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## Hitting the Right Notes: The Need for a General Public Performance Right in Sound Recordings to Create Harmony in American Copyright Law

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# Hitting the Right Notes: The Need for a General Public Performance Right in Sound Recordings to Create Harmony in American Copyright Law

Laura E. Johannes\*

## INTRODUCTION

In 1965, folk music duo Simon and Garfunkel rose to fame with their hit song, “The Sound of Silence.”<sup>1</sup> Paul Simon began writing the song in 1963, ultimately finishing it in February 1964.<sup>2</sup> He and Art Garfunkel recorded it together later that year.<sup>3</sup> The song went on to receive significant airplay on the radio and on television; since its release, “The Sound of Silence” has been broadcast more than five million times.<sup>4</sup> Put differently, if a single radio station were to play nothing but “The Sound of Silence” on a constant loop, it would take nearly thirty years to play the song five million times.<sup>5</sup> Under current American copyright law, if this hypothetical radio station operated using a traditional AM/FM broadcast, it could play “The Sound of

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1. See JAMES BENNIGHOF, *THE WORDS AND MUSIC OF PAUL SIMON 2* (2007).

2. JOSEPH MORELLA & PATRICIA BAREY, *SIMON & GARFUNKEL: OLD FRIENDS* (1991), as reprinted in *THE PAUL SIMON COMPANION: FOUR DECADES OF COMMENTARY* 9, 10 (Stacey Luftig ed., 1997).

3. *Id.*

4. *BMI Top 100 Songs of the Century*, BMI, <http://web.archive.org/web/20010712093947/www.bmi.com/awards/1999/top100.txt> (last visited May 14, 2011); see also *BMI Announces Top 100 Songs of the Century*, BMI (Dec. 13, 1999), <http://www.bmi.com/news/entry/232893>.

5. “The Sound of Silence” is three minutes and five seconds in duration. See SIMON & GARFUNKEL, *The Sound of Silence*, on *SOUNDS OF SILENCE* (Sony BMG Music Entertainment 1966). Based on this length, playing the song five million times would take approximately 29.3 years.

Silence” on repeat indefinitely without incurring any financial obligation to Art Garfunkel.<sup>6</sup> The station would not even need to seek his permission to use the recording.<sup>7</sup> Paul Simon would earn royalties as a *songwriter*, but not as a *recording artist*.<sup>8</sup>

Section 106 of the Copyright Act of 1976 establishes the exclusive rights in a work afforded to copyright owners.<sup>9</sup> In contrast to all other types of copyrightable subject matter, sound recordings are not granted a general public performance right, which would allow copyright owners to collect royalties when their works are performed publicly.<sup>10</sup> Rather, the public performance right in sound recordings is limited to digital transmissions, thereby creating an exception to the public performance right for AM/FM radio broadcasts.<sup>11</sup>

As a result, American recording artists do not receive royalties when their songs are played on the radio, either in the United States or internationally.<sup>12</sup> Even if a foreign country recognizes a public

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6. See 17 U.S.C. §§ 114(a), 106(4), 101 (2006).

7. See *id.*

8. See *id.*; John R. Kettle III, *Dancing to the Beat of a Different Drummer: Global Harmonization—and the Need for Congress to Get in Step with a Full Public Performance Right for Sound Recordings*, 12 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 1041, 1078 (2002).

9. 17 U.S.C. § 106. The exclusive rights in copyrighted works set out in section 106 are the rights:

- (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 work, 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.

*Id.*

10. See 17 U.S.C. §§ 114(a), 106(4), 101.

11. 17 U.S.C. §§ 114(a), 106(6).

12. Matthew S. DelNero, *Long Overdue? An Exploration of the Status and Merit of a General Public Performance Right in Sound Recordings*, 6 VAND. J. ENT. L. & PRAC. 181, 190–

performance right in sound recordings, its radio stations do not have to pay royalties to American artists because the United States does not recognize the right.<sup>13</sup>

This Note argues that the public performance right in sound recordings should extend to traditional AM/FM radio broadcasts. While current copyright law includes the right with respect to digital transmissions, Congress should further expand the public performance right in sound recordings, eliminating the distinctions between the technological platforms used to transmit the broadcasts. The amended legislation should require that artists be paid royalties for the public performance of their songs; however, the royalties should be reasonably priced so that the public's access to the sound recordings is not unduly burdened. Recognition of the public performance right domestically should be accompanied by some sort of international recognition of the public performance right by the United States so that American artists can collect royalties generated from foreign radio airplay.

Part I of this Note begins by describing the unequal protection given to sound recordings under current American copyright law as compared to other categories of copyrightable subject matter with respect to the public performance right. Part I.A details the establishment of copyright protection for sound recordings in the United States and the impact of radio on that process. Part I.B looks at the public performance right as it is put forward in prominent international treaties. Part I.C then briefly examines the existence of the public performance right in the United Kingdom, the European Union, and Canada. Part I.D describes the current proposed legislation that seeks to establish a public performance right in sound recordings in the United States. Part II analyzes arguments for and against the public performance right, and puts forward a potential solution through analysis of the proposed legislation.

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91 (2004).

13. *Id.* at 191.

## I. HISTORY

When listening to a song on the radio, one is actually experiencing two separate copyrightable works—a musical work and a sound recording. The musical work consists of the notes and instrumentation that the composer brings together to form melodies and harmonies, along with any accompanying lyrics.<sup>14</sup> The sound recording is the actual aggregate of vocal and instrumental sounds that one hears.<sup>15</sup> Copyright in the sound recording is separate from copyright in the underlying song. The song is a musical work—the expression of the composer.<sup>16</sup> The creators of a sound recording essentially create a derivative work of the composer’s musical work; their protectable expression is the collection of sounds they assemble in their recording.<sup>17</sup> The Copyright Act of 1976,<sup>18</sup> which provides the primary basis for modern American copyright law,<sup>19</sup> recognizes the distinction between sound recordings and musical works and affords different protections to each,<sup>20</sup> notably with regard to the public performance right.<sup>21</sup> A public performance right enables copyright

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14. Section 102 of the Copyright Act of 1976 sets out seven broad categories of copyrightable subject matter, including both musical works and sound recordings. Section 101 of the 1976 Act defines sound recordings but leaves musical works undefined. Addressing this omission, the legislative history of the 1976 Act states: “Of the seven items listed, four are defined in section 101. The three undefined categories—‘musical works,’ ‘dramatic works,’ and ‘pantomimes and choreographic works’—have fairly settled meanings.” H.R. REP. NO. 94-1476, at 53 (1976), *reprinted in* 1976 U.S.C.C.A.N. 5659, 5666–67. According to the Copyright Office, a musical work (referred to as a “musical composition”) “consists of music, including any accompanying words.” U.S. COPYRIGHT OFFICE, CIRCULAR 56A: COPYRIGHT REGISTRATION OF MUSICAL COMPOSITIONS AND SOUND RECORDINGS 1 (2009), *available at* <http://www.copyright.gov/circs/circ56a.pdf>. Additionally, the musical work “may be in the form of a notated copy (for example, sheet music) or in the form of a phonorecord.” *Id.*

15. Section 101 of the Copyright Act of 1976 states:

“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.

17 U.S.C. § 101.

16. CRAIG JOYCE ET AL., COPYRIGHT LAW § 3.01, at 195 (7th ed. 2006).

17. *Id.*

18. Copyright Act of 1976, 17 U.S.C. §§ 101–810 (2006).

19. JOYCE ET AL., *supra* note 16, § 1.03, at 195.

20. *See* 17 U.S.C. §§ 102(a), 106.

21. *Compare, e.g.*, 17 U.S.C. § 106(4) (granting a public performance right for musical

owners to collect royalties when their works are performed publicly.<sup>22</sup> Courts and commentators recognize the potential of royalties to be one of the most lucrative sources of income in the recording industry.<sup>23</sup>

*A. Development of the Radio and Its Impact on Copyright Protection in the United States*

Prior to the passage of the Copyright Act of 1976, the Copyright Act of 1909 dictated the contours of copyright law in the United States.<sup>24</sup> In 1909, common applications of radio communication

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works), with 17 U.S.C. § 106(6) (granting a public performance right in sound recordings only to “perform the copyrighted work publicly by means of a digital audio transmission”), and 17 U.S.C. § 114(a) (excluding from sound recordings the § 106(4) public performance right).

