Case Western Reserve Law Review

Volume 28 | Issue 3

1978

Performers' Rights under the General Revision of Copyright Law

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PERFORMERS' RIGHTS UNDER THE GENERAL REVISION OF COPYRIGHT LAW*

The General Revision of Copyright Law of 1976 provides public performance rights only to composers. These rights permit a composer to control and commercially exploit broadcasts and other public performances of his music or the use of his music on records. Whether performance rights should be extended to performers is now being considered by Congress. The author discusses the new federal copyright law and evaluates the economic impact of a performance right for performers on the broadcast industry. He concludes that both equitable and legal considerations argue for the creation of such a right.

THE GENERAL REVISION of Copyright Law of 1976[1] revamped the entire system of copyright law which had remained substantially unchanged since the enactment of the Copyright Act of 1909.[2] The studies and hearings culminating in the 1976 Revision spanned more than two decades.[3] The 1976 Revision updates the protection afforded intellectual property rights in light of the communications revolution of the twentieth century; in large part it simply continues provisions that had been enacted five years earlier[4] to protect sound recordings from widespread piracy by those who marketed records and tapes of recordings without authorization.[5] While the unauthorized reproduction of sound recordings is now regulated, no restrictions are imposed upon their commercial use. The principal commercial users of sound recordings—radio and television stations and jukebox operators—do not compensate performers and record producers for their creative efforts.[6] The purpose of this Note is not only to evaluate the present law but to analyze the equitable and economic arguments concerning the creation of a performance right in sound recordings.

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*This Note is an abridged version of a paper submitted to the 1977 Nathan Burkan Memorial Competion.

1. 17 U.S.C. §§ 101–810 (1976) (effective Jan. 1, 1978) [hereinafter cited as 1976 Revision].

2. Copyright Act of 1909, Pub. L. No. 60–349, 35 Stat. 1075.

3. Congress appropriated funds for a study of copyright revision by the Copyright Office in 1954. Legislative-Judiciary Appropriations Act of 1955, Pub. L. No. 83–470, 68 Stat. 455 (1954).

4. Act of Oct. 15, 1971, Pub. L. No. 92–140, 85 Stat. 391. The courts had previously refused to extend copyright protection to sound recordings. Capital Records, Inc. v. Mercury Records Corp., 221 F.2d 657 (2d Cir. 1955); RCA Mfg. Co. v. Whiteman, 114 F.2d 86 (2d Cir.), *cert. denied*, 311 U.S. 712 (1940).

5. 1976 Revision, 17 U.S.C. § 102(a)(7) (1976).

6. *See* text accompanying note 41 *supra*.

I. THE 1976 REVISION

The copyright clause of the Constitution grants Congress the power "to promote 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."[7] Congress implements this policy by granting the artist a temporary, limited monopoly over certain "original works of authorship" which have become fixed in a "tangible medium of expression."[8] Fixation is broadly defined in the statute,[9] and by its terms includes phonorecords,[10] the form of fixation most often used for musical works.

This Note deals with two categories of works: "musical works, including any accompanying words,"[11] and "sound recordings."[12] The term "musical works" is not defined in the 1976 Revision because it has a fairly settled meaning[13] and because the fixed form of the work no longer has any bearing on the copyrightability of a musical work.[14] The 1976 Revision defines the term "sound recordings" as

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7. U.S. CONST. art. I, § 8, cl. 8. According to Professor Kaplan: "Copyright law wants to give any necessary support and encouragement to the creation and dissemination of fresh signals or messages to stir human intelligence and sensibilities: it recognizes the importance of these excitations for the development of individuals and society." B. KAPLAN, AN UNHURRIED VIEW OF COPYRIGHT 74 (1967).

8. 1976 Revision, 17 U.S.C. § 102(a) (1976).

9. 1976 Revision § 101 provides:

> A work is "fixed" in a tangible medium of expression when its embodiment in a copy or phonorecord, by or under the authority of the author, is sufficiently permanent or stable to permit it to be perceived, reproduced, or otherwise communicated for a period of more than transitory duration. A work consisting of sounds, images, or both, that are being transmitted, is "fixed" for purposes of this title if a fixation of the work is being made simultaneously with its transmission.

10. Phonorecords is another term defined by the statute.

> "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 the 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.

Id.

11. *Id.* § 102(a)(2).

12. *Id.* § 102(a)(7).

13. H.R. REP. NO. 94-1476, 94th Cong., 2d Sess. 53, *reprinted in* [1976] U.S. CODE CONG. & AD. NEWS 5659, 5666-67; S. REP. NO. 94-473, 94th Cong., 1st Sess. 52 (1975).

