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Guerrilla Radio: Has the Time Come for a Full Performance Right in Sound Recordings?

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Guerrilla Radio: Has the Time Come for a Full Performance Right in Sound Recordings?

ABSTRACT

Musicians and songwriters occupy a unique place in society as purveyors of composition and expression that impart an intangible benefit to society. Understanding the value of “Science and useful Arts,” the Founders provided Constitutional protection for individuals spending time, money, and energy pursuing creative endeavors. Music defines generations and pivotal moments in history, and has rightfully taken its place at the forefront of human expression. When music began reaching the masses in the early twentieth century, both record labels and radio, even in its infancy, helped propel artists to the national spotlight. Johnny Cash, Ray Charles, and Pearl Jam all owe their success to the efforts and collaborations of radio and label executives—and of course their own talents. The relationship between artists, labels, and radio has not always been symbiotic, especially on the issue of compensation, and the advent of the Internet has helped matters little. The fight over profit allocation between these key players in the music industry is once again on display. The re-introduction in Congress of the Performance Rights Act raises issues about the appropriate extent of protection for a “performance right” to copyright owners of sound recordings. Artists and labels want radio to compensate them for their talents and time; radio says traditional broadcasting does not threaten record sales and serves as free advertising. Though numerous pushes against broadcasters for this performance right have failed, it is a recurring issue unlikely to disappear in the future.

This Note examines the history of copyright protection for sound recordings and other musical works in the United States. It begins by examining the statutory development of copyright protection for musical compositions and sound recordings, and the nature of those compensation schemes. The Note then introduces the Performance Rights Act, and analyzes the potential reasons for and effects of the Act on radio, record labels, and artists, as well as the changing scope of copyright protection in both traditional, terrestrial radio and digital

transmissions. Finally, this Note suggests Congress should pass the Performance Rights Act, but should consider ways to minimize negative financial implications for radio, and align the bill with the goals of American copyright law.

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Aspiring artists spend years, even decades, pursuing an artistic craft. Many artists dedicate their lives to perfecting songwriting and singing, or developing technical expertise on a musical instrument—investing in talent now in the hope of a future payoff. The way artists receive that payoff, if any, varies. Some artists are able to generate consistent income through album sales, touring, or merchandising, while others find steady careers as songwriters, studio musicians, or get hired to tour with more prominent acts.¹ The media providing access to music was once limited to terrestrial radio on Amplitude Modulation (AM) or Frequency Modulation (FM) signals and

1. David J. Hahn, *Average Income of a Musician*, <http://www.musicianwages.com/musician-profile/average-income-of-a-musician/> (last visited Mar. 8, 2010) (discussing the different ways musicians should diversify their performance outlets in order to sustain income).

phonograph records. From the 1930s until the introduction of television in the 1950s, radio was the dominant medium, bringing music to millions of listeners.² Today, however, the landscape looks quite different. Technological developments allowed people to listen to music through numerous outlets, including records, cassette tapes, and compact discs (CDs); and new technology provides access to music from webcasters like Pandora, from online music stores like iTunes, via peer-to-peer file-sharing, over satellite radio, on music television channels like MTV, and on websites like YouTube and MySpace.³ The Napster controversy over unauthorized downloading indisputably showed record labels and artists that if consumers did not have to purchase music, they were not going to.⁴ As new technologies continue to provide a hungry audience with unfettered access to music, often at no cost, lawmakers should strive to protect the rights of copyright holders of both musical compositions and sound recordings from infringement of their rights, honor the full scope of the performance right, and promote fair compensation schemes. Legislation should protect artists dependent on the revenue generated from public enjoyment of their creative works while encouraging the development of new media to provide those works to the public.

Today, the average artist has neither a consistent nor particularly lucrative stream of income, despite representing nearly two million people in the United States workforce.⁵ The presence of artist unions⁶ and musician hospitals, such as The New Orleans Musician's Clinic,⁷ indicates that the average performing musician does not live the charmed life of Faith Hill and Tim McGraw.⁸ Nearly

2. Nadia Lerner, *Radio's Golden Years: Expert's Take on Radio in its Heyday – 1930s to 1950s*, SUITE101, Jan. 5, 2004, http://radioindustry.suite101.com/article.cfm/radios_golden_years (last visited Mar. 8, 2010).

3. Pandora, <http://www.pandora.com/#!/stations/create/> (last visited Mar. 8, 2010); iTunes, <http://www.apple.com/itunes/download/> (last visited Mar. 8, 2010); YouTube, <http://www.youtube.com/> (last visited Mar. 8, 2010); MySpace, <http://www.myspace.com/> (last visited Mar. 8, 2010).

4. See generally *A&M Records, Inc. v. Napster, Inc.*, 239 F.3d 1004 (9th Cir. 2001); see also Steven Hetcher, *User-Generated Content and the Future of Copyright: Part One-Investiture of Ownership*, 10 VAND. J. ENT. & TECH. L. 863 (2008).

5. See Press Release, Nat'l Endowment for the Arts, National Endowment for the Arts Announces New Artists in the Workforce Study (June 12, 2008), available at <http://www.nea.gov/news/news08/artistsinworkforce.html> (analyzing the demographic and employment patterns of artists based on statistics from the United States Census Bureau).

6. See, e.g., Nashville Musicians Association, <http://www.afm257.org/> (last visited Feb. 15, 2010) (protecting performers and songwriters through collective efforts).

7. The New Orleans Musicians Clinic, <http://www.neworleansmusiciansclinic.org/> (last visited Feb. 15, 2010).

8. Hahn, *supra* note 1.

half of all musicians are freelance and work only part-time.⁹ Moreover, the income of the average working musician is around \$34,000 a year.¹⁰ The concept of the struggling musician or artist hits close to home for many in the music industry, and is sometimes seen as a badge of honor by artists who refuse to sacrifice their craft for more lucrative or commercial opportunities that conflict with their creative vision.¹¹ To the public, however, the exception might seem like the rule. Indeed, many rising artists likely continue to pursue their dreams based partially on what they perceive to be the reachable success of artists like Cher, The Rolling Stones, Diana Krall, Alison Krauss, and Jay-Z. Although not superstars, average musicians do get paid—the subject of constant debate and controversy, though, is how. Copyright law can help to resolve some of that conflict.¹²

As it has developed, the purpose of American copyright law is to foster knowledge, creativity, and education in order to benefit the author in the short term and the public in the long term.¹³ This goal is largely achieved by encouraging the development of new media of expression by granting authors a limited monopoly in certain exclusive rights related to uses of their works.¹⁴ With the advent of commercial radio, musicians and songwriters gained national exposure for their compositions, and the public gained access to new music, eventually in recorded form.¹⁵ Record labels and radio stations thereafter collaborated to make money in this new industry: radio through advertising, record labels through the production, sale, and distribution of sound recordings.¹⁶ However, federal copyright law did not protect sound recordings until 1971, even though protection for

9. Press Release, Nat'l Endowment for the Arts, *supra* note 5.

10. *Id.*

11. *CBS News Sunday Morning* (CBS television broadcast Mar. 26, 2009).

12. The American Society of Composers, Authors and Publishers, General Licensing Report Forms, <http://www.ascap.com/licensing/about.html> (last visited Feb. 15, 2010) (describing the royalty payments available for publishing copyright holders); Broadcast Music, Inc., About, <http://www.bmi.com/about/?link=navbar> (last visited Feb. 15, 2010) (describing the royalty payments available under licensing agreements for songwriters, composers, and publishers); SESAC, Inc., About Us, <http://www.sesac.com/About/About.aspx> (last visited Feb. 15, 2010) (describing the organization as a performance rights organization dedicated to procuring royalty payments to songwriters and publishers for the performance of their works).

13. JULIE E. COHEN ET AL., COPYRIGHT IN A GLOBAL INFORMATION ECONOMY 19 (2d ed. 2006); *see also* U.S. CONST. art. 1, § 8, cl. 8.

14. *Id.* at 22-24.

15. *See generally* JIM COX, AMERICAN RADIO NETWORKS: A HISTORY (MacFarland & Co. 2009).

16. Letter from David K. Rehr, President and CEO, Nat'l Ass'n of Broadcasters, to The Honorable Nancy Pelosi, U.S. House of Representatives (Feb. 4, 2009), *available at* http://www.nab.org/documents/newsRoom/pdfs/020409_DKR_PTax_House.pdf.

musical compositions was granted in the early 1800s.¹⁷ Still, even in the early development of the music industry, artists protested against the use of their performances in sound recordings without express permission or compensation.¹⁸ However, because federal copyright protection did not extend to sound recordings, artists had to rely on uncertain and inconsistent state common law remedies that provided little redress for unauthorized uses of their work.¹⁹ Although sound recordings currently receive limited copyright protection,²⁰ radio stations still do not pay artists for airplay of their performances, though record labels and radio stations continue to generate large profits from their use.²¹ Although more successful artists may receive compensation from record sales, live performances, and merchandise, those who do not or who long ago ceased to receive such revenue are deprived of an important source of compensation for use of their performances in sound recordings.²²

Modern technological advances shed new light on whether copyright law should protect sounds recordings. In the early 1970s,

17. COHEN ET AL., *supra* note 13, at 24 (noting 1831 as the year musical compositions were afforded copyright protection); Sound Recordings Act, Pub. L. No. 140, 85 Stat. 39 (1971) (prior to 1976 amendment). There are two separate copyrights in every sound recording: one in the underlying musical composition, and one in the sound recording itself. *See generally* Tim Brooks, *Copyright and Historical Sound Recordings: Recent Efforts to Change U.S. Law*, 65 NOTES: Q.J OF THE MUSIC LIBR. ASS'N 464, (Mar. 2009) (describing the evolution of the copyright protection in sound recordings). The songwriter and publisher usually hold the copyright in the underlying musical composition, while artists and record labels hold the copyright in the sound recording that embodies that musical composition. *Id.* The distinction is nuanced, but crucial, and the two copyrights are treated differently under the law. *Id.* Currently, the authors of musical compositions are paid a royalty for any public performance of their work, while the performer on a sound recording is preventing from receiving that same royalty for radio airplay of their performance of the song. *Id.*

18. *See* RCA Mfg. Co. v. Whiteman, 114 F.2d 86, 88 (2d Cir. 1940) (indicating performers historically opposed unauthorized uses of previous recorded performances on the radio).