22. See 17 U.S.C § 101. According to section 101:

To “perform” a work means to recite, render, play, dance, or act it, either directly or by means of any device or process or, in the case of a motion picture or other audiovisual work, to show its images in any sequence or to make the sounds accompanying it audible.

*Id.* Section 101 goes on to define a public performance:

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.

*Id.*

23. See, e.g., *Woods v. Bourne Co.*, 60 F.3d 978, 983 (2d Cir. 1995); JÖRG REINBOTHE & SILKE VON LEWINSKI, *THE WIPO TREATIES* 1996, at 379 (2002) (positing that the performance right represents “one of the most significant sources of income from a musical composition, and potentially one of the most lucrative from the sound recording”); Kettle, *supra* note 8, at 1050–53; Kara M. Wolke, *Some Catching Up to Do: How the United States, in Refusing to Fully Sign On to the WPPT’s Public Performance Right in Sound Recordings, Fell Behind the Protections of Artists’ Rights Recognized Elsewhere in this Increasingly Global Music Community*, 7 *VAND. J. ENT. L. & PRAC.* 411, 413 (2005).

24. Copyright Act of 1909, Pub. L. No. 60-349, 35 Stat. 1075 (codified at 17 U.S.C. §§ 101–810 (1978)). Requested in 1905 by Theodore Roosevelt, the Copyright Act of 1909 represented a complete revision of the American copyright scheme to meet emerging conditions of that time period. JOYCE ET AL., *supra* note 16, § 1.03, at 20. It remained in effect until January 1, 1978, on which date the Copyright Act of 1976 took effect. *Id.*

technology had progressed little beyond Morse code.<sup>25</sup> Perceiving minimal threat to copyright owners from Morse code messages, Congress did not consider radio broadcasts when it passed the Copyright Act of 1909. In fact, Congress did not include sound recordings in the 1909 Act at all.<sup>26</sup>

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25. Bruce H. Phillips & Carl R. Moore, *Digital Performance Royalties: Should Radio Pay?*, 3 VAND. J. ENT. L. & PRAC. 169, 170 (2001). Guglielmo Marconi patented the radiotelegraph system around 1895, only fourteen years prior to the passage of the 1909 Act. Gr. Brit. Patent No. 12,039 (filed June 2, 1896) (accepted July 2, 1897), available at <http://www.radiomarconi.com/marconi/popov/pat763772.html>; SYDNEY W. HEAD, THOMAS SPANN & MICHAEL A. MCGREGOR, *BROADCASTING IN AMERICA: A SURVEY OF ELECTRONIC MEDIA* 23 (9th ed. 2001). The first transmission of human speech over the radio occurred in 1906. *Id.* at 25. In 1909, clear broadcast of speech or music over long distances using the radio was still technologically infeasible; such a transmission was not possible until the development of the amplifying vacuum tube transmitter in 1914. *Id.* at 24. When the United States entered World War I, the Navy perceived wireless as a threat, and consequently took over all commercial and amateur radio stations in the country, dismantling all except the few needed by the government. *Id.* at 25–26. Wartime pressures and a navy-imposed moratorium on patent lawsuits for radio inventions, which permitted patent, gave companies incentives to innovative new radio technologies. *Id.* at 26.

26. Copyright Act of 1909 §§ 101–810. In contrast to radio, sound recording technology was well developed by 1909. Phillips & Moore, *supra* note 25, at 170, 178 nn.2–3. Edison patented the phonograph in 1877, and by 1909, the phonograph, Gramophone, and Victrola were all commonly marketed in the United States. *Id.* at 170. Phillips and Moore suggest that Congress did not include sound recordings in the 1909 Act because (1) Congress did not think protection for sound recordings necessary, given the difficulty of copying them using technology available in 1909, and (2) Congress did not consider sound recordings to be “writings” as they interpreted Article I, Section 8, Clause 8 of the Constitution (commonly known as the Copyright Clause). *Id.* The Copyright Clause empowers Congress “[t]o 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.” U.S. CONST. art. I, § 8, cl. 8. While the 1909 Act extended copyright protection to “all the writings of an author,” sound recordings were not considered “writings” under the meaning of the 1909 Act, largely as a result of the Supreme Court’s earlier decision in *White-Smith Music Publishing Co. v. Apollo Co.*, 209 U.S. 1 (1908). See also *Digital Performance Right in Sound Recordings Act: Hearing Before the Subcomm. on Courts and Intellectual Property of the Comm. on the Judiciary*, 104th Cong. (1995) (statement of Marybeth Peters, Register of Copyrights), available at <http://www.copyright.gov/docs/regstat062895.html>. In *White-Smith*, the Court held that the perforated piano rolls used in player pianos did not constitute copies of the underlying musical work. The Court stated:

The fact is clearly established in the testimony in this case that even those skilled in the making of these rolls are unable to read them as musical compositions, as those in staff notations are read by the performer. It is true that there is some testimony to the effect that great skill and patience might enable the operator to read this record as he could a piece of music written in staff notation. But the weight of the testimony is emphatically the other way, and they are not intended to be read as an ordinary piece of sheet music, which, to those skilled in the art conveys, by reading, in playing or

After radio gained popularity as an entertainment medium in the 1920s, performers began seeking a performance right.<sup>27</sup> The Supreme Court made it clear that “the transmitting of a musical composition by a commercial broadcasting station is a public performance.”<sup>28</sup>

Congress first established the sound recording category for copyright protection with the Sound Recording Amendment Act of 1971.<sup>29</sup> Prior to this Act, only state common law or criminal statutes provided any protection for sound recordings.<sup>30</sup> Record companies were most concerned with getting more robust protection against rampant music piracy, which had increased dramatically over the previous decade.<sup>31</sup> Music piracy was such a concern for the creators of sound recordings that they were willing to accept incomplete copyright protection for sound recordings just so they could have some federal remedy against the unauthorized duplication and sale of their recordings.<sup>32</sup> The 1971 Act largely aimed to address these piracy concerns.<sup>33</sup>

Congress incorporated the 1971 Act into the Copyright Act of 1976, which remains in place today.<sup>34</sup> An initial draft of the 1976 Act included a performance right for sound recordings, but Congress

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singing, definite impressions of the melody.

Those perforated rolls are parts of a machine which, when duly applied and properly operated in connection with the mechanism to which they are adapted, produce musical tones in harmonious combination. But we cannot think that they are copies within the meaning of the copyright act.

*White-Smith*, 209 U.S. at 18.

27. Phillips & Moore, *supra* note 25, at 170–71.

28. *Buck v. Jewell-La Salle Realty Co.*, 283 U.S. 191, 197 (1931).

29. Sound Recordings Act of 1971, Pub. L. No. 92-140, 85 Stat. 391; *see also* 1 WILLIAM F. PATRY, *COPYRIGHT LAW AND PRACTICE* 73–74 (1995).

30. 1 PATRY, *supra* note 29, at 73–74.

31. JOYCE ET AL., *supra* note 16, § 3.01, at 196.

32. *Id.*

33. For example, the protection granted by the 1971 Act extends only to the copyright owner’s right to “duplicate the sound recording in a tangible form that directly or indirectly recaptures the actual sounds fixed in the recording.” 17 U.S.C. § 1(f) (Supp. 1972); *see also* 1 PATRY, *supra* note 29, at 74.