14. H.R. REP. NO. 94-1476, 94th Cong., 2d Sess. 53, *reprinted in* [1976] U.S. CODE CONG. & AD. NEWS 5659, 5667; S. REP. NO. 94-473, 94th Cong., 1st Sess. 52 (1975). Under the Copyright Act of 1909, a musical work had to be reduced to a written musical composition in order to be copyrightable. Copyright Act, ch. 320, § 5(e), 35 Stat. 1076 (1909). The 1976 Revision allows a composer to use a sound recording of his work as the copyrightable fixation. 1976 Revision, 17 U.S.C. § 102(a)(7) (1976).

"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."[15] Note the distinction between the copyrighted sound recording and the "material object" which embodies the sound recording. Section 202 emphasizes this distinction:

> Transfer of ownership of any material object, including the copy or phonorecord in which the work is first fixed, does not of itself convey any rights in the copyrighted work embodied in the object: nor, in the absence of an agreement, does transfer of ownership of a copyright or of any exclusive rights under a copyright convey property rights in any material object.[16]

The copyright law protects a work of authorship comprised of sounds. These sounds have become fixed on a material object, but the object itself carries with it no rights. It is necessary to keep the sound recording, the material object, and the musical work separate when analyzing copyright protection under the 1976 Revision.

The author of a musical work (composer) as a copyright owner[17] is granted a bundle of rights which he may transfer or retain as he wishes. These rights are described in section 106:

> Subject to sections 107 through 118, the owner of copyright . . . has the exclusive rights 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, . . . to perform the copyrighted work publicly;
>
> (5) in the case of literary, musical, dramatic, and choreographic works, . . . to display the copyrighted work publicly.[18]

The composer usually contracts with a publishing company to market his composition. Normally, the composer will grant to the

15. *Id.* § 101.
16. *Id.* § 202.
17. Copyright ownership vests intially in the author of a work. *Id.* § 201.
18. *Id.* § 106.

publisher the copyrights to make and distribute the sheet music of the composition and to license reproduction of the music by mechanical means.[19] The publisher will, in turn, grant a mechanical license to a record producer. Under the contract, the composer will customarily receive three to five cents on each copy of the sheet music sold in the United States and Canada and half the royalties paid to the publisher for sales in other countries. The composer and the publisher will share in the mechanical license fees the publisher collects from the licensed record producer.[20] The composer may also grant a percentage of his performance copyright to the publisher.[21]

Anyone may obtain a license to make and distribute phonorecords of the composition after the composer has authorized the initial public distribution.[22] Section 115, the compulsory licensing provision, limits the exclusive rights provided in clauses (1) and (3) of section 106, for making and distributing phonorecords.[23] A copyright owner of the musical work who is identified in the registration document filed by the compulsory licensee, or in the records of the copyright office, is entitled to receive royalty payments under the compulsory license.[24] The compulsory license

> includes the privilege of making a musical arrangement of the work to the extent necessary to conform it to the style or manner of interpretation of the performance involved, but the arrangement shall not change the basic melody or fundamental character of the work, and shall not be subject to protection as a derivative work under this title, except with the express consent of the copyright owner.[25]

Thus, the derivative right provided by clause (2) of section 106 is not affected by the compulsory license provision.[26] By retaining the right to prepare derivative works, the copyright owner of the original musical work (the composer) also retains the right to any income generated by derivative works. For example, a performer and the record producer that records the performance cannot have a section 106(2) copyright in the performer's interpretation of another's composition because the

19. That is to say the rights described in § 106(1), (3) of the 1976 Revision. The composer will also transfer the right to display the work publicly. *Id.* § 106(5).

20. S. SHEMEL & M. KRASILOVSKY, THIS BUSINESS OF MUSIC 124–26 (1971).

21. *Id.* at 130.

22. 1976 Revision, 17 U.S.C. § 115(a)(1) (1976).

23. Congress included a compulsory licensing provision in the Copyright Act of 1909 because it was concerned that "a great music monopoly" might otherwise emerge. H.R. REP. No. 2222, 60th Cong. 6, 2d Sess. (1909).

24. 1976 Revision, 17 U.S.C. § 115(c)(1) (1976).

25. *Id.* § 115(a)(2).

26. A composer's derivative right would also remain unchanged if he voluntarily granted a license and did not transfer his derivative right. *Id.* § 106(2).

composer has the derivative right to his original musical work. Nevertheless, the performer and the record producer may qualify as owners of a copyright in a sound recording under section 114.

The owner of a copyright in a sound recording has only three of the five section 106 exclusive rights enjoyed by the copyright owner of the musical work: the rights to (1) reproduce, (2) prepare derivative works, and (3) distribute to the public copies of the sound recording.[27] Although the section 106(2) right to prepare derivative works applies to sound recordings, clause (b) of section 114 limits this right "to the right to prepare a derivative work in which the actual sounds fixed in the sound recording are rearranged, remixed, or otherwise altered in sequence or quality."[28] This caveat protects the composer's 106(3) derivative right while permitting the record producer to adapt the composition electronically.