19. Brooks, *supra* note 17, at 465 (indicating that state law remedies in one state regarding sound recordings could have unintended, negative consequences for the use of that sound recording in other states). Even now, sound recordings created before 1972 are not protected by federal copyright law, and owners must still seek redress for unauthorized use under state law. *Id.*

20. *See* 17 U.S.C. § 106(6) (2006) (granting a performance right for the digital transmission of sound recordings).

21. Alan L. Montgomery & Wendy W. Moe, *Should Record Companies Pay for Radio Airplay? Investigating the Relationship Between Album Sales and Radio Airplay*, (Carnegie Mellon University Working Paper, 2000), available at <http://repository.cmu.edu/tepper/332/> (analyzing the relationship between radio airplay and album sales, noting in particular the profitability of current practices for both record labels and radio broadcasters).

22. Christopher Knab, *Artist Income Sources*, MUSIC BIZ ACADEMY, Jan. 2008, <http://www.musicbizacademy.com/knab/articles/artistincome.htm> (listing various sources of revenue for musicians).

sound recordings became copyrightable under federal law.²³ However, this protection was more limited in scope than for musical compositions, as it purposefully excluded a performance right.²⁴ Additionally, the Internet enabled the easier transfer and distribution of sound recordings through digital transmissions and made copyright infringement problems more acute and widespread.²⁵ The concern among entertainment industry players was that a main source of revenue for labels and artists, record sales, was becoming substantially diminished by availability of songs free-of-charge on the Internet.²⁶ Record labels and artists were eventually successful in pushing Congress to protect sound recordings from unlawful reproduction, distribution, and unauthorized performance—but the rights were still strictly limited to digital transmissions.²⁷ The scope of protection for copyright holders against digital audio transmissions is still contested, and new lawsuits arise every year seeking to define which uses are protected.²⁸ Despite this vigorous debate, artists remain uncompensated for public performances of their work via AM or FM radio. The proposed Performance Rights Act (PRA) seeks to resolve this issue by including terrestrial radio transmissions in the performance right guaranteed by copyright law to their counterpart in digital transmissions and musical compositions.²⁹

This Note examines the development of copyright law with regard to musical compositions and sounds recordings, why performance royalties are paid for some uses and not others, how the PRA seeks to remedy a perceived loophole for artist compensation, and the motivation behind the legislation. To do so, the Note addresses the current conflict between the purpose of terrestrial broadcast

23. See Sound Recordings Act, Pub. L. No. 140, 85 Stat. 39 (1971); 17 U.S.C. § 102(a)(7) (2006) (amending federal copyright law in 1971 to include “sound recordings,” as now defined in 17 U.S.C. § 101 as “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”).

24. *Id.*

25. See *Arista Records, LLC v. Launch Media, Inc.*, 578 F.3d 148, 153 (2d Cir. 2009) (describing the unlawful reproduction and distribution problems associated with digital audio transmissions over the Internet).

26. *Id.*

27. 17 U.S.C. § 106(6) (2006).

28. See *Bonneville Int’l Corp. v. Peters*, 347 F.3d 485 (3rd Cir. 2003) (seeking to determine whether streaming music from a radio broadcast onto that broadcasters website was included in the terrestrial radio exemption for sound recording royalties); see also *Arista Records, LLC v. Launch Media, Inc.*, 578 F.3d 148 (2d Cir. 2009) (determining whether “webcasting” services are “interactive” within the meaning of the Copyright Act).

29. Performance Rights Act, H.R. 848, 111th Cong. (2009).

performance royalties and the opposing viewpoints, and then analyzes whether the goals served by including a performance right in digital sound recordings are also served by a performance right in terrestrial transmissions. Part I examines the development of copyright protection for musical compositions and sound recordings, and the reasons protection in sound recordings may not have been immediately necessary to encourage creativity. Part II describes the PRA and the basis for its introduction in Congress, and compares its purpose and effect with those of the Digital Performance Right in Sound Recording Act. Part III analyzes the potential effects such royalty payments may have on traditional radio, record labels, artists, and the music industry generally. Finally, Part IV presents the Note's conclusion that Congress should pass the PRA, but seek to minimize adverse financial effects and negative externalities that may run counter to the goals of copyright law.

I. BACKGROUND: COPYRIGHT LAW AND SOUND RECORDINGS IN THE UNITED STATES

Copyright law protects a broad scope of creative and artistic expression.³⁰ In the United States, the purpose of copyright law tends to reflect the valuation of economic incentives and productivity over the moral rights or integrity of artists.³¹ However, some statutory provisions and case law support the idea that moral rights of authors are also recognized and respected, though perhaps more implicitly, within the existing protections of copyright law.³² Copyright law grants artists a temporary monopoly—ownership of exclusive methods of control over their works for a specified length of time—and courts have consistently stated that the purpose underlying the Copyright

30. See 17 U.S.C. § 102(a) (2006) (granting copyright protection to literary works, musical works, dramatic works, pantomimes and choreographic works, pictorial, graphic, and sculptural works, motion pictures and other audiovisual works, sound recordings, and architectural works).

31. COHEN ET AL., *supra* note 13, at 6 (framing the purpose of copyright protection as an answer to the “public goods problem in intangibles”) (“Once the good is produced, there is no way to exclude others from enjoying its benefits,” diminishing the author’s incentive to create). Granting authors certain exclusive rights in the use of their intellectual property is seen as a utilitarian answer to encourage the production of creative works and provide the public with access to those works. *Id.*

32. See *Gilliam v. Am. Broad. Cos.*, 538 F.2d 14 (2d Cir. 1976) (finding ABC “impaired the integrity” of the works of Monty Python by airing edited versions of the television series without permission); see also Visual Artist Rights Act, 17 U.S.C. § 106A (1990) (granting certain rights of attribution, and the right to prevent distortion, mutilation, or modification of a work that would prejudice the author’s honor or reputation to certain visual works in a defined category).

Clause in the Constitution is to “encourage the production and dissemination of artistic works for the general public good.”³³ Protecting the use of sound recordings did not seem to address the stated purposes of copyright law,³⁴ and as a result, recordings were denied protection until the 1970s.³⁵ However, as technological changes increasingly deprived creators of the economic benefits of their works, Congress began paying attention.³⁶ Although sound recordings and the creative minds behind those recordings now receive some protection, the scope of that protection is incomplete.

A. Copyright Generally

The Copyright and Patent Clause is found in Article I, Section 8, Clause 8 of the United States Constitution.³⁷ The Clause states: “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.”³⁸ Due to the open-ended constitutional language, the scope of copyright protection has been challenged, altered, and amended since its inception, and continues to expand and adapt to attempt by lawmakers to harmonize economic and artistic goals, and to benefit society.³⁹

Congress formally embraced the idea that copyright protection offered an educational purpose in the Copyright Act of 1790.⁴⁰ The stated purpose of the Act was the “encouragement of learning,” and the Act granted authors the “sole right and liberty of printing, reprinting, publishing, and vending” copies of various works for a

33. Harry Fox Agency, Inc. v. Mills Music, Inc., 543 F. Supp. 844, 862 (S.D.N.Y. 1982); see also Sony Corp. of Am. v. Universal City Studios, Inc., 464 U.S. 417 (1984); Ladd v. Law & Tech. Press, 762 F.2d 809 (9th Cir. 1985) (discussing the overarching goal of copyright as that of serving the public good).

34. The National Association of Broadcasters, *No Performance Tax: Oppose the Record Label-Led Performance Fee on Radio*, <http://www.noperformancetax.org> (last visited Oct. 15, 2009) (indicating digital audio transmissions create a perfect digital copy that can be captured by the end user, creating a market replacement, and that those concerns are not implicated with transmission of sound recordings over terrestrial radio).

35. 17 U.S.C. § 102(a)(7) (2006).

36. See *Arista Records, LLC v. Launch Media, Inc.*, 578 F.3d 148, 153 (2d Cir. 2009) (“At the time, the United States Register of Copyrights referred to the [I]nternet as ‘the world’s biggest copying machine.’ ” (quoting Stephen Summer, *Music on the Internet: Can the Present Laws and Treaties Protect Music Copyright in Cyberspace?*, 8 CURRENTS: INT’L TRADE L.J. 31, 32 (1999))).

37. U.S. CONST. art. I, § 8, cl. 8.

38. *Id.*

39. COHEN ET AL., *supra* note 13, at 24-26 (describing the extension of copyright protection from 1790 until the late twentieth century).