34. JOYCE ET AL., *supra* note 16, § 3.01, at 196. Congress initially authorized a copyright revision project in 1955, when it became apparent that the system in place was too flawed to repair, particularly in light of the technological advances that occurred over the forty-six years since the last major copyright law revision. *Id.* § 1.03, at 21. Congress commenced extensive hearings and reports on the subject, ultimately passing the Copyright Act of 1976 twenty-one years later. *Id.* § 1.03, at 20–22.



ultimately removed that language.<sup>35</sup> Desperate to obtain federal copyright protection for sound recordings and correctly anticipating strong objections from broadcasters, club owners, and restaurateurs who opposed the sound recording copyright in the first place, the record companies agreed to support the limitations imposed by section 114(a) of the 1976 Act in order to forestall the broadcaster's objections and promote the passage of the Act.<sup>36</sup> Sections 106(4) and 114(a) together exclude a general performance right in sound recordings.<sup>37</sup> To play a song over the radio, broadcasters must acquire a license from the composer of the underlying musical work,<sup>38</sup> and the composer receives a royalty payment.<sup>39</sup> Typically, the composer and the publisher of the musical work enter into a non-exclusive license agreement with a performing rights society.<sup>40</sup> The performing rights society then offers potential users of musical works a license to conduct a public performance.<sup>41</sup> The performing rights society collects money from these licenses, and distributes it between the

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35. Phillips & Moore, *supra* note 25, at 171–72, 179 n.29 (citing S. 111, 94th Cong. §§ 1–4 (1975)). Specifically, in 1974 the Senate removed the proposal for a public performance right in sound recordings after its inclusion threatened to defeat the passage of any revised legislation. 1 PATRY, *supra* note 29, at 85. Congress later asserted that it intended to further examine the public performance right in sound recordings. S. REP. NO. 104-128, at 357–58 (1995). The Register of Copyrights delivered a report to Congress in 1978, asserting that a public performance right would be constitutional and “entirely consonant with the basic principles of copyright law generally, and with those of the 1976 Copyright Act specifically.” *Id.* (quoting REGISTER OF COPYRIGHTS, REPORT ON PERFORMANCE RIGHT IN SOUND RECORDINGS, H.R. Doc. No. 95-15 (1978)). In spite of this endorsement, Congress decided to maintain the status quo and did not enact legislation to institute a public performance right. Phillips & Moore, *supra* note 25, at 171–72.

36. JOYCE ET AL., *supra* note 16, § 7.05, at 510–11; *see also* Phillips & Moore, *supra* note 25, at 171–72.

37. According to section 106(4), the copyright owner has the exclusive right to do and to authorize “in the case of literary, musical, dramatic, and choreographic works, pantomimes, and motion pictures and other audiovisual works, to perform the copyrighted work publicly.” 17 U.S.C. § 106(4). Section 114 states: “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).” *Id.* § 114(a).

38. *See id.* § 106.

39. JOYCE ET AL., *supra* note 16, § 7.05, at 510.

40. Kettle, *supra* note 8, at 1047–48. American performing rights societies include the American Society of Composers, Authors and Publishers (ASCAP), SESAC, Inc. (SESAC), and Broadcast Music Inc. (BMI). *Id.* at 1047.

41. *Id.* at 1048.

composer and the publisher.<sup>42</sup> The artists who perform the songs do not participate in these transactions. The 1976 Act does not require users to acquire a license from the performer, and the performer does not receive a royalty payment.<sup>43</sup>

Passage of revising legislation may have been difficult in 1976 without the compromise created by providing disparate treatment for the composers of musical works and the creators of sound recordings.<sup>44</sup> However, sound recording copyright owners have criticized it ever since.<sup>45</sup> The predominant justification for upholding the compromise is that free airplay on the radio results in increased record sales.<sup>46</sup> As such, broadcasters argue that even though record companies may not receive royalties, the artists and record companies are actually being rewarded in the form of free publicity.<sup>47</sup> Broadcasters assert that professionals in the recording industry, from artists to record executives, recognize the importance of radio airplay to an artist's ultimate success.<sup>48</sup> Other prominent arguments put

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42. *Id.*

43. *See* 17 U.S.C. § 114(a).

44. Phillips & Moore, *supra* note 25, at 171–72.

45. *Id.*; *see also* JOYCE ET AL., *supra* note 16, § 7.05, at 510–11.

46. *See, e.g.*, Nat'l Ass'n of Broadcasters, *Radio at Risk*, NO PERFORMANCE TAX, <http://www.noperformancetax.org/en/RadioatRisk> (last visited May 14, 2011).

47. *Id.*

48. For example, in her 2008 Grammy acceptance speech, Alicia Keys thanked “every DJ, every radio guy, every promotions guy, everybody who ever put up a poster for me and spread the word.” *Performance Rights Act Bill Introduced in the Senate*, ECOSTICS.COM (Feb. 6, 2009, 4:25pm), <http://news.ecoustics.com/bbs/messages/10381/549087.html>. Accepting the Horizon award for Best New Artist at the Country Music Awards in 2007, Taylor Swift stated, “I want to thank country radio. I will never forget the chance that you took on me.” *Id.*

Historically, record companies have spent a considerable amount of money to get their records on the radio. Some record companies have gone so far as to literally bribe radio DJs to play their records, a practice dubbed “payola.” Phillips & Moore, *supra* note 25, at 172. The term “payola” is an amalgamation of the words “payoff” and “Victrola,” referencing the practice’s early roots in the payment of bribes to DJs to broadcast records played on the Victrola, an early type of record player. DelNero, *supra* note 12, at 196, 210 n.196. Congress criminalized the practice in 1960, but the music industry has effectively circumvented the law by using third-party promoters. *Id.* at 196. Specifically, the promoter will pay the radio station a fee, typically a few hundred thousand dollars, for the ability to represent the station with the record companies. *Id.* The record companies will then pay the promoter to suggest that the radio station play that company’s songs, paying generally between \$800 and \$5000 to the promoter for each song added to a radio station’s playlist. *Id.* Consequently, record companies will frequently spend upwards of \$200,000 to \$300,000 for nationwide promotion of a single song, with promotion costs sometimes reaching as high as \$1 million. *Id.*

forward for continuing to exclude a general public performance right in sound recordings include the fear that paying royalties will financially devastate radio stations,<sup>49</sup> and the concern that a public performance right would unduly burden the public's access to sound recordings.<sup>50</sup>

The 1980s saw the introduction of digital technologies that made it easier for consumers to make high quality copies of sound recordings.<sup>51</sup> In response to lobbying by the record industry, Congress passed the Audio Home Recording Act (AHRA), which attempted to shift the balance of copyright protection back in favor of the copyright owners.<sup>52</sup> However, technology continued to progress, reaching the point where digital signals could be broadcast.<sup>53</sup> To address the fears of copyright owners regarding digital technology,<sup>54</sup> Congress passed two amendments to the Copyright Act: the 1995 Digital Performance Right in Sound Recordings Act (DPRA)<sup>55</sup> and the 1998 Digital Millennium Copyright Act (DMCA).<sup>56</sup> During debate over the DMCA and the DPRA, the Clinton Administration's Working Group on Intellectual Property Rights argued for increased protection for the music industry.<sup>57</sup> However, Congress sided with the

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49. DelNero, *supra* note 12, at 199–200.

50. *Id.* at 201.

51. Phillips & Moore, *supra* note 25, at 172.

52. AHRA imposed a tax on certain technologies, such as blank cassettes, digital audiotape, and CD-Rs, which made it easier to produce copies of sound recordings. Audio Home Recording Act of 1992, Pub. L. No. 102-563, 106 Stat. 4237. It also required that certain recording devices incorporate technological copy protections. *Id.*; H.R. 3204, 102d Cong. (1992); S. 1623, 102d Cong. (1992); *see also* Phillips & Moore, *supra* note 25, at 172, 180 n.37.

53. A “digital transmission” refers to “a transmission in whole or in part in a digital or other non-analog format.” 17 U.S.C. § 101 (2006). This includes formats like satellite radio, as well as both on-demand and non-interactive formats of internet radio. HEAD ET AL., *supra* note 25, at 154; DelNero, *supra* note 12, at 186–88. Digital transmission stands in contrast to terrestrial radio, which refers to the traditional AM/FM “over-the-air” type radio broadcast. *Id.*

54. Copyright owners feared that broadcast of digital signals would enable recipients of such signals to record high quality copies, equivalent in sound quality to what one might get on an album. JOYCE ET AL., *supra* note 16, § 3.01, at 197. They asserted that the high quality subscription-based and interactive services threatened to cause consumers to buy fewer CDs. *Id.*

55. Digital Performance Right in Sound Recordings Act of 1995, Pub. L. No. 104-39 (codified as amended at 17 U.S.C. §§ 101, 114, 115).