Copyright protection is limited to "original works of authorship,"[29] and copyright vests initially in the author of the work.[30] The author of a sound recording must, therefore, be identified. The House and Senate Reports indicate that both the performer and the record producer may have copyrightable interests in a sound recording:

> The copyrightable elements in a sound recording will usually, though not always, involve "authorship" both on the part of the performers whose performance is captured and on the part of the record producer responsible for setting up the recording session, capturing and electronically processing the sounds, and compiling and editing them to make the final sound recording. There may, however, be cases where the record producer's contribution is so minimal that the performance is the only copyrightable element in the work, and there may be cases (for example, recordings of birdcalls, sounds of racing cars, et cetera) where only the record producer's contribution is copyrightable.[31]

A composer-performers artistry would, a fortiori, constitute an original work. Moreover, a performer's rendition of another's musical work should easily meet the originality requirement.

The performer's contribution to the musical experience was recognized by Judge Learned Hand even before Congress extended copyright to sound recordings. Judge Hand, dissenting in *Capital Records v. Mercury Records Corp.*,[32] recognized that the quantum of origi-

27. *Id.* § 114(a).
28. *Id.* § 114(b).
29. *Id.* § 102(a).
30. *Id.* § 201(a). *See* note 17 *supra* and accompanying text.
31. H.R. REP. NO. 94–1446, 94th Cong., 2d Sess. 51, *reprinted in* [1976] U.S. CODE CONG. & AD. NEWS 5659, 5669; S. REP. NO. 94–473, 94th Cong., 1st Sess. 53–54 (1975).
32. 221 F.2d 657 (2d Cir. 1955).

nality in a performance (separate and distinct from the composition) is sufficient to qualify it for copyright protection under the Constitution if Congress chose to enact such protection:

> [A] musical score in ordinary notation does not determine the entire performance, certainly not when it is sung or played on a stringed or wind instrument. Musical notes are composed of a "fundamental note" with harmonics and overtones which do not appear on the score. There may indeed be instruments—e.g. percussive—which do not allow any latitude, though I doubt even that; but in the vast number of renditions, the performer has a wide choice, depending upon his gifts, and this makes his rendition pro tanto quite as original a "composition" as an "arrangement" or "adaptation" of the score itself, which §1(b) makes copyrightable.[33]

Under this view, every instrumental performance contains enough originality to qualify the sound recording for copyright protection. On the other hand, as the House and Senate Reports suggest, non-human performances (such as "recordings of bird calls, sounds of racing cars, et cetera") may be copyrightable only by the record producer when the editing constitutes the sole original contribution.[34] Absent an original contribution by the record producer, the instrumental performers will have the sole copyrightable interest in the sound recording.

Customarily, the performer's copyright in the sound recording will be bargained away when he enters into a contract with the record producer. The performer will then be making the record "for hire" and the employer-record producer will be the copyright owner.[35] In exchange for his interest, the performer will receive royalty payments from the record producer. For a new performer the royalty is normally about three percent of the suggested retail list price for domestic sales of records and tapes, and about half that for foreign sales. As the performer becomes more popular, his royalty percentage increases, reaching as high as ten percent for "superstars."[36] Studio and backup musicians also work for hire and customarily receive the union scale for their performance contribution.[37]

While the copyright owner of a musical work has the exclusive

33. *Id.* at 664 (Hand, J., dissenting).

34. *Accord*, 1 M. NIMMER, NIMMER ON COPYRIGHT § 35.121 (1976).

35. Clause (b) of § 201 provides:

> In the case of a work made for hire, the employer or other person for whom the work was prepared is considered the author . . . and, unless the parties have expressly agreed otherwise in a written instrument signed by them, owns all of the rights comprised in the copyright.

1976 Revision, 17 U.S.C. § 201(b) (1976).

36. S. SHEMEL & M. KRASILOVSKY, *supra* note 20, at 2.

37. *Id.* at 52–53.

right to authorize the public performance of his work,[38] the copyright owner of a sound recording does not have the same right to control public performance of phonorecords and tapes. When a radio station broadcasts a copyrighted sound recording, for example, the composer will be compensated for his contribution,[39] but the owner of the sound recording and the performer will not be paid. Congress considered establishing a limited performance right in sound recordings, but decided the problem required further study: the Register of Copyrights, after consulting with interested parties and organizations, was to submit a report by January 3, 1978, "setting forth recommendations as to whether this section should be amended to provide for performers and copyright owners of copyrighted material any performance rights in such material."[40]

The opponents of the performance right were the primary commercial users of sound recordings—the radio and television broadcasters and jukebox owners. The radio industry portrayed itself as a partner in the creative process equal to the record producer and the performer. It argued that the air play of records was primarily responsible for increasing record sales. Moreover, radio exposure adds to the performer's popularity and increases fees for personal appearances.[41] This free promotion, the industry argued, increases compensation and stimulates

38. 1976 Revision, 17 U.S.C. § 106(4) (1976).