40. *Id.* at 22.

period of fourteen years, with one option to renew for another fourteen years.⁴¹ Through the Act, Congress sought to incentivize authors to share their works with the public by securing them a way to protect their creative efforts.⁴² However, this early Act limited protection to “authors of maps, charts, and books,”⁴³ and did not include other types of writings or works like musical compositions, newspapers, or the works of foreign authors. As new technologies emerged, however, Congress continued to expand copyright protection to other works as they became adversely affected by changing markets and technology.⁴⁴

Musical compositions were accorded statutory copyright protection in 1831,⁴⁵ and received additional protection under the Copyright Act of 1909.⁴⁶ The 1909 Act extended the period of copyright protection granted to works to a maximum of fifty-six years, instead of the previous twenty-eight.⁴⁷ In addition, the 1909 Act added a public performance right to musical compositions,⁴⁸ and protection to all the original works of the author when those works (1) were published and (2) notice of copyright was attached.⁴⁹ More importantly for musical compositions, the Act created the first compulsory mechanical license, allowing anyone to make a phonorecord of a musical composition without the consent of the copyright owner as long as the user complied with the requirements of the license and paid the statutory fee.⁵⁰ This license was originally intended to cover the use of piano rolls on player pianos, but now applies to covers of songs as well.⁵¹

A year before the 1909 Act was enacted, the Supreme Court held that a player piano roll was not a copy of the musical composition that it represents because it was created for a machine to read, and therefore was not a reproduction within the meaning of copyright

41. Copyright Act of 1790, available at www.copyright.gov/history/1790act.pdf (last visited Mar. 9, 2010).

42. COHEN ET AL., *supra* note 13, at 24 (indicating that by the end of the nineteenth century, copyright protection was an established means of encouraging knowledge and learning).

43. *Id.* at 24.

44. See Digital Millennium Copyright Act, 17 U.S.C. § 512, 1201-1205, 1301-1332; 28 U.S.C. § 4001 (1998) (creating heightened penalties for copyright infringement on the Internet).

45. COHEN ET AL., *supra* note 13, at 24.

46. Copyright Act of 1909, available at www.copyright.gov/history/1909act.pdf (last visited Mar. 9, 2010).

47. *Id.* at 27. The original fourteen-year limit on copyright protection was renewable once, making the maximum time of copyright protection twenty-eight years. *Id.* at 22.

48. *Id.* at 27.

49. Copyright Act of 1909, available at www.copyright.gov/history/1909act.pdf (last visited Mar. 9, 2010).

50. COHEN ET AL., *supra* note 13, at 447; see 17 U.S.C. § 115 (2006).

51. COHEN ET AL., *supra* note 13, at 447.

law.⁵² As a result, the owner of the copyright in a musical work could not obtain payment for such a use.⁵³ Although the Court acknowledged the negative implications of the holding for composers, it declined to further address them, leaving the question for legislative resolution.⁵⁴ The compulsory license made it possible to record and distribute a cover version of a hit song once a recording was released, as long as notice was given to the copyright holder of intent to use and the user paid the set statutory fee.⁵⁵ The copyright holder cannot prohibit reproductions of this kind, and is forced to accept a predetermined statutory fee for these uses.

With the advent of commercial radio broadcasting and mass production of sound recordings of musical compositions, new unauthorized uses of works revealed gaps in copyright protection. For example, Paul Whiteman, an orchestra conductor and composer in the 1930s, attached a label to each record produced stating that it was "Not Licensed for Radio Broadcast" in an attempt to prevent the unauthorized performance of his works on the radio.⁵⁶ The radio broadcasters disregarded this notice, and in 1937 Whiteman filed what became a landmark case against the W.B.O. Broadcasting Corporation, seeking an injunction to prevent the station from broadcasting the performances without his permission.⁵⁷ RCA joined the lawsuit against W.B.O., but also requested a judgment against Whiteman stating that he had no interest in the recordings of his performances due to superseding provisions of his existing recording contract.⁵⁸ The question was simple: could W.B.O., as the purchaser of Whiteman's recorded performances, broadcast them to the public without compensating either RCA or Whiteman?

The district court said that W.B.O. could not, holding that Whiteman's common-law property rights in the works passed to RCA under his contract, and the record company could enforce those rights

52. White-Smith Music Publ'g Co. v. Apollo Co., 209 U.S. 1, 14 (1908).

53. *Id.* at 18.

54. *Id.*

55. COHEN ET AL., *supra* note 13, at 447.

56. RCA Mfg. Co. v. Whiteman, 114 F.2d 86, 87 (2d Cir. 1940).

57. *Id.*

58. *Id.* Whiteman's dispute was with broadcasters and his record label. Disagreements and legal disputes over record label contracts have existed as long as the industry, a fact terrestrial radio executives point to as a bigger reason for the lack of financial stability of performers. National Association of Broadcasters, *Oral Testimony of Steve Newberry and Larry Patrick Before House Judiciary Committee*, <http://www.nab.org/documents/newsroom/pressRelease.asp?id=1753> (last visited Mar. 9, 2010).

against the radio station.⁵⁹ In addition, the court found that Whiteman was entitled to an injunction against W.B.O. because broadcasting Whiteman's performance without his consent constituted unfair competition.⁶⁰ Whiteman appealed the ruling that his common-law property rights in the work passed to RCA by virtue of his recording contract, and RCA appealed the court's determination of Whiteman's rights.⁶¹

In a decision that would shape radio broadcasting for the next seventy years, Judge Learned Hand and the Second Circuit reversed the ruling of the district court and found for W.B.O. Broadcasting.⁶² Hand defined copyright protection as consisting of the right to prevent others from *reproducing* a protected work, and held that W.B.O. had not violated this right.⁶³ Instead, the station merely purchased the recordings and put them to their intended use—playing them on record players.⁶⁴ To Hand, this action did not constitute copying the work, which would require the permission of the author or publisher.⁶⁵ In fact, the court announced that Whiteman himself had allowed the copying of his performances when he recorded with RCA, and he could not subsequently blame the public for unlawful copying simply because they put that copy to its intended use.⁶⁶ In conformity with the common-law property interest at issue, Hand stated that once chattels are sold, any restrictions upon their use are presumptively invalid.⁶⁷ The radio station lawfully purchased a copy of Whiteman's performance in the sound recording.⁶⁸ Once the copy was purchased, neither Whiteman nor RCA had control over its subsequent use by the purchaser.⁶⁹ The decision helped put radio on solid legal ground to

59. *RCA Mfg.*, 114 F.2d at 87; Judge Hand's opinion treats rights in musical works under a real property framework. However, copyright cases and protections have begun to adopt a tort-centered analysis in dealing with injury and compensation for infringement claims. *see e.g. Sony*, 464 U.S. 417 (1984) (analyzing the tort of contributory infringement).

60. Broadcasting was competition with the live performances that composers relied on for income. *RCA Mfg.*, 114 F.2d at 87

61. *Id.* at 88.

62. *See id.* at 90 (addressing both Whiteman's claims against broadcasters and the record label's claims against Whiteman).

63. *Id.* at 88.

64. *Id.*

65. *Id.*

66. *Id.* at 89.

67. *Id.* The reasoning in *Whiteman* is in conformity with the first sale doctrine, which permits the owner of physical property in which intellectual property is contained to alienate that property in any manner the owner chooses, as long as he or she does not infringe the copyright protections in the underlying work. *See COHEN ET AL.*, *supra* note 13, at 369.

68. *Whiteman*, 114 F.2d at 87.

69. *Id.*

play records without compensating performers for the next seventy years.

B. Copyright in Sound Recordings

The lack of copyright protection in sound recordings forced record labels to come to a different financial arrangement with radio broadcasters in order to generate income, which largely worked until new technology permitted seemingly unfettered duplication of sound recordings and presented music in a wider variety of formats. Radio, even if not directly paying for music, was essentially advertising new music to listeners, and the success of this practice bred fierce competition to get songs on the air.⁷⁰ With the explosion of commercial radio in the 1950s increasing scrutiny of the format, it soon became clear that record label conglomerates were paying terrestrial broadcasters under the table to play their songs on the air.⁷¹ “Payola,” as it came to be known, became the object of national controversy in the 1950s and is now an illegal practice under federal law.⁷² With no performance rights for sound recordings and loss of control over which songs were played, record labels and artists again relied predominantly on record sales and other revenue streams to generate profits.

Finally, the Sound Recording Act of 1971 (SRA) extended the first federal copyright protection to sound recordings. This protection arrived late into a booming music industry era already thriving on the relationship between record labels and radio broadcasters.⁷³ The SRA gave copyright holders an exclusive right “to reproduce and distribute” any “tangible” copies of sound recordings.⁷⁴ Noticeably absent from the rights included in the SRA was the performance right accorded other musical works, despite the existence of recorded sound in the 1800s and the phonograph machine in the early 1900s.⁷⁵ As a result,

70. Ed McKenzie, *Gimmie, Gimmie, Gimmie on the Old Payola: A Deejay's Expose - and Views*, LIFE, Nov. 23, 1959, at 45, available at <http://books.google.com/books?id=XIUAAAAAMBAJ&lpg=PA45&dq=payola&pg=PA45#v=onepage&q=payola&f=false> (describing the rise and fall of pay-for-play during the commercial radio boom in the 1950s)

71. *Id.*

72. *Id.*; see also 47 U.S.C. § 317(a)(1) (2006) (“All matter broadcast by any radio station for which any money, service or other valuable consideration is directly or indirectly paid, or promised to or charged or accepted by, the station so broadcasting, from any person, shall, at the time the same is so broadcast, be announced as paid for or furnished, as the case may be, by such person.”).