56. Digital Millennium Copyright Act of 1998, Pub. L. No. 105-304, 112 Stat. 2860 (codified as amended at 17 U.S.C. §§ 101, 112, 114, 1201).

57. Kettle, *supra* note 8, at 1069–70.

opposing broadcasters, and debate was subsequently limited to digital technology.<sup>58</sup> The DMCA and DPRA create a complex system of licensing for digital transmissions.<sup>59</sup> It is notable that the DPRA marked the first time that Congress provided some sort of public performance right, albeit limited, in sound recordings.<sup>60</sup> However, the amendments applied strictly to digital transmissions and did not impact traditional terrestrial radio broadcasts.<sup>61</sup> Furthermore, even if terrestrial broadcasts are transmitted in digital form, they are still exempt from the public performance right as long as they remain free to consumers.<sup>62</sup>

### *B. The Public Performance Right in International Treaties*

The exclusion of a general performance right in sound recordings places the United States at odds with the mainstream approach to copyright protection in international law. Many countries, including virtually all other industrialized nations, recognize performance rights for sound recordings, including rights for terrestrial broadcasts.<sup>63</sup>

Various international treaties include a performance right for sound recordings. The first such treaty was the International

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58. *Id.* Congress asserted that the public performance right should only be applicable to specific types of digital transmissions, such as subscription-based and interactive services, because consumers of such services would be less inclined to buy CDs. JOYCE ET AL., *supra* note 16, § 7.07, at 541–42. While terrestrial radio transmissions produced sound quality inferior to CDs, Congress feared that the improved sound quality of digital transmissions might serve as a replacement for CDs. *Id.*; cf. Jonathan Franklin, *Pay to Play: Enacting a Performance Right in Sound Recordings in the Age of Digital Audio Broadcasting*, 10 U. MIAMI ENT. & SPORTS L. REV. 83, 85 (1993) (arguing in favor of a public performance right for digital transmissions of sound recordings prior to the passage of the DMCA and DPRA, using arguments similar to those espoused by Congress).

59. Kettle, *supra* note 8, at 1072–73.

60. *Id.* at 1070.

61. See 17 U.S.C. § 106(6) (providing the copyright owner the exclusive right “in the case of sound recordings, to perform the copyrighted work publicly by means of a digital audio transmission”).

62. DelNero, *supra* note 12, at 188.

63. *Ensuring Artists Fair Compensation: Updating the Performance Right and Platform Parity for the 21st Century*, Hearing Before the Subcomm. on Courts, the Internet, and Intellectual Prop. of the H. Comm. on the Judiciary, 110th Cong. (2007) [hereinafter *Ensuring Artists Fair Compensation*] (statement of Marybeth Peters, Register of Copyrights), available at <http://www.copyright.gov/docs/regstat073107.html>; see also JOYCE ET AL., *supra* note 16, § 7.05, at 510.

Convention for the Protection of Performers, Producers of Phonogram Recordings and Broadcasting Organizations (Rome Convention).<sup>64</sup> Article 12 of the Rome Convention provides a performance right for sound recordings.<sup>65</sup> Despite its heavy involvement in drafting the Rome Convention, the United States is not among the contracting parties.<sup>66</sup> There has, however, been a significant increase in the number of contracting parties over the last two decades.<sup>67</sup> As of 2010, there are eighty-eight contracting parties to the Rome Convention.<sup>68</sup> Under the Rome Convention, neighboring rights are granted only on a reciprocal basis.<sup>69</sup> In other words, only those performers who are nationals of a country participating in the Rome Convention can receive performance rights in other countries that participate in the Rome Convention.<sup>70</sup> Since the United States is not a contracting party, American artists do not receive royalties when their songs are broadcast on the radio in other countries, even if those countries have agreed to a public performance right under the Rome Convention.<sup>71</sup>

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64. International Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organizations, Oct. 26, 1961, 496 U.N.T.S. 43 [hereinafter Rome Convention], available at [http://www.wipo.int/treaties/en/ip/rome/trtdocs\\_wo024.html](http://www.wipo.int/treaties/en/ip/rome/trtdocs_wo024.html); see also *Ensuring Artists Fair Compensation*, *supra* note 63 (statement of Marybeth Peters).

65. Article 12 of the Rome Convention (“Secondary Uses of Phonograms”) states:

If a phonogram published for commercial purposes, or a reproduction of such phonogram, is used directly for broadcasting or for any communication to the public, a single equitable remuneration shall be paid by the user to the performers, or to the producers of the phonograms, or to both. Domestic law may, in the absence of agreement between these parties, lay down the conditions as to the sharing of this remuneration.

Rome Convention, *supra* note 64, at 43.

66. DelNero, *supra* note 12, at 190.

67. *Id.*

68. *Contracting Parties—Rome Convention*, WIPO, [http://www.wipo.int/treaties/en/ShowResults.jsp?lang-en&treaty\\_id=17](http://www.wipo.int/treaties/en/ShowResults.jsp?lang-en&treaty_id=17) (last visited May 12, 2011).

69. DelNero, *supra* note 12, at 191. A neighboring right is:

[a]n intellectual property right of a performer or of an entrepreneur such as a publisher, broadcaster, or producer, as distinguished from a moral right belonging to an author or artist as the work’s creator. In civil-law systems, neighboring rights and moral rights are typically protected by different laws, while in common-law systems both are typically protected by the same copyright laws.

BLACK’S LAW DICTIONARY 1065 (8th ed. 2004).

70. Franklin, *supra* note 58, at 113–14.

71. DelNero, *supra* note 12, at 191. While it is difficult to find an exact figure for how

The United States is a party to the Berne Convention for the Protection of Literary and Artistic Works (Berne Convention),<sup>72</sup> the oldest existing international instrument for implementing copyright protection for literary and artistic works.<sup>73</sup> Although the Berne Convention came into existence in 1886, the United States did not become a party until 1989,<sup>74</sup> acting in response to increasing pressure from American authors and publishers desiring more robust international copyright protection for their works.<sup>75</sup> The Berne Convention recognizes the duty to protect the authors of musical works,<sup>76</sup> but it does not mandate the establishment of a public performance right in sound recordings.<sup>77</sup> As a result, the Berne Convention's devotion to harmonizing international approaches to copyright protection adds little direct pressure to establish a public performance right.<sup>78</sup>

The Uruguay Round of the Multilateral Trade Negotiations to Amend the General Agreement on Tariffs and Trade (GATT) hosted some of the most important discussions on the protection and standardization of international intellectual property rights.<sup>79</sup> The United States faced pressure regarding reciprocal treatment by

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much money American artists could potentially gain from the United States' membership in the Rome Convention, one 1990 study placed this value as high as \$27 million per year. *Id.* While it may be difficult to find a definitive answer for how much money American artists stand to gain today, the fact that over 60 percent of foreign record sales are albums created by American artists points to a potentially significant amount. *Id.*

72. Berne Convention for the Protection of Literary and Artistic Works, Sept. 9, 1886, 828 U.N.T.S., 303 [hereinafter Berne Convention].

73. Kettle, *supra* note 8, at 1076.

74. *Contracting Parties—Berne Convention*, *supra* note 68.

75. Kettle, *supra* note 8, at 1076–77.

76. Article 11(1) of the Berne Convention states, “Authors of dramatic, dramatico-musical and musical works shall enjoy the exclusive right of authorizing: (i) the public performance of their works, including such public performance by any means or process.” Berne Convention art. 11(1), *supra* note 72, at 728; *see also* Kettle, *supra* note 8, at 1077.