39. Composers' and publishers' performance fees are collected by performing-right organizations, chiefly the American Society of Composers, Authors and Publishers (ASCAP) or Broadcast Music, Inc. (BMI). ASCAP monitors random radio and television broadcasts to determine which of its members' compositions have received air time. BMI makes a similar determination by requiring selected stations to compile logs of the music they play. These statistical sampling methods are used to determine the amounts to be charged the stations and the appropriate distribution among the member composers and publishers. S. SHEMEL & M. KRASILOVSKY, *supra* note 20, at 135–52.

40. 1976 Revision, 17 U.S.C. § 114(d) (1976). On January 3, 1978, the Register of Copyrights submitted to Congress a report summarizing and analyzing data relevant to the performance right question. On March 21, 1978, the Register submitted addenda to the report. 43 Fed. Reg. 11,773–74 (1978).

41. *Proposed Amendments to the Copyright Act: Hearings on S. 1111 Before the Subcomm. on Patents, Trademarks, and Copyrights of the Senate Comm. on the Judiciary*, 94th Cong., 1st Sess. 71 (1975) (statement of Vincent T. Wasilewski). *See also* the remarks of Everett H. Erlick, Senior Vice President and General Counsel American Broadcasting Companies:

> It is a well known fact that broadcasters greatly stimulate record sales to potential buyers. Radio stations contribute immeasurably to the popularity of recordings and, therefore to the profits enjoyed by record manufacturers and performers alike. As record play provides effective advertising and creates consumer demand, it is not surprising that record companies expend considerable efforts promoting the use of their materials on the air. Unlike most advertising, which can only be descriptive of a product, radio broadcast provides the potential buyer with a precise appraisal of the product.

Id. at 89.

additional creative efforts by record producers and performers. The broadcast industry reasoned that since they were already required to pay approximately 3.5% of their net advertising receipts to composers and publishers, an additional performance-right assessment of approximately 1% would be an unfair financial burden.[42] The jukebox operators also contended that the free promotional value provided the performer and record producer was of sufficient magnitude to obviate any claim for the payment of royalties for the use of records in jukeboxes. A performance right would have added about $1.00 per jukebox to an operator's annual expenses. This amounted to approximately $450,000 per year in an industry of small businessmen.[43]

The rejection of the performance right, however, did not seem to be the result of opposition from the broadcast and jukebox industries. Rather, there was a feeling among committee members that the bill was designed mostly to benefit the few performers who received substantial air play—the superstars who were already well paid through royalties from the sales of records and tapes and live performance fees.[44]

II. ECONOMIC ANALYSIS OF THE PROPOSED PERFORMANCE RIGHT

Representative Danielson has proposed an amendment to the 1976 Revision which would require most commercial users of sound recordings to pay a royalty to performers and owners of copyrights in sound recordings.[45] Usually, the holder of the copyright in a sound recording is the record producer.[46] Under the proposed amendment, the exclusive right to control and commercially exploit the public performance of a copyrighted musical work by means of a phonorecord is separate and independent from the right to perform publicly a copyrighted sound recording.[47] Once a phonorecord of the sound recording has been distributed to the public under the authority of the copyright owner, anyone may obtain a compulsory license for the commercial use of the sound recording. The annual royalty fees for a compulsory license would be computed, at the user's option, on a per-use, prorated, or blanket basis.[48] A negotiated license may be

42. *Id.* at 72 (statement of Vincent T. Wasilewski).

43. *Id.* at 80–81 (statement of Russell Maudslez).

44. *Id.* at 29 (statement of Sen. Hugh Scott).

45. H.R. 6063, 95th Cong., 1st Sess. § 114 (1977). The proposed amendment would apply only to copyrighted sound recordings fixed on or after February 15, 1972.

46. *See* text accompanying note 35 *supra*.

47. H.R. 6063, 95th Cong., 1st Sess. § 114(b) (1977).

48. *Id.* § 114(c). Despite the statutory language which explicitly allows the user to determine how the royalty will be computed, no minimum statutory rates have been defined for royalties computed on a per-use or prorated basis. The Register of Copy-

substituted for the compulsory license. The royalty under the negotiated license, however, cannot be less than the amount which would have been received under a compulsory license.[49] Record producers would receive one-half of all royalties to be distributed and the other half would be split equally among the performers.[50] Thus, the musicians, lead singers, and backup performers involved in the recording process are to share equally in the royalties received for each record. Finally, the amendment prohibits a performer or a copyright owner of a sound recording from assigning his right to a share of the performance royalties,[51] and encourages copyright owners, performers, and copyright users to establish a private, nongovernmental entity to assume the collection and distribution functions which otherwise would be performed by the Register of Copyrights.[52]