73. *Arista Records, LLC v. Launch Media, Inc.*, 578 F.3d 148, 152 (2d Cir. 2009).

74. *Id.*

75. COHEN ET AL., *supra* note 13, at 444.

the SRA denied owners of sound recording copyrights, principally record labels, the right to extract licensing fees from broadcasters of recorded music.⁷⁶

Under current copyright law, copyrighted works other than sound recordings are fixed in “copies.”⁷⁷ However, sound recordings are fixed in “phonorecords,” which are defined as the material objects from which sounds can be perceived either directly or by using a machine.⁷⁸ Copyright protection of recordings (phonorecords) differs from the protection granted to musical compositions (copies), which includes a performance right.⁷⁹ The oft-cited reason for the lack of a sound recording performance right, and a recurring argument today,⁸⁰ is that the symbiotic relationship between radio stations and record labels eliminated the need for this right in order to protect against economic loss.⁸¹ Although largely a post hoc rationalization, radio broadcasters and record labels do enjoy a seemingly symbiotic economic relationship. Nevertheless, artists and labels continue to push for a performance right in sound recordings,⁸² and after the passage of the SRA, Congress studied the need for stronger copyright protection in this area for the next twenty years.⁸³

Currently, copyright protection extends to two elements in recorded music: (1) the musical composition, including the words and music, and (2) any recording of that composition.⁸⁴ The copyright in musical compositions provides the owner with the exclusive right to reproduce, distribute, perform, and alter the work.⁸⁵ These rights entitle the copyright holder to receive royalties when they choose to

76. *Id.*

77. Lydia Pallas Loren, *Understanding the Complexity of Music Copyrights in the United States*, in *INTELLECTUAL PROPERTY AND INFORMATION WEALTH: ISSUES AND PRACTICES IN THE DIGITAL AGE* 161, 166 (Peter K. Yu ed., 2007).

78. *Id.*

79. *Id.*

80. Free Radio Alliance, Media Center, <http://www.freeradioalliance.org/mediaCenter.asp> (last visited Feb. 16, 2010).

81. *Id.*

82. *Bonneville Int'l Corp. v. Peters*, 153 F. Supp. 2d 763, 766 (E.D.P.A. 2001) (noting the recording industry first requested a broad performance right in the 1920s and has continued to do so until this day).

83. *Arista Records, LLC v. Launch Media, Inc.*, 578 F.3d 148, 152 (2d Cir. 2009) (“In response to continued lobbying by the recording industry, Congress and the Copyright Office (the “Office”) studied the need for stronger copyright protection for sound recordings for two decades after passage of the SRA.”)

84. Posting of Howie Cockrill (*Copyright: Performance Rights Act Pt. 1*) to M.E.L.O.N., <http://beatblog.typepad.com/melon/2008/02/copyright-amfm.html> (Feb. 2, 2008, 11:01 EST).

85. 17 U.S.C. § 106 (2006).

license those exclusive rights to others.⁸⁶ Performing rights organizations such as the American Society of Composers, Authors, and Publishers (ASCAP), SESAC, and Broadcast Music, Inc. (BMI) collect and distribute performance royalties to copyright holders.⁸⁷ These royalties come from terrestrial, Internet, and satellite radio, as well as cable and other digital outlets.⁸⁸ In contrast to performance rights for compositions, sound recording copyright holders receive royalties, via a performance rights organization called SoundExchange, that collects from all of these sources except traditional AM or FM radio.⁸⁹ Specifically, 17 U.S.C. §106(6) states that copyright holders have exclusive right “in the case of sound recordings, to perform the copyrighted work publicly by means of digital audio transmission” only.⁹⁰

C. Performance Rights in Digital Audio Transmissions of Sound Recordings

Until 1995, neither labels nor artists had any performance right in sound recordings. Between 1971 and 1995, a technological boom in entertainment media formats created new dangers of unauthorized use of copyrighted works, and the concept of music piracy on the Internet made national headlines.⁹¹ In light of these changes, Congress reevaluated whether copyright protection should include a performance right for sound recordings.

As music became widely available on the Internet, the Recording Industry Association of America (RIAA) viewed on-demand radio as a potential market replacement for album sales.⁹² Essentially, if users could listen to music broadcasts online, or

86. Cockrill, *supra* note 84.

87. The American Society of Composers, Authors and Publishers, *supra* note 12 (describing the royalty payments available for publishing copyright holders); Broadcast Music, Inc., *supra* note 12 (describing the royalty payments available under licensing agreements for songwriters, composers, and publishers); SESAC, *supra* note 12 (describing royalty payments for copyright holders for public performances).

88. The American Society of Composers, Authors and Publishers, <http://www.ascap.com/about/payment/whocollect.html> (listing the entities from which ASCAP collects performance royalties).

89. See *SoundExchange, Inc. v. Librarian of Cong.*, 571 F.3d 1220, 1222 (D.C. Cir. 2009); see also 17 U.S.C. § 801(b)(1) (2006) (listing four specific objectives in the calculation of royalty rates).

90. 17 U.S.C. § 106(6) (2009).

91. Lev Grossman, *Learning to Love Your Inner Pirate*, TIME, June 4, 2007, at 54, available at <http://www.time.com/time/magazine/article/0,9171,1625209,00.html>; see also Jube Shiver, Jr., *Digital Double Trouble*, L.A. TIMES, Apr. 11, 1994, at A1.

92. Cockrill, *supra* note 84.

download songs from the Internet free of charge, they would no longer purchase music.⁹³ The risk of unauthorized copying by transmitting songs over the Internet was considered more dangerous than recordings made from terrestrial radio because the digital sound quality far exceeded analog recording, and it was much more convenient to create a copy.⁹⁴ After some discussion on Capitol Hill, Congress passed the Digital Performance Right in Sound Recordings Act.⁹⁵

Congress stated two primary reasons for providing a performance right for digital audio transmissions.⁹⁶ First, to promote the continued creation of new sound recordings and musical works; inadequate protection in a digital environment risked discouraging creation.⁹⁷ Second, the interactive nature of Internet radio increased potential adverse effects on the sale of sound recordings and limited the enforcement of existing copyright protection.⁹⁸ As a result, the performance right was limited only to digital transmissions of sound recordings in order to simultaneously encourage the development of new media and forms of distribution.⁹⁹ The National Association of Broadcasters (NAB) probably also played a role in limiting the performance right to only digital transmissions.¹⁰⁰

Three years later, Congress again evaluated the implications of developing technology with the Digital Millennium Copyright Act, expanding the performance right to include interactive webcasters.¹⁰¹ What constitutes “interactive” under the Act remains an open question, but it clearly does not include AM/FM broadcasters. It is clear, however, that under both these laws terrestrial radio remains exempt from paying a performance royalty to copyright holders of

93. *Arista Records, LLC v. Launch Media, Inc.*, 578 F.3d 148, 154 (2d Cir. 2009). It should be noted that iTunes, which as of April, 2008 was the largest online music store in the United States, did not open until 2003. Press Release, Apple, Inc., iTunes Store Top Music Retailer in the US (Apr. 3, 2008), available at <http://www.apple.com/pr/library/2008/04/03itunes.html> (last visited Mar. 9, 2010).

94. *Id.*

95. musicFIRST, Background, <http://musicfirstcoalition.org/background/> (last visited Feb. 16, 2010).

96. *Arista Records, LLC v. Launch Media, Inc.*, 578 F.3d 148, at 154 (2d Cir. 2009).

97. *Id.*

98. *Id.*

99. *Id.*

100. *Digital Performance Right in Sound Recordings Act of 1995: Hearing on H.R. 1506 Before the Subcomm. On Courts and Intellectual Property Comm. on the Judiciary*, 104th Cong. 1 (1995) (statement of Marybeth Peters, Register of Copyrights) available at <http://www.copyright.gov/docs/regstat062895.html> (noting the NAB's continued objection to an extension of a performance right in sound recordings) (last visited Mar. 9, 2010).

101. 17 U.S.C. § 114 (2006).

sound recordings for airplay. The enactment of the PRA would change this by establishing a full performance right in sound recordings for the first time in American copyright history.

II. THE PERFORMANCE RIGHTS ACT

A. Amendments and Provisions Granting a Performance Right for Terrestrial Radio Uses

In February of 2009, Senators Orrin Hatch and Patrick Leahy, along with Representatives Darrell Issa and John Conyers, introduced the PRA in Congress.¹⁰² The stated purpose of the PRA is to provide “parity in radio performance rights,” and “fair compensation to artists for use of their sound recordings.”¹⁰³ Fairness to artists and performers is the dominant theme echoing from supporters of the Act.¹⁰⁴ Section 2 of the PRA is entitled “Equitable Treatment for Terrestrial Broadcasts,” and seeks to amend the exclusive performance right granted in § 106(6) of the Copyright Act to read: “in the case of sound recordings, to perform the copyrighted work publicly by means of an *audio transmission*,” replacing the current “digital transmission” and bringing terrestrial radio uses within the control of copyright holders.¹⁰⁵ The PRA also strikes the word “digital” from § 114(d)(1) and § 114(j)(6) of Title 17, which would also bring terrestrial radio within the existing statutory licensing structure.¹⁰⁶

Seemingly aware of disparities in financial capability between larger corporate and smaller local radio stations, the PRA also includes a special treatment provision for noncommercial, educational, and religious radio stations, as well as certain incidental uses of sound recordings.¹⁰⁷ Instead of charging set royalty payments across the board, the PRA states that any “individual terrestrial broadcast station that has gross revenues in any calendar year of less than \$1,250,000” may elect to pay an annual flat fee of \$500 to \$5,000—reduced to \$1,000 for public broadcast entities—in lieu of the individual royalties the station would otherwise be required to pay on a per-play basis.¹⁰⁸ The PRA is not specific about the mathematical

102. Performance Rights Act, H.R. 848, 111th Cong. (2009).

103. *Id.*

104. musicFIRST, Mission, <http://musicfirstcoalition.org/mission/> (last visited Feb. 16, 2010).