77. Kettle, *supra* note 8, at 1077.

78. *Id.*

79. *Id.* at 1078. The Uruguay Round of the Multilateral Trade Negotiations to Amend the General Agreement on Tariffs and Trade was “the largest trade negotiation ever.” *Understanding the WTO—The Uruguay Round*, WTO, [http://www.wto.org/english/thewto\\_e/whatis\\_e/tif\\_e/fact5\\_e.htm](http://www.wto.org/english/thewto_e/whatis_e/tif_e/fact5_e.htm) (last visited May 14, 2011). Spanning seven and a half years, the Uruguay Round saw 123 countries participating in discussions covering almost all trade. *Id.* The pertinent discussions occurred during hearings for the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS), which took place in Marrakesh on April 15, 1994. Kettle, *supra* note 8, at 1078 n.204.

member countries, with the international community calling for the United States to provide a full public performance right.<sup>80</sup> The United States' continued refusal to recognize such a right was a significant barrier to discussion with other nations, and ultimately GATT did not resolve these issues.<sup>81</sup> In response, the World Intellectual Property Organization (WIPO) stepped in to create two new treaties: the WIPO Copyright Treaty (WCT) and the WIPO Performances and Phonograms Treaty (WPPT).<sup>82</sup> These treaties attempted to harmonize international approaches to music copyright, but neither treaty ultimately increased the protection granted to sound recordings in the United States.<sup>83</sup>

The WPPT provides for equitable remuneration for the secondary uses for phonograms.<sup>84</sup> However, the WPPT also allows a signatory to limit the applicability of the right to certain uses or to declare that the right does not apply at all.<sup>85</sup> Although the United States is a signatory to the WPPT, it limits the performance right under Article 15 to performance by digital means.<sup>86</sup> Consequently, the WPPT

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80. Kettle, *supra* note 8, at 1078–79.

81. *Id.* at 1079.

82. *Id.*

83. *Id.* at 1079–80.

84. Article 15 (1) of the WPPT (“Right to Remuneration for Broadcasting and Communication to the Public”) provides: “Performers and producers of phonograms shall enjoy the right to a single equitable remuneration for the direct or indirect use of phonograms published for commercial purposes for broadcasting or for any communication to the public.” WIPO Performances and Phonograms Treaty art. 15, Dec. 20, 1996, S. Treaty Doc. No. 105-17, 2186 U.N.T.S. 245.

85. Article 15(3) states:

Any Contracting Party may, in a notification deposited with the Director General of WIPO, declare that it will apply the provisions of paragraph (1) only in respect of certain uses, or that it will limit their application in some way, or that it will not apply these provisions at all.

*Id.*

86. Specifically, the United States' instrument of ratification provides:

Pursuant to Article 15(3) of the WIPO Performances and Phonograms Treaty, the United States will apply the provisions of Article 15(1) of the WIPO Performances and Phonograms Treaty only in respect of certain acts of broadcasting and communication to the public by digital means for which a direct or indirect fee is charged for reception, and for other retransmissions and digital phonorecord deliveries, as provided under United States law.

*WPPT Notification No. 8, WIPO Performances and Phonograms Treaty: Ratification by the United States of America*, WIPO (Sept. 14, 1999), <http://www.wipo.int/treaties/en/notifications/>

provides little help for American artists seeking remuneration for the terrestrial broadcast of their recordings in other signatory countries. Since the United States establishes reservations to the public performance right under Article 15(3), other signatories do not need to provide national treatment for American artists.<sup>87</sup>

### C. The Public Performance Right in Other Countries

While the United States may not recognize a general public performance right in sound recordings, most other developed nations do recognize such rights.<sup>88</sup> There are currently at least seventy-five other nations that recognize a public performance right in sound recordings.<sup>89</sup>

The United States and United Kingdom may share a legal tradition, but their approaches to the public performance right in sound recordings are completely contrary. Like the United States, the United Kingdom is a leader in the recording industry.<sup>90</sup> However, unlike the United States, the United Kingdom is a firm supporter of Article 12 of the Rome Convention.<sup>91</sup> Even before the Rome Convention, the United Kingdom had a history of recognizing a public performance right in sound recordings.<sup>92</sup>

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wppt/treaty\_wppt\_8.html.

87. The obligation to provide national treatment is outlined in Article 4 of the WPPT:

(1) Each Contracting Party shall accord to nationals of other Contracting Parties, as defined in Article 3(2), the treatment it accords to its own nationals with regard to the exclusive rights specifically granted in this Treaty, and to the right to equitable remuneration provided for in Article 15 of this Treaty.

(2) The obligation provided for in paragraph (1) does not apply to the extent that another Contracting Party makes use of the reservations permitted by Article 15(3) of this Treaty.

WIPO Performances and Phonograms Treaty, *supra* note 84, art. 4. The United States makes exceptions under Article 15(3), and therefore falls under Article 4(2).

88. *Performance Rights Act: Hearing on H.R. 848 Before the H. Comm. on the Judiciary*, 111th Cong. 38 (2009), [http://judiciary.house.gov/hearings/printers/111th/111-8\\_47922.pdf](http://judiciary.house.gov/hearings/printers/111th/111-8_47922.pdf).

89. Kettle, *supra* note 8, at 1075.

90. DelNero, *supra* note 12, at 191, 209 n.145.

91. *Id.* at 191.

92. The 1911 U.K. Copyright Act states, "Copyright shall subsist in records . . . by means of which sounds may be mechanically reproduced, in like manner as if such contrivances were musical works." Copyright Act, 1911, 1 & 2 Geo. 5, c. 46, § 19(1) (Eng.). In *Gramophone Co. Ltd. v. Stephen Carwardine & Co.*, the court held that the 1911 Act provided for an independent



In the European Union, performers have the exclusive right to allow reproductions of their fixations of performances, and record companies have the exclusive right to allow reproductions of sound recordings.<sup>93</sup> Performers also have the exclusive right to make their fixations of performances available to the public, while record companies have the exclusive making available right to sound recordings.<sup>94</sup> Furthermore, performers are entitled to equitable remuneration whenever a wireless medium transmits their commercial sound recording.<sup>95</sup> These rights are bolstered by the historic practice of recognizing the performance right within individual European Union nations.<sup>96</sup>

In Canada, acceptance of the public performance right has changed over time.<sup>97</sup> In 1971, Canada repealed a previously recognized public performance right in response to protests from broadcasters.<sup>98</sup> In a controversial move, it reinstated the right in the 1990s.<sup>99</sup> However, while Canada now recognizes a public performance right in sound recordings, this right is not complete because artists do not necessarily receive royalties every time their song plays on the radio.<sup>100</sup> There is a cap of \$100 Canadian dollars (CAD) on annual royalty fees to be paid for the first \$1.25 million

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public performance right in sound recordings, separate from the performance right in the underlying musical work. *Gramophone Co. Ltd. v. Carwardine & Co.*, (1934) 1 Ch. 450 (U.K.).

93. Neil Conley, *The Future of Licensing Music Online: The Role of Collective Rights Organizations and the Effect of Territoriality*, 25 J. MARSHALL J. COMPUTER & INFO. L. 409, 438–39 (2008).

94. *Id.*

95. Tilman Lüder, *The Next Ten Years in E.U. Copyright: Making Markets Work*, 18 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 1, 24 (2007); see also Conley, *supra* note 93, at 438–39.

96. For example, in *Furtwangler v. Societes Thalia & Urania*, the highest court of ordinary jurisdiction in France, the Cour de Cassation, held that performers have the right to prohibit unauthorized use of their performances. DelNero, *supra* note 12, at 191, 208 n.149 (citing *Furtwangler v. Societes Thalia and Urania* (Cour de Cassation, Ch. Civ., Jan. 4, 1964 Gaz. Pal. Jan. 25–29, 1964)). At this point, France did not have an official performance rights statute; the case evidences a history of providing for such a right even before the right was formally enacted by the legislature. *Id.* The French legislature ultimately added a legislative public performance right in sound recordings in 1985. *Id.* at 191, 208 n.148 (citing Law No. 85-660 of July 3, 1985, J.O., July 4, 1985, Title II, art. 18).

97. *Id.* at 192.