Radio stations will be most affected financially by the proposed amendment. The radio industry has argued that the increased cost of operating a station if a performance right is implemented will cause more stations to incur losses, and as a result, investment funds will flow to other industries where yields are higher. Lack of investment support would force many stations to cease operations.[53] A study of the financial reports of radio stations licensed by the FCC during the period 1971 to 1975, however, suggests that, contrary to the claims of the radio industry, it can afford the added expense of a performance copyright without any significant impact on profits or the number of stations in operation.[54] Moreover, the proposed amendment attempts to meet this argument by exempting broadcasters with small profits from the royalty payments.[55]

The argument of the broadcast industry implies that profit maximization is a station's ultimate goal. Station operators, however, may not

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rights is empowered to prescribe by regulation a standard formula for computing the alternative prorated rate. *See, e.g.*, *id.* § 114(c)(4)(A)(iii). The blanket royalty rates vary from $250 yearly for a radio station with gross advertising receipts of more than $25,000 but less than $100,000 a year, to 1% of yearly net advertising receipts for a radio station with gross receipts from advertising of more than $200,000 a year. *Id.* § 114(c)(4)(A)(i)–(iii). Television royalty charges would range from $750 to $1,500 yearly. *Id.* § 114(c)(4)(B)(i)–(ii). Background music services would pay 2% of gross receipts from subscribers or an alternative prorated rate. *Id.* § 114(c)(4)(C). Jukebox operators would be exempted from the amendment. *Id.* § 114(c)(4)(D).

49. H.R. 6063, 95th Cong., 1st Sess. § 114(c)(4) (1977).

50. *Id.* § 114(e)(3)(A).

51. *Id.* § 114(e)(3)(B).

52. *Id.* § 114(f).

53. Werner, An Economic Impact Analysis of a Proposed Change in the Copyright Law, at ix (Prepared for the Copyright Office, U.S. Library of Congress, under Contract No. A77–200) (submitted to Congress on Jan. 3, 1978).

54. *Id.* at xii.

55. H.R. 6063, 95th Cong., 1st Sess. § 114(d) (1977).

be concerned with maximizing profits because other factors apparently exist which make profit maximization less important. For example, a station owner-operator may prefer receiving income in the form of a higher salary rather than dividends from earnings and profits in order to avoid higher corporate taxes. There may also be important tax advantages for a station operator who owns other communication or media firms to charge joint production costs solely to the radio station.[56] Financial data indicate that there may in fact be appreciable "hidden" profit in the operation of a radio station. Financial reports submitted to the FCC make substantial use of the category "other administrative expenses" which excludes such costs as salaries, depreciation, interest, and most operating costs. This may be a device to disguise profit.[57] When "other administrative expenses" and payments to owners of stations are subtracted out of total broadcast expenses, the number of stations which sustained no losses over the five year period ending in 1975 increased from 40.2% to 77.0%.[58] Therefore, the financial condition of the radio broadcast industry is probably stronger than the level of reported profits would at first indicate. This point is borne out by the fact that the radio stations which repeatedly report losses do not leave the industry.[59]

In addition, the increased cost of operations resulting from a performance right can be passed onto advertising sponsors who purchase air time. Total advertising expenditures in all media usually vary directly with the Gross National Product and the level of corporate profits. Data indicates that the demand for advertising via radio is relatively inelastic. There are no good substitutes for radio advertising; therefore, the proportion of total advertising expenditures on radio should remain relatively constant.[60] This suggests that demand for radio advertising is relatively insensitive to price changes and that stations can pass on the additional expense of a performance right.

III. THE PERFORMER'S CONTRIBUTION TO THE MUSICAL EXPERIENCE

Before the role of the performer can be fully understood, the concept of "music" must be explored. Some define music in the

56. Werner, *supra* note 53, at xi–xii.

57. *Id.* at 49–50.

58. *Id.* at xii.

59. *Id.* at x.

> [O]ver the five year period, an average of less than one tenth of one percent of all stations ceased operations. Most operators wanting to divest themselves of radio broadcasting stations transfer their license with the sale of the stations. There is some evidence that over the last decade, the average capital gain from the sale of stations may have been substantial.

Id. at xi. Thus owners may take the profit out of their stations as capital gains.