105. Performance Rights Act, H.R. 848, 111th Cong. § 2(a) (2009) (emphasis added).

106. *Id.* § 2(b)-(c).

107. *Id.* § 3.

108. *Id.* § 3(a)(1)(D)-(E).

method for calculating royalty payments, and it remains unclear whether the exception for smaller stations would be meaningful in application. Instead, if a traditional radio station does not qualify for or elect to pay the flat fee, the royalty amount due will be determined through either independent negotiation or by the Copyright Royalty Board.¹⁰⁹ Currently, § 801(b) provides general factors the Board should consider in making royalty determinations.¹¹⁰ However, the only economic guidance provided is to “minimize any disruptive impact on the structure of the industries involved.”¹¹¹ Without specific economic guidance, corporate radio giants remain uncertain, and understandably wary, as to how the PRA will affect their bottom line.¹¹²

In addition, the PRA includes provisions protecting incidental uses of sound recordings and the existing rights of copyright holders of musical works, stating that the new provisions shall not be used to adversely affect royalty payments or publishing rights already established under the Copyright Act.¹¹³ In essence, this provision effectively prevents radio broadcasters from siphoning off royalty payments from musical composition copyright holders in order to pay the new performance royalties.

The NAB has successfully blocked the grant of a performance right in sound recordings for decades.¹¹⁴ Before the enactment of the 1976 Copyright Act, Congress considered including a full performance right for sound recordings along with a compulsory licensing system modeled after that for mechanical reproductions of works.¹¹⁵ This broad protection was not included in the final version of the bill, mostly as a result of strenuous opposition from broadcasters, performance rights organizations, and publishing companies.¹¹⁶ Not surprisingly, broadcasters opposed paying new royalties for activities they freely engaged in for decades, and around which they built their business model.¹¹⁷ Similarly, performance rights organizations and

109. Posting of David Oxenford (*Senate Judiciary Committee Hearing on Radio Performance Royalty and Platform Parity for Webcaster Royalties*) to Broadcast Law Blog, <http://www.broadcastlawblog.com/2009/08/articles/broadcast-performance-royalty/senate-judiciary-committee-hearing-on-radio-performance-royalty-and-platform-parity-for-webcaster-royalties/> (Aug. 6, 2009).

110. 17 U.S.C. § 801(b)(1) (2006).

111. *Id.* § 801(b)(1)(D).

112. The National Association of Broadcasters, *supra* note 34.

113. Performance Rights Act, H.R. 848, 111th Cong. § § 5(a)(1)(i)(1) (2009).

114. Loren, *supra* note 77.

115. *Id.* at 166-67.

116. *Id.*

117. *Id.*

publishers enjoyed exclusive control over royalty payments for the use of the underlying musical works and did not want to divide what they perceived to be the fixed amount of money radio stations were willing to pay.¹¹⁸ Subsequently, in 1978, the Copyright Office released a report endorsing a performance right in sound recordings.¹¹⁹ Despite this recommendation, broadcasters have successfully thwarted the inclusion of such a right to this day.¹²⁰

There was less momentum from broadcasters to block the enactment of the Digital Performance Right in Sound Recordings Act of 1995. Congress addressed the recording industry's fear that digital delivery of songs would replace the need for CDs and other profit-making tangibles.¹²¹ Because traditional radio play did not implicate the same music piracy concerns as its digital counterpart, a performance right for AM/FM uses was still excluded.¹²² However, there is evidence that the broadcasting lobby, among others, had a hand in keeping Congress from rocking the boat and upsetting the "longstanding business and contractual relationships" between powerful players in the music industry.¹²³ Indeed, Congress admitted as much.¹²⁴ Nevertheless, broadcaster opposition eventually gave way to the political compromise that resulted in the Digital Performance Right in Sound Recordings Act.¹²⁵

B. Comparative Rights

The absence of a performance right in sound recordings in American copyright law is almost unique in the world.¹²⁶ Upon introduction of the bill to Congress, Representative Issa stated that America's ignorance of intellectual property rights was a worldwide embarrassment, and that the legislation presented the opportunity to

118. *Id.*

119. Steven M. Marks, *Entering the Sound Recording Performance Right Labyrinth: Defining Interactive Services and the Broadcast Exemption*, 20 LOY. L.A. ENT. L. REV. 309, 311 (2000).

120. *Id.* at 311 n.12 (stating that the lack of a performance right in the U.S. is a "huge loss" to copyright holders).

121. Loren, *supra* note 77, at 168.

122. *Id.*; see also Digital Millennium Copyright Act, 17 U.S.C. § 512, 1201-1205, 1301-1332; 28 U.S.C. § 4001 (2004).

123. Loren, *supra* note 77, at 168.

124. *Id.*

125. Marks, *supra* note 119, at 311.

126. *Performance Rights Act: Hearing on H.R. 848 Before the H. Comm. on the Judiciary*, 111th Cong. 38 (2009) (statement of Paul Almeida, President, Department for Professional Employees, AFL-CIO), available at http://judiciary.house.gov/hearings/printers/111th/111-8_47922.PDF.

correct that ignorance.¹²⁷ Although the United States is a signatory to the Berne Convention, which affords broader, global protection for copyright, America is not a signatory to the 1961 Rome Convention for the International Protection of Performers, Producers of Phonograms, and Broadcasting Organizations, which requires all members grant a performance right in sound recordings.¹²⁸

Along with the United States, there are less than a handful of countries that do not recognize a sound recording performance right: China, Iran, Rwanda, and North Korea.¹²⁹ As a result of this missing right, performers in the United States are deprived of substantial revenue streams that foreign governments and commercial entities would otherwise be obligated to pay for AM/FM broadcasts of American songs; the nearly one billion dollars ASCAP collects annually for music publishers and songwriters indicates that similar revenue may exist for performers.¹³⁰ However, granting a performance right is not a guarantee to this foreign revenue, as Article 16 of the Rome Convention allows signatories to opt out of the obligation to pay foreign performance royalties.¹³¹

III. ARGUMENTS SUPPORTING AND OPPOSING A PERFORMANCE RIGHT IN SOUND RECORDINGS

Aside from the benefit of harmonizing United States copyright law with that of other countries, there are several arguments offered in support of the adoption of a performance right in sound recordings. Supporters make the equitable arguments that such a right is a basic fairness to performers whose songwriter counterparts are compensated for the same use of their work and that such a right would further incentivize the creation of sound recordings, enhancing the economic goals of American copyright.¹³² Opponents of a performance right state that granting such a right would bankrupt

127. Press Release, U.S. Senator Patrick Leahy, Leahy, Hatch Introduce Bipartisan Performance Rights Legislation (Feb. 4, 2009), available at <http://leahy.senate.gov/press/200902/020409a.html>.

128. Emily F. Evitt, *Money, That's What I Want: The Long and Winding Road to a Public Performance Right in Sound Recordings*, 8 INTELL. PROP. & TECH. L.J. 10, 11 (2009).

129. *Hearing on H.R. 848 Before the H. Comm. on the Judiciary*, *supra* note 126, at 38.

130. ASCAP, Music & Money, Performing Right Payments, www.ascap.org/musicbiz/money-payments.html (last visited Feb. 17, 2010).

131. Rome Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organisations arts. 12, 16, Oct. 26, 1961, 496 U.N.T.S. 43.

132. Matthew S. DelNero, *Long Overdue? An Exploration of the Status and Merit of a General Public Performance Right in Sound Recordings*, 51 J. COPYRIGHT SOC'Y U.S.A. 473, 475 (2004); Evitt, *supra* note 128, at 11.

terrestrial radio stations, impede public access to important public services, and limit public access to sound recordings.¹³³ In addition, because radio stations already provide free publicity to performers, opponents believe the right is unnecessary to incentivize creativity.¹³⁴

A. *The Merits of a General Performance Right*

1. Fairness

Performers and record labels view the creation of a finished musical product as a collaborative effort of creative interdependence and decry the fact that only part of the contributors receive compensation for the performance of a copyrighted work.¹³⁵ Songwriters and publishers who create musical compositions are compensated through a performance right, whereas the artists and record labels that collaborate to bring that music to life and provide the financial means to produce it are not.¹³⁶

The contribution of the performer is as important as—if not more important than—that of the musical composer or songwriter. In essence, the performer is the last step in the process of creating a sound recording of a musical composition, and consumer purchases of recorded music are influenced more often by the artist performing the songs than the writer composing them.¹³⁷ Arguably, the royalties that ASCAP and BMI pay to songwriters are determined by and dependent upon the success of the particular artist performing the work.¹³⁸ It is rather obvious that, when a major artist like Whitney Houston or Carrie Underwood performs a song, the potential publishing revenue for the songwriter increases dramatically.¹³⁹

133. The National Association of Broadcasters, *supra* note 34.

134. DelNero, *supra* note 132, at 493; see also David Lieberman, *Fight Looms over Music Royalties*, USA TODAY, Oct. 21, 2009, at 2B, available at http://www.usatoday.com/money/media/2009-10-20-radio-music-royalties-congress_N.htm.