98. *Id.*

99. *Id.*

100. *Id.*

CAD in revenue.<sup>101</sup> Approximately 65 percent of Canadian broadcasters fall into the group protected by this ceiling.<sup>102</sup>

Canada is also one of the most recent signatories to the Rome Convention, embracing the treaty on June 4, 1998.<sup>103</sup> However, as a major importer of American music,<sup>104</sup> Canadian lawmakers are critical of any legislation that would cause the United States to enforce neighboring rights under the Rome Convention.<sup>105</sup> At least one commentator asserts that the Canadian removal of the public performance right in 1971 was a response to fears that the United States would join the Rome Convention.<sup>106</sup>

*D. Proposed Legislation for a Performance Right in Sound Recordings in the United States*

Over the years, there have been numerous bills introduced in Congress that would provide a full public performance right in sound recordings in the United States.<sup>107</sup> At this point, they have met with little success.<sup>108</sup> In 2007, Congress considered the Performance Rights Act, which proposed an amendment to the Copyright Act to create a public performance right in sound recordings for terrestrial

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101. *Id.*

102. *Id.*

103. *Contracting Parties—Rome Convention, supra* note 68.

104. An estimated 50 percent of all public performances in Canada involve sound recordings owned by American artists. DelNero, *supra* note 12, at 192.

105. *Id.*

106. *Id.*

107. *See id.* at 181, 202–03 n.11; *see also* H.R. 1805, 97th Cong. (1981); H.R. 997, 96th Cong. (1979); H.R. 6063, 95th Cong. (1977); H.R. 8015, 94th Cong. (1975); H.R. 7750, 94th Cong. (1975); H.R. 7059, 94th Cong. (1975); H.R. 5845, 94th Cong. (1975); S. 1111, 94th Cong. (1975); H.R. 14636, 93d Cong. (1974); H.R. 15522, 93d Cong. (1974); H.R. 14922, 93d Cong. (1974); H.R. 8186, 93d Cong. (1974); S. 1361, 93d Cong. (1973); S. 644, 92d Cong. (1971); S. 543, Amdt. No. 9, 91st Cong. (1969); S. 597, Amdt. No. 131, 90th Cong. (1967); H.R. 2464, 82d Cong. (1951); H.R. 1270, 80th Cong. (1947); S. 1206, 79th Cong. (1945); H.R. 3190, 79th Cong. (1945); H.R. 1570, 78th Cong. (1943); H.R. 7173, 77th Cong. (1942); H.R. 9703, 76th Cong. (1940); H.R. 4871, 76th Cong. (1939); S. 2240, 75th Cong. (1937); H.R. 52745, 75th Cong. (1937); H.R. 11420, 74th Cong. (1936); H.R. 10632, 74th Cong. (1936); H.R. 10976, 72d Cong. (1932); H.R. 10740, 72d Cong. (1932); H.R. 10364, 72nd Cong. (1932); H.R. 12549, 71st Cong. (1930); H.R. 10434, 69th Cong. (1926).

108. Since 1926, there have been over thirty ultimately unsuccessful bills introduced in Congress to provide a general public performance right in sound recordings. DelNero, *supra* note 12, at 181; *see also supra* note 107 (listing thirty-three unsuccessful attempts to provide a general public performance right in sound recordings).

radio broadcasts.<sup>109</sup> Congress did not enact the bill in 2007,<sup>110</sup> and the Performance Rights Act was reintroduced in Congress on February 4, 2009.<sup>111</sup>

While the proposed legislation would extend the public performance right in sound recordings to terrestrial radio, the right would not be absolute because, like the current Canadian system, it provides for a cap on royalties in certain circumstances. For example, the House bill advances a system in which noncommercial, public broadcast stations and individual terrestrial broadcast stations with gross revenues of less than \$1.25 million may choose to pay a flat annual fee instead of royalty payments.<sup>112</sup>

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109. Performance Rights Act, H.R. 4789, 110th Cong. (2007).

110. 2008 Bill Tracking H.R. 4789, 110th Cong. (2008) (LEXIS).

111. See H.R. 848, 111th Cong. (2009); S. 379, 111th Cong. (2009). According to the language of the proposed statute, the purpose of the Performance Rights Act is “[t]o provide parity in radio performance rights under title 17, United States Code, and for other purposes.” H.R. 848. According to the corresponding Senate bill, the purpose is “[t]o provide fair compensation to artists for use of their sound recordings.” S. 379.

The Performance Rights Act would amend section 106(6) of the Copyright Act, which currently provides the owner of a copyright the exclusive rights “in the case of sound recordings, to perform the copyrighted work publicly by means of a digital audio transmission.” 17 U.S.C. § 106(6) (2006). Specifically, the proposed statute would expand the public performance right to include terrestrial broadcasts as well by deleting the word “digital.” H.R. 848. The amended section would therefore read: “(6) in the case of sound recordings, to perform the copyrighted work publicly by means of an audio transmission.” *Id.*

The Performance Rights Act would also amend section 114 to allow for a public performance right in sound recordings. It would accomplish this by eliminating “digital” from section 114(d)(1), which provides limitations on the exclusive right regarding exempt transmissions and retransmissions. *Id.* It would also eliminate section 114(d)(1)(A), which currently provides that a performance of a sound recording publicly by means of a digital audio transmission is not an infringement of section 106(6) if the performance is part of “a nonsubscription broadcast transmission.” 17 U.S.C. § 106(6). The House Resolution groups these changes together in a section titled “Inclusion of Terrestrial Broadcasts in Existing Performance Right.” H.R. 848. The Senate subtitle currently reads, “Equitable Treatment for Terrestrial Broadcasts” communicating that the Performance Rights Act is not intended simply to award royalties to recording artists when their songs are played on the radio, even though that is the practical effect. S. 379. Rather, the new subtitle reflects the fact that the amendment would harmonize the public performance right among the different methods of transmission.

112. H.R. 848. The proposed bill establishes a system in which individual terrestrial broadcast stations having a gross annual revenue of:

(I) less than \$10,000 may elect to pay for its over-the-air nonsubscription broadcast transmissions a royalty fee of \$500 per year;

(II) at least \$100,000 but less than \$500,000 may elect to pay for its over-the-air nonsubscription broadcast transmissions a royalty fee of \$2500 per year; and

Broadcasters have lobbied strongly against this act.<sup>113</sup> In response to their lobbying efforts, there have been concurrent resolutions introduced in the House and the Senate in support of the Local Radio Freedom Act, which would oppose the imposition of “any new performance fee, tax, royalty or other charge relating to the public performance of sound recordings on a local radio station for broadcasting sound recordings over the air.”<sup>114</sup>

## II. ANALYSIS AND PROPOSAL

### A. Analysis

In recognizing a public performance right for digital broadcasts but not terrestrial radio, Congress created a system in which the existence of a recording artist’s public performance right depends not on whether her work is publicly performed, but on what technology is used. Allowing a public performance right for digital broadcasts but not terrestrial radio broadcasts creates an inconsistency in American copyright law. Artists should enjoy a public performance right in sound recordings regardless of the platform on which their works are transmitted.

Historically, broadcasters have argued that artists receive adequate payment in the form of publicity garnered through free airplay.<sup>115</sup> However, radio stations could not exist without sound recordings.<sup>116</sup> The stations get their money from advertisers.<sup>117</sup> These advertisers

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(III) at least \$500,000 but less than \$1,250,000 may elect to pay for its over-the-air nonsubscription broadcast transmissions a royalty fee of \$5,500 per year.

*Id.*

113. *See, e.g.*, NO PERFORMANCE TAX, <http://www.noperformancetax.org> (last visited May 14, 2011) (website set up by the National Association of Broadcasters to provide information in opposition to the Performance Rights Act and give general information about the NAB’s position regarding the proposed legislation).

114. S. Con. Res. 14, 111th Cong. (2009); *see also* H.R. Con. Res. 49, 111th Cong. (2009). The concurrent resolutions have significant support in both houses. *See* Katy Bachman, *Media Regulations*, *MEDIAWEEK*, Jan. 4, 2010, at 13 (noting that 252 House members and 27 Senators have signed the Local Radio Freedom Act).