60. *Id.* at 67, 128–30.

broadest possible terms. Milton Babbit has been quoted as saying: "Music is, of course, sound."[61] Frank Zappa, one of the most prolific and respected of the rock composers, has stated that: "Music is organized sound."[62] These definitions suggest myriad possibilities for sound which a composer may organize (or consciously refrain from organizing) into a musical composition. Most traditional definitions of music concentrate on the "coherent succession"[63] of sounds, or the "structurally complete and emotionally expressive compositions" formed from the combination of sounds and tones.[64] Igor Stravinsky's definition of music is more traditional, and seems to fit copyright theory more closely:

> Music is the sole domain in which man realizes the present. By the imperfection of his nature, man is doomed to submit to the passage of time—to its categories of past and future—without ever being able to give substance, and therefore stability, to the category of the present.
>
> The phenomenon of music is given to us with the sole purpose of establishing an order in things, including, and particularly, the coordination between *man* and *time*. To be put into practice, its indispensable and single requirement is construction. Construction once completed, this order has been attained, and there is nothing more to be said. . . . One could not better define the sensation produced by music than by saying that it is identical with that evoked by contemplation of the interplay of architectural forms. Goethe thoroughly understood that when he called architecture petrified music.[65]

The fixation of the music at one point in time and the transmission of the fixation at another point in time requires a coordination of a composer's creative process, a performer's talented execution, and an audience's contemplation in such a form that both time and space converge in the realization of the present.[66]

The composer is the supplier of musical material. What is the role of the performer, and how should the copyright law distinguish between the contributions of the composer and the performer? Stravinsky explains the traditional view of the performer:

> [M]usic should be transmitted and not interpreted, because interpretation reveals the personality of the interpreter

61. Keziah, *Copyright Registration for Aleatory and Indeterminate Musical Compositions*, 17 BULL. COPYRIGHT SOC'Y 311, 330 (1970).

62. Live performance at Musicarnival, Cleveland, Ohio, Aug. 18, 1968.

63. Keziah, *supra* note 61, at 330.

64. 2 WEBSTER'S NEW WORLD DICTIONARY OF THE AMERICAN LANGUAGE 969 (1960).

65. I. STRAVINSKY, AN AUTOBIOGRAPHY 54 (1936).

66. *Id.*

> rather than that of the author, and who can guarantee that such an executant will reflect the author's vision without distortion?
>
> An executant's talent lies precisely in his faculty for seeing what is actually in the score, and certainly not in a determination to find there what he would like to find.[67]

It can be argued that no matter how complete the composer's notation, even the most accomplished "executants" will disagree concerning the execution which the composer intended. The sound recording has helped to standardize musical performances offering the composer an audible fixation of the sounds he envisions rather than the necessarily imperfect medium of written notation. Stravinsky recognized the advantage of the new medium and often conducted his own music on records for the express, aesthetic purpose of fixing his own intentions for future musicians to follow.[68] This distinction between composer and performer alots the exercise of imagination and construction to the composer and the use of instrumental technique and reading skill to the performer. The sheet of music provides not only the common ground between the two roles but also the boundary because the composition must necessarily precede the performance.

According to Stravinsky, the third and final stage of the artistic experience is communication with the audience:

> [A]rt postulates communion, and the artist has an imperative need to make others share the joy which he experiences himself. . . .
>
> Unfortunately, perfect communion is rare, and the more the personality of the author is revealed the rarer that communication becomes. . . .
>
> The author's need for communion is all-embracing, but unfortunately that is only an unattainable ideal, so that he is compelled to content himself with something less.[69]

The importance of this communion to Stravinsky suggests that he had greater esteem for the executant than his very conservative description of the roles of composer and performer[70] would suggest. The composer must rely on the executants, including both conductor and musicians, to effect the communion between composer and audience. Thus, the performer is more than a mere executant.

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67. *Id.* at 75.

68. Is it not amazing that in our times, when a sure means which is accessible to all, has been found of learning exactly how the author demands his work to be executed, there should still be those who will not take any notice of such means, but persist in inserting concoctions of their own vintage?

Id. at 150.

69. *Id.* at 175.

70. *See* text accompanying note 67 *supra*.

The Stravinsky aesthetic represents a traditional, conservative view of the roles of the composer, performer, and audience. At the opposite extreme lies the modern aesthetic which has resulted in avant garde, aleatoric, and chance music.[71] An aleatoric piece will often consist of a bare, skeletal score from which the performer improvises as he performs. Such a piece may also incorporate a degree of audience participation such as applause or verbal stimuli. The roles of composer, performer, and audience blur together, occasionally to the point of nonrecognition.

Jazz lies somewhere between these two extremes. Musicologist William Austin writes:

> There can be no single outstanding composer in this style, because, first, an essential part of it is the responsibility of performers to improvise, that is to compose as much as they can while playing in reference to a nucleus of traditional harmony that they call a piece of music, and because, moreover, they improvise in ensembles, not merely as soloists.[72]

The person who supplies the "nucleus" or the original song occupies the traditional role of the composer. The performers use the sheet of music as a basis for improvisation rather than as the immutable command of the composer. The improvisation contains all the essentials of a composition; it has technique and spontaneous intuition.