135. Press Release, Recording Industry Association of America, RIAA Applauds Introduction of New Performance Rights Legislation (Feb. 4, 2009), <http://www.riaa.com/newsitem.php?id=7BE7264B-5BC4-C823-777D-73D5B410805A> (last visited Mar. 10, 2010).

136. DelNero, *supra* note 132, at 501; Press Release, Am. Fed'n of Television & Radio Artists, AFTRA Members Applaud Senate Judiciary Approval of Performance Rights Act (Oct. 15, 2009), available at <http://www.aftra.org/D2E63093CE1747CDB100A362F7EE16E8.htm>.

137. DelNero, *supra* note 132, at 501-02 (suspecting that consumers are unlikely to know the names of hit songwriters such as Bruce Robinson and Farrah Braniff, but are intimately familiar with the Dixie Chicks, which “took those composers’ work to the top of the Billboard charts”).

138. *Id.*

139. For example, Elvis Presley approached Dolly Parton earlier in her career as a songwriter, seeking to record her song, “I Will Always Love You.” Although Elvis would have

Furthermore, preventing performers from reaping the benefits of their performances defies traditional principles of equity and fairness. In addition to the performers, the contributions of producers that create the sound and direction of a song and of record labels that bear the financial risk of producing sound recordings are also overlooked.¹⁴⁰ In fact, the record producer “is akin to a music publisher, who typically receives half of all public performance royalties for a musical composition.”¹⁴¹

The flip side of this equity argument points out radio’s promotional value in generating income for artists from album, merchandise, and ticket sales that songwriters do not earn unless they are also the artist. Even supporters of a performance right acknowledge the promotional value of radio airplay and the substantial revenue generated from this medium.¹⁴² Indeed, the promotional value of radio is evident in the payola scandal in the 1950s.¹⁴³ Recently, Warner Music Group CEO Edgar Bronfman stated that radio airplay was a “critical driver of music sales” and cited artists such as Madonna, Jay-Z, and Paramore as current beneficiaries of radio airplay.¹⁴⁴ Similarly, former NAB Executive Vice President Dennis Wharton stated, “Purely and simply, free radio airplay is the primary driver of music sales in America, and local radio stations build a foundation of fans who buy music, attend concerts, and pay \$60 for T-shirts.”¹⁴⁵ Essentially, broadcasters agree that performers should be compensated for use of their work but argue that performers are already compensated through radio’s promotional force.¹⁴⁶

The question remains whether the relationship between radio and record labels and a performance right in sound recordings are

brought the song national attention, Parton refused because Elvis also demanded ownership of the publishing rights. Many years later, Whitney Houston recorded the song without demanding publishing rights and earned Parton six million in royalties from her performance. Liz Hoggard, *Dolly Parton: Liz Hoggard Meets the Country Legend*, OBSERVER, Apr. 20, 2008, at 30, available at <http://www.guardian.co.uk/music/2008/apr/20/popandrock17> (last visited Mar. 10, 2010).

140. Steven J. D’Onofrio, *In Support of Performance Rights in Sound Recordings*, 29 UCLA L. REV. 168, 175-76 (1981).

141. DelNero, *supra* note 132, at 502.

142. Press Release, Nat’l Ass’n of Broadcasters, Warner Music CEO Touts Radio’s Promotional Value (Aug. 7, 2009), available at <http://www.nab.org/documents/newsroom/pressRelease.asp?id=2070>.

143. Brooks Boliek, *Radio Giant Faults Labels: Clear Channel CEO Deflects Pay-for-Play Blame*, HOLLYWOOD REP., Jan. 31, 2003 (stating that payola became a household word when a popular disc jockey was exposed for taking bribes to play records on the radio).

144. Press Release, Nat’l Ass’n of Broadcasters, *supra* note 142.

145. *Id.*

146. DelNero, *supra* note 132, at 506-07.

relevant to one another. The seemingly symbiotic relationship between the record industry and radio business models is not necessarily related to, or a substitute for, revenue that would be generated from granting a performance right and therefore seems to be a post hoc argument by broadcasters for maintaining the status quo. Moreover, the promotional argument becomes less compelling when viewed through the lens of artists that are no longer active in the entertainment industry, who are not the featured artist on a song, or who are not generating revenue through ticket sales and other income related to radio airplay. Radio airplay is unlikely to foster record sales for songs played on oldies or classical stations across the country, yet radio operators still profit from use of those works.¹⁴⁷ The argument is weakened, logically, when radio's promotional benefits to the artist are diminished or non-existent. Additionally, terrestrial radio is no longer the dominant outlet for access to musical works, as it competes with satellite radio, cable, and various digital formats that promote music and pay a performance royalty.¹⁴⁸

Furthermore, a balanced analysis cannot overlook the fact that broadcasters profit substantially from the use of sound recordings, generating millions of dollars annually in advertising sales.¹⁴⁹ The primary motivation for broadcasters to play music is not for its promotional value to record labels, artists, and songwriters, but simply to generate income through advertising.¹⁵⁰ Radio play arguably provides the same promotional value to songwriters and composers, who receive additional compensation through performance rights royalties.¹⁵¹ The promotional argument is increasingly difficult to justify to artists and performers who are not played on popular stations because they do not receive the same benefits from radio airplay of their performances.

In addition, broadcasters claim that the primary reason performers are largely overworked and underpaid is due to their ongoing exploitation by record labels, not due to the lack of a

147. *Id.* at 510.

148. *See generally* Digital Millennium Copyright Act, 17 U.S.C. § 512 (1998); *Digital Performance Right in Sound Recordings Act of 1995: Hearing on H.R. 1506 Before the Subcomm. On Courts and Intellectual Property Comm. on the Judiciary*, 104th Cong. 1 (1995)

149. Clear Channel Reports Year-End and www.clearchannel.com/Investors/Documents/318.pdf

150. DelNero, *supra* note 132, at 510.

151. The National Association of Broadcasters, *supra* note 34 (arguing that publishing royalties differ from performance royalties, as songwriters and composers do not carry the same name recognition that allows performers to financially exploit themselves to make money, a reasoning that largely applies only to performers with enough success to capitalize on any self-exploitation opportunities).

performance right.¹⁵² Record labels undoubtedly maintain superior bargaining power over artists seeking to bring their music careers to a larger audience, and contractual arrangements between the two entities overwhelmingly favor record labels.¹⁵³ Prominent artists, such as Eminem and the Allman Brothers, have frequently sued their record labels over unpaid royalties and breach of contract disputes,¹⁵⁴ and the reason the artist Prince changed his name to an unpronounceable symbol in the 1990s was to protest his contract with Warner Bros. Music.¹⁵⁵

Record labels provide funding and greater exposure to otherwise unknown artists, who are generally bound to biased terms the label sets, and labels are rarely forced to renegotiate these contracts unless the artist gains enough earning-power.¹⁵⁶ Artists generally sign away all their potential authorship rights in the work to the label in exchange for a royalty payment granted to the artist only if the record company recoups the money invested in the performer.¹⁵⁷ However, it is questionable whether the disparate bargaining power between artists and labels is even related to the issue of performance royalties from AM/FM radio. Broadcasters' paternal argument that artists would be adequately compensated if the law provided them equal bargaining power in contract negotiations sidesteps the issue of what rights with which artists should have to negotiate.¹⁵⁸ Whether or not artists choose to sign away their authorship rights to record labels is unrelated to the rights to which artists are entitled. A performance right would allow for potentially more revenue than under current law, and if artists chose to sign away the potential for performance royalties as well, they should be so entitled. The contractual relationship between

152. *Performance Rights Act: Hearing on H.R. 848 Before the H. Comm. on the Judiciary*, 111th Cong. 192 (2009) (statement of Mitch Bainwol, Chairman and CEO, Recording Industry Association of America) (stating that some artists, such as TLC, are forced to use bankruptcy as an extreme remedy in order to release themselves from unfair recording contracts), available at http://judiciary.house.gov/hearings/printers/111th/111-8_47922.PDF.

153. Phillip W. Hall, Jr., *Smells Like Slavery: Unconscionability in Recording Industry Contracts*, 25 HASTINGS COMM. & ENT. L.J. 189, 190-91 (2002).

154. *Id.*

155. *Id.* at 190.

156. *Id.* at 191.

157. *Id.* at 190, 213.

158. The National Association of Broadcasters, *No Performance Tax: Oppose the Record Label-Led Performance Fee on Radio*, <http://www.noperformancetax.org> (last visited Oct. 15, 2009) (stating that artists are not the beneficiaries of their record contracts, nor would they benefit from additional performance royalties in large part because of those contracts).

performers and labels, dysfunctional though it may be, is unrelated to artist's entitlement to a performance right.

