright amendment should be in the form of a compulsory license and require the payment of royalties to the copyright owner of the sound recording and the recording artist on a basis similar to that afforded the music publisher and songwriter of the musical composition. The uses that trigger the royalty obligations should mirror those uses of recorded music for which the music publisher and songwriter of the musical composition are currently receiving public performance royalties.[235] This would rightfully exclude live performances by bands and vocalists when the sound recording is not used. Moreover, the compulsory license should not apply to use of music for dramatic purposes, or when it is used to create derivative works. Under current law a license must be obtained directly from the copyright owner for such use, and this requirement should remain.[236]

Recognizing the past objections of the public performance societies to a full public performance right for sound recordings,[237]

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[232] *See supra* notes 144-50 and accompanying text.
[233] *See supra* notes 151-57 and accompanying text.
[234] *Id.*
[235] This would include the exemptions provided for in 17 U.S.C. § 110, but should exclude the provisions of §110 (5) (B) for the reasons set forth in Section VI of this Article.
[236] The license required for dramatic use and derivative use for example as part of the motion picture soundtrack is referred to in the music business as a "master use" license.
[237] *See supra* note 39 and accompanying text.

the copyright amendment should authorize a different collection organization. The RIAA would be ideal since it not only advocates worldwide on behalf of the sound recording copyright owners and recording artists, but also has experience in royalty collection. The RIAA's Soundexchange[238] could be used to collect and disburse the new royalty payments in addition to those it administers under the DPRA and DMCA. This expanded authority to collect and disburse the monies collected under a full public performance right would be economically sound and appropriate. Although there could be initial start-up cost savings by having the royalties collected by ASCAP, BMI, or SESAC, the historical opposition to the right would likely raise questions as to philosophical alignment and commitment in carrying out such new responsibilities.

The issue that is likely to be key is that of royalty rate. The major opposition to date against the full public performance right for sound recordings centers on the additional cost that a music user would incur, or alternatively, the reduction to the amount that the copyright owner and songwriter of the musical composition would receive.[239] One approach to dealing with this sensitive issue is to use a rate court to establish the royalty rates. This is the method used for licensees of ASCAP.[240] Under this model the controversial political lobbying, which has also been a major factor in Congress's denial of a full public performance right, would be avoided.

Another recommendation is to have the new royalty obligation applied prospectively. Additionally, the royalty obligation could be set to take effect one year after the initial public release of each sound recording. The drawback to a one-year safe harbor provision is that record companies and recording artists will likely balk at the idea, and other countries may view this provision as inconsistent with their policy of requiring payment of public performance

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[238] *See supra* note 64 and accompanying text.

[239] *See supra* notes 51-53 and accompanying text.

[240] *See* NIMMER ON COPYRIGHT, *supra* note 173, at 8.19; *see also* American Society of Composers, Authors and Publishers v. Showtime/The Movie Channel, Inc., 912 F.2d 563 (2d Cir. 1990). The purpose of the rate court is set forth in the appendix to the opinion. The court notes that the rate court serves to "minimize the likelihood that ASCAP's evident market leverage may be exerted to obtain unacceptably inflated price levels for its licenses." *Id.* at 576. BMI and SESAC are not governed by a rate court.

royalties concurrent with the first release of a record. Congress could float the one-year safe harbor proposal past the important foreign countries to see if it would be accepted or rejected. If reciprocal treatment will still be denied, then the one-year safe harbor provision could be abandoned. Tracking public performances for the purpose of identifying the sound recordings entitled to payment could be done by the same methods used by ASCAP and BMI. If greater certainty were required, then the digital technology that SESAC uses would work best.[241]

An alternative approach suggested by one commentator is to use a pure market solution.[242] Leaving the solution to the marketplace may seem attractive on the surface, since it would not require governmental involvement or an amendment to the Copyright Act, but this model would require each music user to extract a public performance right from each sound recording copyright owner. Seeking out a license from each copyright owner for a negotiated fee would not be practical.[243] It is for this reason that ASCAP, BMI, and SESAC exist.