Musical authorities recognize that the performer makes an important and essential contribution to the musical event. A composer's creative work is necessarily incomplete; a performer must transform the written score into sound so that it may be enjoyed by the audience. The performer's interpretation adds something new and valuable to the composition which is as important as the contribution made by the composer. With regard to some types of music, the performer's interpretative contribution may be even more musically significant than the creative work of the composer. Therefore, the performer should receive commensurate compensation, and a performance right should be enacted to protect his contribution.

IV. THE ARGUMENT FOR A PERFORMANCE RIGHT

The sound recording is the only creative work performed that has been denied a performance right and corresponding royalty under the

71. *See generally* Goldstein, *Copyrighting the New Music*, 17 BUFFALO L. REV. 355 (1968); Keziah, *supra* note 61; Savelson, *Electronic Music and Copyright Law*, 11 BULL. COPYRIGHT SOC'Y 144 (1964).

72. W. AUSTIN, MUSIC IN THE 20TH CENTURY FROM DEBUSSY THROUGH STRAVINSKY 181 (1966).

1976 Revision. Composers have the right to control and exploit the commercial use of their creations. Curiously, the broadcast industry, the major opponents of a performance right for performers and record producers, have a performance-type right in their own copyrighted programs under the 1976 Revision. The Revision provides that a cable system must obtain a compulsory license when making a secondary public transmission of a primary transmission made by a broadcast station licensed by the FCC (or by the Canadian or Mexican governments). The broadcast station receives a payment by the cable system user under the compulsory license.[73] When it is in its financial interest, the broadcast industry will support the principle that the creator of a work should be compensated by those who use the work. On the other hand, the broadcast industry opposes a performance right for performers and record producers because it is an additional expense. This is clearly an illogical and untenable position.

The lack of a performance right contradicts a major policy underlying copyright law—that one who uses another's creative work for profit must compensate the creator of the work. Copyright creates a market for valuing artistic work. Joseph Traubman explains: "Copyright . . . is the principal mechanism, provided by our legal system, for the structure of the market in connection with the dissemination of creative works of literary and artistic nature."[74] The market treats a work of art as property. Criticism and other qualitative evaluation may create a demand for a work, and help place a price on the work. The market, however, has no interest in the artistic merits of a work except for economic purposes:

> Copyright invests the creator and his assigns with the same bundle of rights, . . . regardless of the degree of quality of the work from any point of view, so long as the irreducible minima of originality and tangibility are there. Copyright only structures the market; it does not create the market.[75]

It is the performer as the communicator between the composer and the public who creates the market for the musical work.[76] As a performer's popularity rises, his record sales will also increase. Therefore, a composer will seek to license a record producer which has contracts with commercially successful artists. After the sales of a record begin to taper off, the composer will still receive royalties for the broadcast of his work, however, the performer who created the market for the work will not be compensated.

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73. 1976 Revision, 17 U.S.C. § 111(c)–(d) (1976).
74. 1 J. TRAUBMAN, PERFORMING ARTS MANAGEMENT AND LAW 165 (1972).
75. *Id.* at 166.
76. *See* part III *supra*.

The financial return that the performer expects from his creative efforts is usurped by the radio broadcast industry and the other commercial users of sound recordings. Without the creative efforts of the performer, the radio broadcast industry would cease to exist because sound recordings make up approximately seventy-three percent of radio programming.[77] Radio stations use recordings in order to build audiences, advertising, and profits; not to promote record sales. The air play of a popular performer's records will attract a large broadcast audience; the size of the audience determines how much a broadcaster can charge for advertisements. As the copyright law presently stands, the performer who attracts the broadcast audience which produces the broadcast revenues does not get paid.[78] Instead, in effect, the radio broadcast industry receives a free programming inventory at the expense of the performer. This anomaly affronts the policy of protection for creative works which the copyright law seeks to implement.

Vocalists, musicians, and other performing artists are especially disadvantaged by the lack of a performance right since performers often do not receive royalty payments from the record producers. Most contracts between the record producer and the performer provide that the recording costs will be recouped by the producer from the royalties payable to the performer. In other words, until the record producer recovers its recording costs, the performer will not be paid for the records and tapes which are sold to the public.[79] A new performer who receives a low royalty percentage will have to wait longer to be paid than an established artist with a high royalty percentage (assuming that recording costs are approximately equal). Moreover, the record producer will recoup its costs for all the performer's recordings made within a single accounting period from the royalties earned by the performer for that period. Therefore, a performer's successful recordings end up paying for the costs of his commercial failures.[80] Given the fact that few of the thousands of recordings made each year ever reach the "hit" category and become profitable, the performer seldom sees a royalty payment for his endeavors.[81] Only the rare superstar is able to demand a recording contract which does not contain a recoupment provision.[82]

77. Kenton, *The Recording Artists' Case for Copyright Revision*, 4 J. BEVERLY HILLS B.A. 21, 25 (Jan. 1970).

78. Programming consisting of recorded music produces approximately 81% of radio revenue. *Id.*

79. S. SHEMEL & M. KRASILOVSKY, THIS BUSINESS OF MUSIC 8-9 (1971).

80. *Id.*

81. "In a survey of 1449 recording artists under contract [during 1969] to a variety of record companies, only 13.8% received sufficient royalties to offset recording costs. The remaining 86.2% were paid the minimum union scale." Kenton, *supra* note 77, at 25.