2. Incentives

American copyright law seeks to maintain the appropriate balance between incentivizing the creation of new works and providing the public with access to those works.¹⁵⁹ Courts have had a difficult time determining the scope of copyright protection in sound recordings, if any, based partially on how much incentivization would be increased through the grant of increased copyright protection.¹⁶⁰ Fifteen years after Judge Learned Hand held no copyright protection existed in sound recordings in *RCA v. Whiteman*, the Second Circuit overruled that decision in *Capitol Records v. Mercury Records* and granted a right to reproduce and distribute prerecorded music.¹⁶¹ Later, in 1972, the United States District Court for the District of Columbia found a constitutionally-based copyright interest in sound recordings in *Shaab v. Kleindienst*.¹⁶² The court recognized that incentives for production change based on new and emerging technologies and reasoned that changes unanticipated by the Framers could not prevent protection for sound recordings under copyright law.¹⁶³

The simple economic rationalization for a performance right is that artists and labels will be more likely to create new works if they are provided the prospect of gaining more revenue. However, it is less clear in practice that there is a direct correlation between artist revenue and creativity. Well-established and successful artists will probably gain little incentive to create from the grant of a performance right, as they already gain substantial revenue through alternative means. Indeed, broadcasters have a strong argument that artists are already incentivized to create based on revenue gained through other media.¹⁶⁴ However, for artists on the margin who earn little to

159. *Metro-Goldwyn-Mayer Studios, Inc. v. Grokster, Ltd.*, 545 U.S. 913, 928 (2005) (stating that copyright law is an exercise in managing the trade-offs between innovation and creation and serving the public good); *Twentieth Century Music Corp. v. Aiken*, 422 U.S. 151, 156 (1975) (stating that although the immediate effect of copyright protection is to grant a limited monopoly to give authors a fair return on their works, the overarching goal of copyright law is to serve the public good).

160. *Id.*

161. 221 F.2d 657 (2d Cir. 1955); *see RCA Mfg. Co. v. Whiteman*, 114 F.2d 86 (2d Cir. 1940).

162. 345 F. Supp. 589 (D.D.C. 1972).

163. *Id.* at 590.

164. *See DelNero, supra* note 132, at 493; *see also Lieberman, supra* note 134.

nothing from record sales, a performance right may help to keep them in an occupation they would otherwise leave because it is too difficult to maintain a basic quality of life. After all, very few recording artists “sell enough albums or generate sufficient income from other sources for a record company to recoup its investment.”¹⁶⁵ In fact, one industry expert found that only two of ten albums are economically successful for the record labels.¹⁶⁶ A performance right might incentivize labels to invest in artists that might not otherwise generate enough album sales to allow the recoupment of production costs and allow for an enduring revenue stream long after the earning power of the performer has declined.¹⁶⁷

Although the incentives-based argument makes intuitive sense, it is difficult to determine in practice how new performance-based royalties would actually affect the production of creative works. The argument depends on the assumption that the lack of this performance right impedes some artists from entering the creative markets, though this assumption is difficult to prove. There is simply no way to determine what works would or would not be created if “artists had more or less money.”¹⁶⁸ In addition, copyright protections must balance these economic incentives with the desire to promote the general public welfare by providing access to information and creative works.¹⁶⁹

The Copyright Clause makes clear that copyright protection must serve a public benefit and limits the duration of exclusionary rights to help achieve this goal.¹⁷⁰ Extending and broadening copyright protection to performances in sound recordings may restrict public access to works and diminish the overall public welfare. Broadcasters argue that additional royalty payments may force a change in format or reduce the airplay of non-profit-making songs, depriving the public of musical works to which they would otherwise have unimpeded access.¹⁷¹ If increased incentives substantially diminish the public benefit, the argument becomes less meritorious.

165. 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 Performance Right for Sound Recordings*, 12 FORDHAM INTELL. PROP. MEDIA & ENT. L.J., 1041, 1050 (2002).

166. *Id.*

167. DelNero, *supra* note 132, at 506; Kettle, *supra* note 165, at 1051.

168. DelNero, *supra* note 132, at 506.

169. COHEN ET AL., *supra* note 13, at 17 (stating that the concept of public welfare is a slippery one, especially when looked at from a global perspective, and questioning whether copyright law is actually necessary to protect that welfare).

170. Wendy J. Gordon, *Authors, Publishers, and Public Goods: Trading Gold for Dross*, 36 LOY. L.A. L. REV. 159, 160 (2002).

171. National Association of Broadcasters, *supra* note 34.

In light of these arguments, the most workable principle under which to operate is the assumption that economic incentives generally foster creativity.¹⁷² The principle relies on the more workable assumption that the creation of some works would be a direct result of the opportunity for performance royalty payments. The small minority of artists unlikely to need additional compensation to incentivize creativity does not defeat the potential increase in creative works by artists who would substantially benefit from a performance royalty. In addition, even if royalty payments change what is played on the radio in some ways, there is not sufficient economic evidence that these royalty payments would deprive the public of access to musical works so as to outweigh the need for a performance right.

B. Arguments Opposing a General Performance Right

1. Financial Impact on Traditional Radio Broadcasters

Broadcasters' most persuasive argument against an additional performance right is a financial one: additional performance royalties, often referred to by broadcasters as a new tax, will burden broadcasters financially to the point of bankruptcy.¹⁷³ Steven Newberry of the Commonwealth Broadcasting Corporation testified before the House of Representatives that most smaller radio stations in American are already struggling financially and that the performance right would have a particularly adverse effect upon these stations.¹⁷⁴ The over seven hundred million dollars collected by ASCAP worldwide in the past year for publishing rights is a potential reflection of the royalty amounts that could be collected and distributed to performers as well, which would, naturally, be taken out of the pockets of mainstream radio.¹⁷⁵ Specifically, Newberry

172. COHEN ET AL., *supra* note 13, at 18.

173. *Performance Rights Act: Hearing on H.R. 848 Before the H. Comm. on the Judiciary*, 111th Cong. 150-51 (2009) (statement of Steven Newberry, Commonwealth Broadcasting Corporation), available at http://judiciary.house.gov/hearings/printers/111th/111-8_47922.PDF; see also Tamara Conniff, *Radio Will Stop Playing Music*, HUFFINGTON POST, Oct. 9, 2009, http://www.huffingtonpost.com/tamara-conniff/radio-will-stop-playing-m_b_316152.html (stating that due to the economy and the impact of technology, radio has lost an estimated 60 percent of its advertisers as companies have declared bankruptcy or shut down, and noting that both Clear Channel and Cox Radio have implemented significant layoffs in the past year, and Citadel is nearing Chapter 11 bankruptcy).

174. *Performance Rights Act: Hearing on H.R. 848 Before the H. Comm. on the Judiciary* (statement of Steven Newberry), *supra* note 126, at 154 (stating that broadcasters nationwide reported as much as a 20 percent decline in revenue due to the economic recession).

175. ASCAP, ANNUAL REPORT, at 2 (2008), available at http://www.ascap.com/about/annualReport/annual_2008.pdf.

predicted that broadcasters would be forced to reduce staff members and search for offsetting revenues that would “affect the time available for public service announcements for charities and other worthy causes, coverage of local news and public affairs, and other valuable programming.”¹⁷⁶ The NAB presents radio as an invaluable asset to communities, stating that stations generate six billion dollars in public service annually, and provide vital news and community information to listeners.¹⁷⁷ In essence, broadcasters argue that the public would lose a valuable source of information were the performance right to be enacted because it would create a serious financial burden for radio that would result in the loss of these services.

Undoubtedly, a new stream of revenue from sound recording use would cut into the profits of broadcasters, but this is not in itself a compelling reason to forego the grant of a performance right in sound recordings. First, smaller stations seemingly subject to the more acute financial concerns are considered in the PRA itself.¹⁷⁸ Although larger commercial stations will pay royalties either negotiated or determined by the Copyright Royalty Board, smaller and noncommercial stations can pay flat fees of \$500 to \$5,000 annually under the PRA.¹⁷⁹

Secondly, the fact that terrestrial radio has historically used music to attract advertisers and advance their business model should not be a reason to pervert the basic assumptions of an economy predicated on property rights: those who own the property, not those who use it, should under most circumstances determine how and when it is used.¹⁸⁰ Finally, the financial health of traditional radio has remained largely unaffected by fluctuations in the economy, such as the economic downturn of the late 1990s.¹⁸¹

The continuation of radio’s financial stability is partially a result of the Telecommunications Act of 1996 that amended the Communications Act of 1934 and opened the floodgates for ownership consolidation.¹⁸² Clear Channel Communications, Inc., a conglomerate

176. *Performance Rights Act: Hearing on H.R. 848 Before the H. Comm. on the Judiciary* (statement of Steven Newberry), *supra* note 126, at 153-54.

177. National Association of Broadcasters, *supra* note 34.

178. Performance Rights Act, H.R. 848, 111th Cong. § 3(a) (2009).

179. *Id.*; see also Conniff, *supra* note 173.

180. *Performance Rights Act: Hearing on H.R. 848 Before the H. Comm. on the Judiciary* (statement of Mitch Bainwol), *supra* note 152, at 192.

181. *Id.*

182. Jenny Toomey, *Empire of the Air*, NATION, Jan. 13, 2003, available at <http://www.thenation.com/doc/20030113/toomey>.

in radio broadcasting, owns 1,240 stations and reaches more than a hundred million listeners, more than one-third of the American population.¹⁸³ The closest competitor owns less than a quarter of that number.¹⁸⁴ In local markets, four firms control 70 percent of the market share, and consolidation is even greater in the smallest markets.¹⁸⁵ Deregulation substantially diminished competition in radio and concentrated large profits in the hands of a few conglomerates.¹⁸⁶ Although adding an additional cost to music played on the radio would decrease broadcasting profits, the business model that has withstood both technological changes and economic downturns can arguably adapt by absorbing the new royalty payments and passing on the costs in other ways.