A pure market approach also fails to recognize a fact of life in the music industry: the significant difference in bargaining power between the parties. Under such a model, there could also be reduced access to recorded music due to overpricing of license fees or failure of the parties to reach agreement. Additionally, broadcasters could insist on paying no royalty or low rates in exchange for playing certain songs. This would defeat the purpose of the public performance royalty. The potential problems and uncertainty of a pure market approach, coupled with the likelihood that more costs would arise for both the industry and consumer in the

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[241] SESAC claims it is "the technological leader among the nation's performing rights organizations, SESAC was the first p.r.o. to employ state-of-the-art Broadcast Data Systems (BDS) performance detection. SESAC utilizes BDS in conjunction with cutting edge ConfirMedia Watermarking technology, providing SESAC's writer and publisher affiliates with the fastest, most accurate royalty payment available anywhere. The system required to compute compensation is based on many factors, including music trade publication chart activity, broadcast logs, computer database information, and state-of-the-art monitoring", *available at* http://www.sesac.com/aboutsesac/aboutsesac1.html (last visited Jan. 15, 2002).

[242] *See* O'Dowd, *supra* note 40, at 270.

[243] *Id.*

long run, does not bode well for leaving the solution to the marketplace. As explained earlier, a compulsory licensing model with a royalty rate set by law would be the most effective and fair approach.

All in all, to be a successful copyright amendment, it must be crafted to (1) maintain the economic incentive for recording artists and record companies to continue to create and release sound recordings; (2) maintain the level of royalties currently enjoyed by songwriters and music publishers; (3) prevent the additional costs to the broadcasters and other public venues from being excessive; and (4) accomplish the foregoing by authorizing the RIAA to collect the statutory license fees, set by a rate court, under a compulsory licensing model.

CONCLUSION: TIME TO FACE THE MUSIC

When considering the foregoing arguments for and against a full public performance right for sound recordings, the need for an amendment to the Copyright Act granting the right is compelling. Congress not only has the constitutional authority, but also the justification to do so in light of international treaties, historical development of the copyright laws, demands arising out of current technology, and the international call for global harmonization.

Although this may be easier said than done, nevertheless it needs to be done. Creating a compulsory license model would be the most effective approach and should prove fair to all that music impacts. Though the powerful lobbying efforts of the broadcast industry and performing rights organizations will likely continue, such opposition will face an ever-growing opponent, both domestically and internationally. It is important that the change be accomplished on Congress's own initiative. It would be unfortunate if the only way to get Congress to do this were by forcing the issue through tougher international treaties.[244] Compelling Congress to amend the

[244] *See Hearings on the WIPO Copyright Treaties Implementation Act before the House Subcomm. on Courts and Intell. Prop. of the Comm. On the Judiciary,* 105th Cong. (1997) (testimony of Bruce Lehman before the House Subcommittee on Courts and Intellectual

copyright laws by external foreign force has not been overly successful in the past.[245]

It has taken almost a century for Congress to recognize a public performance right in sound recordings, albeit partial. Congress should now work diligently to make up for lost time and lost opportunity, and adopt the full public performance right for recorded music. The call for reciprocal treatment of this right is loud and clear both in the U.S. and abroad. With entertainment the number one export of the United States, we must stop dancing around this important issue and get in step with the movement toward global harmonization of this valuable intellectual property right.

Property, during which he opined that a treaty obligation may be the only way to compel Congress to amend the Copyright Act to recognize a full public performance right for music), *available at* http://www.house.gov/judiciary/40001.htm (last visited Feb. 4, 2002).

[245] *See* Statement of Marybeth Peters, *supra* note 28, at 12. The Honorable Ms. Peters quoted the President of the RIAA at a House Oversight hearing who stated "[I]ronically, the United States, who has the most to gain, was recently forced to block an agreement in the GATT that would have created a new international obligation to extend public performance rights to sound recordings. This same foot shooting has occurred in drafting a model law in the World Intellectual Property Organization in the past." *Id.*