82. S. SHEMEL & M. KRASILOVSKY, *supra* note 79, at 9.

Composers fare much better than performers with regard to payments made to them for the mechanical rights to their creations. Under a mechanical license, the composer will receive a royalty for each record or tape sold.[83] Thus, the record producer cannot recover its costs from the royalties earned by the composer. This compensation procedure along with the performance right puts the composer in a better financial situation than the performer. Yet, without the contribution of the performer, the composer would be unable to commercially exploit his creation.

V. THE ADVANTAGES OF A PERFORMANCE RIGHT

A performance right in sound recordings for performers would stimulate interest in musical careers and promote musical quality. The United States Department of Labor projects that the only increase in employment opportunities for performers will be in the video cassette and prerecorded music area.[84] The Labor Department predicts that teaching rather than performing presents more opportunity because of the rise of interest in music as an avocation.[85] Performers are also among the lowest income groups.[86] Because of the bleak outlook for employment for performers, Stan Kenton, president of the National Committee for the Recording Arts, is apprehensive about the quality of future performers:

> A job shortage not only means unemployment today, it poses a long term threat to the future of music. The old hereditary links in music are being broken. At the stage when parents must decide whether or not to invest in a musical training for their children, they now often hesitate, even if they themselves are musicians, because there is no certainty that the profession will offer a secure future.
>
> This problem is a matter of concern to both broadcasters and the recording industry, who for their part have a natural interest in maintaining the supply of highly qualified performers. The United States Department of Labor pessimistically advises young artists to utilize their talents as a hobby, rather than a profession.
>
> . . . Part-time attention to as demanding a field as the performing arts cannot produce the excellence which only a profession can offer.[87]

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83. *Id.* at 126–27.

84. *See* Extracts from 1972–1973 Report by the United States Department of Labor on Employment Outlook for Performing Arts Occupations, *reprinted in* S. SHEMEL & M. KRASILOVSKY, MORE ABOUT THIS BUSINESS OF MUSIC 125–26 (1974).

85. *Id.* at 127–29.

86. 1 1970 CENSUS OF POPULATION, § 2, table 227 (category: writers, artists and entertainers).

87. Kenton, *supra* note 77, at 22–24.

The institution of a performance right would encourage more artists to devote their full time to musical endeavors, thereby improving musical quality.

Classical music conceivably would stand to benefit more, proportionately, from a performance right than popular music such as rock, soul, or country and western. Classical music is primarily enjoyed by a middle age group which traditionally has not purchased records in the large quantities that younger people have.[88] Consequently, very few classical recordings return a profit for their producers.[89] The royalty from a performance right would be relatively larger with respect to classical records sales than such a royalty would be with regard to popular record sales. Theoretically, this would encourage the creation and performance of better quality classical music.[90]

VI. CONCLUSION

The arts have played an important role in the cultural development of America. The importance of this role is reflected in the protection afforded the arts by the copyright law which seeks to foster artistic improvement by enabling the creator to control the commercial use of his creation. In the area of music it is the copyright law that structures the market relationships between the composer, publishing house, record producer, and performer. The 1976 Revision, however, did not create a performance right in sound recordings. This ignores the importance of the performer's role in the musical experience, and thwarts the basic policy underlying copyright law—that those who make use of the creative work of another should compensate the creator for this privilege. In addition, the major commercial user of sound recordings, the broadcast industry, can well afford the additional expense of a performance right. All of these factors argue in favor of a performance right in sound recordings. Granting such protection would be an appropriate way for Congress to acknowledge the important contribution the performer makes to the musical experience and to music in America.

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88. Bard & Kurlantzick, *A Public Performance Right in Recordings: How to Alter the Copyright System Without Improving It*, 43 GEO. WASH. L. REV. 152, 184 (1974).

89. "In an industry-wide study it was found that only 40% of all popular albums, 27% of all singles, and only 13% of all classical records, sold enough copies to make a profit." Kenton, *supra* note 77, at 25.

90. Nevertheless, the revenues generated by a performance right would probably not have any appreciable economic impact. It has been estimated that classical record producers would earn only about $59,000 from a performance right. Bard & Kurlantzick, *supra* note 88, at 186.