For example, as an unintended consequence of granting a performance right, broadcasters might choose to treat record labels and artists like any other advertisers by selling time spots for play on the radio to advertise new songs. This is probably not what performers and record labels have in mind, but radio could certainly choose to recoup the new royalty payments by treating music as just another form of advertising. Such a practice would not be difficult to implement, as they could charge the rates already established for a thirty- or sixty-second spot featuring a portion of a new song in order to encourage listeners to buy the corresponding albums.

2. Listener Loss

Performance right opponents also cite a loss of diversity in formatting as an inevitable effect of a new performance right. Due to higher costs that cut into profits, smaller and local stations argue they will be forced to play only songs that have proven lucrative or to switch to talk-only formats, including news, sports, and religion, foregoing music to keep from going dark altogether.¹⁸⁷ However, this argument loses force in light of the negative toll that deregulation has already had on diversity in programming.¹⁸⁸ The previous argument supporting common ownership was that it would increase diversity in

183. *Id.*

184. *Id.*

185. *Id.*

186. *See id.*

187. Andrew Seal, *Kill the Bill: Performance Rights Act*, CURRENT, Sept. 8, 2009, <http://www.thecurrentonline.com/2.14134/seal-kill-the-bill-performance-rights-act-1.1957240>.

188. Jim Rutenberg, *Fewer Media Owners, More Media Choices*, N.Y. TIMES, Dec. 2, 2002, at C1, available at <http://www.nytimes.com/2002/12/02/business/media/02MEDI.html>.

programming.¹⁸⁹ As Federal Communications Commission (FCC) Chairman Michael Powell stated when addressing the potentially adverse effects of deregulation, “What does the owner get for having duplicative products? I don’t know why you’d want to have two newspapers that say the same thing.”¹⁹⁰

This justification has proven largely untrue as format variety has not proven to diversify musical selections on the radio. Data from charts from *Radio and Records* and *Billboard’s Airplay Monitor* showed that although format variety increased after deregulation, the term “format variety” created a misperception because formats with different names have similar playlists and artist overlap.¹⁹¹ The data put playlist overlap between distinct formats up to as much as 76 percent.¹⁹² In light of the already significant overlap in playlists on traditional radio, the argument that a new performance right will lead to a substantial loss in programming diversity rings hollow.¹⁹³

It is unlikely that a new performance royalty will significantly harm a terrestrial radio business model that is already centered on profit-generating songs that make it difficult for independent artists to get radio airplay.¹⁹⁴ Furthermore, it should be noted that the advent of newer digital media outlets arguably provide independent artists with a greater ability to get their music heard than traditional radio, which could lead to greater diversity in formats and programming in the digital world than the terrestrial one. Notably, the performance royalties paid to these artists from digital outlets through the collective management organization SoundExchange have not driven them to talk-only formats.

Finally, if terrestrial radio chooses to lean on a public service justification for limiting a performance right, it opens up the argument that these indispensable public services belong under government control and regulation, not to private commercial corporations.¹⁹⁵ If these services are in fact indispensable to the public

189. *Id.*

190. *Id.*

191. See Toomey, *supra* note 182 (indicating that “alternative,” “top 40,” “rock,” and “hot adult contemporary” are all likely to play songs by the band Creed, despite the difference in format name).

192. *Id.*

193. *Id.*

194. *Id.* The advent of other media outlets provides independent artists with a greater ability to get their music heard than terrestrial radio. There is arguably more diversity in digital radio stations, who also pay a performance right to those artists.

195. Telephone Interview with Kenneth Sanney, Assistant Professor at Central Michigan University, Mich. (Oct. 20, 2009) (discussing the problems with relying on a “public service” argument).

welfare, it lends support to the notion of implementing government subsidies or regulation to assist in maintaining those services.

C. Backlash and Industry Response

Although the PRA initially stalled in 2007, the return of the bill has brought with it renewed adverse reaction and controversy.¹⁹⁶ Numerous established artists have come forth to support the PRA, including Amy Grant, U2, Sheryl Crow, and Billy Corgan of the Smashing Pumpkins, who testified before Congress on the issue.¹⁹⁷ In response, broadcasters around the nation boycotted artists supporting the PRA and ran on-air spots opposing the performance royalty.¹⁹⁸ The MusicFIRST coalition, an organization created solely to support the PRA, responded by filing a complaint with the FCC, seeking an injunction against the advertisements and requesting the FCC to look into the actions of radio stations boycotting and intimidating performers and running advertisements advocating only one side of a political issue.¹⁹⁹ The NAB called the complaint nothing more than a political stunt to garner support for the performance right, and the FCC stayed investigation until further information was presented.²⁰⁰

However, the scathing, well-publicized dispute between MusicFIRST, the RIAA, and the NAB may have instigated a formal request by Congress in November 2009 for the NAB to negotiate with the RIAA and MusicFIRST to reach an agreement on appropriate royalty payments.²⁰¹ The NAB begrudgingly agreed in a response letter stating:

NAB is of course willing to talk with members of Congress on this issue and any issue that could negatively impact the ability of free and local hometown radio stations to

196. Cortney Harding, *Performance Rights Act Introduced*, BILLBOARD, Dec. 18, 2007, available at http://www.billboard.biz/bbbiz/content_display/industry (last visited Mar. 10, 2010); see also H.R. 4789, 110th Cong. (2007).

197. Greg Sandoval, *Billy Corgan Wants Broadcast Radio to Pay Performers*, CNet News, Mar. 10, 2009, http://news.cnet.com/8301-1023_3-10192982-93.html; see also musicFIRST, Background, *supra* note 95.

198. Sandoval, *supra* note 197.

199. Posting of David Oxenford (*MusicFirst's Complaint to the FCC: The First Amendment and the Performance Royalty*) to Broadcast Law Blog, <http://www.broadcastlawblog.com/2009/06/articles/broadcast-performance-royalty/musicfirsts-complaint-to-the-fcc-the-first-amendment-and-the-performance-royalty/> (June 21, 2009).

200. *Id.*

201. Ed Christman, *Lawmakers Call for Performance Rights Act Negotiations*, BILLBOARD, Nov. 2, 2009, http://www.billboard.biz/bbbiz/content_display/industry/e3ie84e5cd17ae0924c6641358a681a90a0.

serve our listeners. We would hope that any discussion would also include the nearly 300 members of Congress who oppose the RIAA-backed bill.²⁰²

As this Note goes to publication, no agreement has currently been reached, and Congress awaits the results of ongoing negotiations before sending the bill to the floor of either house of Congress. It remains to be seen whether the RIAA can push through a sound recording performance right, or if the NAB will once again flex its powerful lobbying muscle to block it once again.

IV. CONCLUSION

American copyright law has never included a full performance right in sound recordings, which indisputably deprives performers of one potential, and possibly more enduring, stream of revenue. The absence of this right is becoming increasingly hard to justify given the greater goals of copyright law and the desire to harmonize American law with the global treatment of performance rights. Enacting the PRA is the most efficient way to effectuate these goals and adapt to ever-changing creative processes and markets.

Now more than ever, the elements of a finished musical product are a woven tapestry of the creative contributions of numerous individuals. Historically, it was commonplace for an artist to compose both the musical composition and lyrics of a song, perform it himself, and record that performance with a record label, sometimes as the producer.²⁰³ In such a case, a performance right would appear more redundant in economic terms, as the artist could already find protection, control over, and remuneration for the work in a bundle of other copyrights. However, the structure and business models of the music business have changed significantly over recent decades, focusing more on hit singles and personalities as much as the actual songs performed.²⁰⁴ The result is performers who do only that: perform a piece of music. Although more prominent artists may receive significant compensation through album, ticket, and merchandise sales, these revenue streams are usually limited in duration. Less prominent artists may not have that luxury. Granting a performance right increases the potential for artists to continue to receive compensation long after their star power has faded or to boost their current meager earnings. It defies principles of equity to allow a

202. *Id.*

203. See generally Ricardo Baca, *As Albums Fade Away, Music Industry Looks to Shorter Records*, DENVER POST, (Jan. 10, 2010) available at <http://www.dailycomet.com/article/20100110/ENTERTAINMENT/100109862?p=all&tc=pgall> (last visited Mar. 12, 2010).

204. *Id.*

profit-generating industry to make use of an artist's intellectual property without compensating the artist for that use.

Although the economic repercussions that may affect terrestrial radio should not be dismissed, there is ample evidence indicating an additional performance right will not result in the end of AM/FM radio as we know it, as the NAB ominously predicts. There are merely five countries in the world that do not include such a right; this is a testament to the powerful lobbies that have successfully prevented a performance right from coming to pass in the United States. In countries that embrace a performance right in sound recordings, there is also a thriving traditional radio business that has survived the obligation to compensate artists.

Moreover, the digital broadcasters already paying a performance royalty in sound recordings present a workable example that traditional radio can follow of an effective, cost-efficient manner in which to sustain a preferred format while compensating performers. However, the compensation scheme based on the revenue generated by each station should be determined by incorporating the recommendations of and negotiations between the RIAA and the NAB. Each entity is in a better position to advance their own interests and reach a compromise they can then present to Congress than to accept a vague, congressional determination. Once an equitable solution for artists, record labels, and radio broadcasters is reached, it should be incorporated into the PRA and enacted into law—finally realizing adequate compensation for performers for the first time.

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