115. Nat’l Ass’n of Broadcasters, *supra* note 46.

116. *Id.*

117. *Id.*

seek stations with a significant listening audience.<sup>118</sup> Since listeners tune in to a particular station to hear music, not commercials, the radio stations rely on the creators of sound recordings—not just the songwriters—to generate songs that they can play to attract an audience.<sup>119</sup> Creators of works falling into other categories of copyrightable subject matter are not expected to forgo royalties in favor of publicity resulting from public performance of their works.<sup>120</sup>

Additionally, the publicity-as-payment model falls apart when applied to already popular songs.<sup>121</sup> There are entire radio stations devoted exclusively to classic rock or classical music.<sup>122</sup> The recording artists who released their now-classic songs forty years ago would not derive the same promotional benefit from radio airplay as the recording artist behind a newly released pop song.<sup>123</sup> Similarly, musicians who create new recordings of classical works would not receive the same promotional benefit from radio airplay, as these works are often already well established. The classical music industry is largely focused on recordings of works composed many years ago. Even though there may be a demand for modern recordings of works by Mozart, Chopin, or Beethoven, the musician who makes such recordings is afforded no public performance right because, by the nature of the recording, he is not the songwriter. The current copyright regime seemingly disincentivizes the creation of new recordings of classical works because musicians would be precluded from receiving royalties for public performance of these recordings.

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118. *See id.*

119. DelNero, *supra* note 12, at 197–98.

120. For example, when a television station broadcasts a film, the broadcast provides incidental publicity for the film, which may serve to improve DVD sales. However, the copyright owners are not expected to settle for publicity in lieu of royalties when their films are shown on television. *See* 17 U.S.C. § 106(4). The copyright owners can collect royalties in addition to whatever incidental publicity they receive from their film being broadcast on television. *Id.*

121. DelNero, *supra* note 12, at 198.

122. *Id.*

123. *Id.*; Wolke, *supra* note 23, at 413 (“[A]t some point in most performers’ careers, their ability to generate income from touring, merchandising, and record sales will decline, and except for the digital performance right . . . , the performer’s income stream will dry up. Meanwhile, a composer continues to collect royalties every time a song he or she wrote is performed publicly.”).

In both the classic rock and classical music scenarios, the radio station derives a benefit from the use of the artist's recording, but the artist receives no real compensation in return.<sup>124</sup>

Furthermore, the dynamic between radio station and artist is changing. While radio stations still represent a source of publicity for emerging artists, other media outlets are playing an increasingly important role in the music industry.<sup>125</sup> Artists no longer rely exclusively on the radio for generating publicity.<sup>126</sup> If listeners turn to iTunes, YouTube, or Pandora rather than the AM/FM radio for music, the necessity for radio publicity decreases.<sup>127</sup> In such a situation, the publicity-as-payment justification loses its efficacy.

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124. DelNero, *supra* note 12, at 198.

125. *See supra* notes 52–54 and accompanying text.

126. Musical acts increasingly use social networking sites like MySpace, Friendster, and Bebo to promote themselves. Marc Cieslak, *Rise of the Web's Social Network*, BBC NEWS (Sept. 30, 2006, 10:47 PM), [http://news.bbc.co.uk/2/hi/programmes/click\\_online/5391258.stm](http://news.bbc.co.uk/2/hi/programmes/click_online/5391258.stm). For example, Lily Allen and the Arctic Monkeys rose to fame on MySpace. *Id.* OK Go gained popularity on YouTube, where their breakthrough video "A Million Ways" and their treadmill-based video for "Here It Goes Again" have each been viewed tens of millions of times. Timothy Karr, *OK Go to Congress: OK Act*, HUFFINGTON POST (Mar. 13, 2008, 11:23 AM), [http://www.huffingtonpost.com/timothy-karr/ok-go-to-congress-ok-act\\_b\\_91337.html](http://www.huffingtonpost.com/timothy-karr/ok-go-to-congress-ok-act_b_91337.html); Gil Kaufman, *YouTube Faves OK Go: The Band Least Likely to Become Famous for Their Dancing*, MTVNEWS (Aug. 29, 2006, 6:00 AM), <http://www.mtv.com/news/articles/1539637/go-risk-becoming-goofy-dancing-band.jhtml>. Soulja Boy Tell 'Em released his single "Crank Dat (Soulja Boy)" on YouTube, where it became a popular viral video, helping it to ultimately reach the number one spot on the Billboard Hot 100. Steven D. Jamar, *Crafting Copyright Law to Encourage and Protect User-Generated Content in the Internet Social Networking Context*, 19 WIDENER L.J. 843, 866–67 (2010); Mariel Concepcion, *Teen Rapper Soulja Boy Building Hip-Hop Empire*, REUTERS (Dec. 13, 2008, 7:48 PM), <http://www.reuters.com/article/2008/12/14/us-souljaboy-idUSTRE4BD02B20081214>; Salima Korona, *Soulja Boy, Will.i.am, Akon Take YouTube Live*, HIP HOP DX (Nov. 12, 2008, 2:11 PM), <http://www.hiphopdx.com/index/news/id.8073/title.soulja-boy-will-i-am-akon-take-youtube-live>. Like Lily Allen and the Arctic Monkeys, he also owes some of his early fame to MySpace. *Id.* Sites like Facebook and Pandora can also expose potential listeners to new artists. *See, e.g.*, Jefferson Graham, *Pandora Online Radio Service Scores a Hit Smartphones' Popularity Helps Company to Profit*, USA TODAY, Jan. 13, 2010, at 5A (describing Pandora as a service "to hear favorite songs and discover new ones"); *Facebook-My Band*, FACEBOOK, <http://www.facebook.com/apps/application.php?id=2405167945> (last visited Feb. 5, 2010) (Facebook application designed as a promotion and marketing tool for aspiring artists).

127. Furthermore, Pandora is expanding beyond computer-based applications and moving toward platforms traditionally dominated by terrestrial radio. Graham, *supra* note 126. Having quadrupled its listenership since 2008 as a result of smartphone popularity, Pandora soon may also be incorporated into cars and alarm clocks. *Id.* The availability of digital broadcasts on these traditionally AM/FM-dominated outlets would further increase AM/FM radio's competition with digital broadcast platforms, and make an exception for AM/FM radio more difficult to justify.

While the songwriter should certainly continue to collect royalties, it is increasingly difficult to see why a recording artist should not also be compensated for his or her creative contribution, considering that the recording artist frequently contributes at least as much, and sometimes more, to the popularity of a given song.<sup>128</sup> The songwriter initially crafts the song, but the recording artist brings it to life. Without the talent and effort of the recording artist, the song would remain sheet music, a completely unusable format for the radio.

Meanwhile, as long as the United States does not recognize a public performance right in sound recordings, artists cannot collect royalties for radio broadcast of their songs in foreign countries, even if those countries recognize the right themselves.<sup>129</sup> Over seventy-five countries recognize a public performance right, but music from American recording artists can be played royalty-free even in those nations.<sup>130</sup> Entertainment ranks among the United States' most significant exports.<sup>131</sup> Considering that the amount of music exported from the United States vastly outweighs the amount of music imported into the country from other sources, it seems strange that the United States would not do everything possible to maximize potential earnings.<sup>132</sup>

However, maximizing international earnings may not necessarily be so straightforward. While the United States potentially loses millions of dollars each year in royalties by not joining the Rome

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128. For example, songwriters Billy Steinberg and Tom Kelly may have penned "Like a Virgin," but Madonna is in no small part responsible for the song's international success. Marianne Betts, *Setting the Record Straight*, HERALD-SUN (Melbourne), Jan. 15, 2005, at W10. In fact, Steinberg and Kelly initially had a difficult time finding a studio that would record the song. *Id.* However, when they pitched it to Michael Ostin at Warners, the senior vice president knew that it would be ideal for Madonna. Robert Webb, *Rock & Pop: Story of the Song 'Like a Virgin' Madonna (1984)*, INDEPENDENT (U.K.), Jan. 9, 2004, at 15. Steinberg and Kelly noted, "We were lucky that Madonna came along, because I don't think anyone else could have put the song across quite like she did." *Id.* As one newspaper feature observed, "Even back in 1984 [Madonna] knew how to bring something iconic to a song. Before she got involved, Billy Steinberg and Tom Kelly's piano demo of Like a Virgin sounded like something you wouldn't have rescued from Barry Manilow's dustbin." Pete Paphides & Peter Robinson, *Madge v. Kylie: Who'll Be No. 1?*, TIMES (U.K.), Sept. 7, 2007, at 12.

129. Kettle, *supra* note 8, at 1075.

130. *Id.*

131. *Id.* at 1074. RIAA estimates entertainment exports to be around \$4 billion annually, approximately 40 percent of which comes from sound recordings. *Id.* at 1074 n.177.

132. *Id.* at 1074.

Convention,<sup>133</sup> simply becoming a signatory likely would not be an effective solution.<sup>134</sup> Joining the Rome Convention would not guarantee that the United States would receive royalties from all other signatories.<sup>135</sup> Some nations, like the United Kingdom and France, might adhere to Article 12 and agree to pay the royalties.<sup>136</sup> However, not all nations would necessarily follow suit.<sup>137</sup> Other nations—particularly those with smaller domestic recording industries that import more music than they export—could institute reservations to Article 12 and avoid paying the royalties.<sup>138</sup> Canada has made several advances in copyright law in the past few years, particularly in their recognition of a public performance right in sound recordings.<sup>139</sup> However, in the past, Canadian legislators have sought to avoid the major outflow of cash that would surely follow if the United States were to enforce neighboring rights.<sup>140</sup> As such, Canada might retreat from its recent advances to avoid enforcement of neighboring rights with the United States.<sup>141</sup>

There are likely more countries in Canada's position than in the United Kingdom's position or France's position; in some countries, American-made sound recordings constitute more than 90 percent of

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133. *Id.* at 1075.

134. *See* DelNero, *supra* note 12, at 192.

135. *Id.* at 192–93.

136. France and the United Kingdom both have strong domestic recording industries and long histories of recognizing a public performance right in sound recordings. *Id.* at 191.

137. *Id.* at 192–93.

138. DelNero asserts that reciprocity may just be “a form of economic protectionism employed to avoid payment of performance royalties to the U.S., a particularly large exporter of sound recordings.” *Id.* at 193.

139. *Id.* at 192.

140. For example, as mentioned previously, the concern regarding potential American participation in the Rome Convention—or, more specifically, the concern regarding the royalties that would need to be paid to American artists if the United States were to participate in the Convention—contributed to the abolition of the Canadian public performance right in 1971. *Id.*; *see also supra* notes 103–06 and accompanying text. Later, seeing that the United States could enforce neighboring rights for digital performances after the passage of the DPRA and DMCA, the Canadian Standing Senate Committee on Transport and Communications advised the Canadian government to “immediately undertake an in-depth study of the new digital technologies, in particular the Internet, and the impact their widespread commercial deployment might have on the payments Canadian broadcasters may have to make to both Canadian and foreign rights holders.” DelNero, *supra* note 12, at 192 (quoting *Proceedings of the Standing Senate Comm. on Transport and Communications, Ninth Report (1997)* (Can.)).

141. DelNero, *supra* note 12, at 192.



broadcast public performances.<sup>142</sup> As such, if the United States were to recognize the public performance right in the Rome Convention, other signatories might back away from it.<sup>143</sup> It seems that countries in such a situation would be unlikely to acquiesce to a sudden major outflow of cash to the United States in order to license American sound recordings if they could avoid it.<sup>144</sup> Consequently, joining the Rome Convention would not guarantee the windfall for American artists predicted by various commentators.<sup>145</sup> A retreat from recognition of the public performance right in other countries would not accomplish the goal of international harmonization of American copyright law.

There are similar issues with the WPPT. Even if the United States were to remove its stipulation that Article 15 applies only to digital transmissions, other nations could simply impose stipulations of their own.<sup>146</sup> Other nations could choose not to observe public performance rights in sound recordings, and could thereby avoid paying equitable remuneration to American artists in the same way that they could under the Rome Convention.

Consequently, it seems unlikely that the United States would completely recover the millions of dollars in potential royalties it currently loses. However, even if some countries were to back away from the Convention, other countries would likely stay, particularly those with robust domestic recording industries themselves. Their radio stations would need to start paying royalties to American artists to play their songs, but at the same time, American radio stations would be compensating *their* artists.<sup>147</sup> While the result might not be a multi-million dollar windfall for American artists, they would at least be getting *some* compensation for their work. As long as the United States maintains the status quo and does not recognize a fuller public performance right in sound recordings, American artists will not receive any foreign royalties at all.<sup>148</sup>

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142. *Id.* at 193.

143. *Id.*

144. *See id.*

145. *See, e.g.,* Kettle, *supra* note 8, at 1075.

146. *See supra* notes 84–87 and accompanying text.

147. DelNero, *supra* note 12, at 191.

148. *Id.*

*B. Proposal for a Public Performance Right in Sound Recordings*

The adoption of a public performance right for digital transmissions was a step in the right direction, but it did not put American recording artists on par with their international contemporaries, or with songwriters in the United States. The United States should recognize a public performance right in sound recordings that does not turn on the medium of transmission. Recording artists work to develop creative copyrightable works separate from the underlying musical work, and should be compensated for the use of those works.

Effective legislation does not need to be more elaborate than the language already in the Copyright Act that gives the public performance right to owners of other works of authorship. The legislation currently before Congress eliminates the now-arbitrary distinction between digital and terrestrial transmissions, thereby removing the inconsistency.<sup>149</sup>

The proposed legislation does not lean to the extreme on either side of the debate. The legislation does not give the artists everything they want at the broadcasters' expense; rather, it strikes a balance between the competing interests. The legislation provides long-overdue compensation to recording artists when their songs are played on the radio, but simultaneously establishes certain limitations on the right in order to protect broadcasters.<sup>150</sup>

The addition of the fixed price option presents an important and valid limitation. While broadcasters fear that additional royalty payments could financially devastate radio stations,<sup>151</sup> the fixed rate system helps address some of those fears. If a radio station is making less than \$1.25 million dollars annually, it can choose to pay a fixed fee.<sup>152</sup> This will help keep smaller broadcasters, such as college radio stations and public stations, from going out of business as a result of being unable to pay royalties.

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149. H.R. 848, 111th Cong. (2009).

150. *See id.*

151. DelNero, *supra* note 12, at 199. Broadcasters argue that they already pay significant royalties to songwriters and publishers, and they therefore cannot afford additional royalties for sound recordings. *Id.*

152. H.R. 848.

Aside from this fixed fee system, any royalties charged must be reasonable. If the recording industry were to demand unreasonable royalties, then the broadcasters' opposition to the establishment of the performance right gains more validity.<sup>153</sup> In any case, the radio industry is reasonably financially healthy and appears that it will remain stable in the future.<sup>154</sup> If the new royalties are reasonable, then it is likely that the industry could support them.<sup>155</sup>

#### CONCLUSION

Political and social justifications, both domestic and international, support the recognition of the public performance right in American copyright law. The policy reasons opposing the public performance right, while perhaps compelling in 1976 when Congress passed the current Copyright Act, lose their force in light of the modern music industry. The Performance Rights Act presents Congress with the opportunity to correct an inconsistency in the copyright law of sound recordings and remedy the longstanding disparity in treatment between songwriters and recording artists. Recognition of the public performance right would also open the door to potential royalty payments from foreign radio broadcasters, although these payments might not be the major windfall some commentators anticipate. Importantly, the Performance Rights Act would give recording artists the opportunity to collect royalties when their works are broadcast over the radio, finally providing them fair compensation. As Billy Corgan, vocalist and lead guitarist of the Smashing Pumpkins, stated in his testimony before the House Committee on the Judiciary:

Few could deny that when a classic performance is captured, forever frozen as a musical snapshot in time, generation after generation returns to these moments, each finding something a little different. Whether we are talking about Motown, Stax, Elvis, or Howling Wolf, when the public decides that a specific performance is worthy of their attention, then it seems only

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153. DelNero, *supra* note 12, at 200.

154. *See id.* at 199–200.

155. *Id.*

fitting that this little bit of magic as documented be recognized in the form of direct compensation for the artists and organizations that helped to create it.<sup>156</sup>

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156. *First Session on H.R. 848: Hearing Before the H. Comm. on the Judiciary*, 111th Cong. 30 (2009) (statement of Billy Corgan, Vocalist and Lead Guitarist, The Smashing Pumpkins).