

THE PERFORMANCE RIGHTS ACT OF 2009 AND THE LOCAL RADIO FREEDOM ACT: WILL PERFORMANCE RIGHTS KILL THE RADIO STAR?

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INTRODUCTION	334
I. THE PERFORMANCE RIGHTS ACT OF 2009 AND THE LOCAL RADIO FREEDOM ACT	337
A. The Performance Rights Act of 2009	337
B. Congressional Support for the Performance Rights Act of 2009	339
C. Industry Opposition to the Performance Rights Act of 2009	341
D. The Local Radio Freedom Act	344
II. THE CURRENT TREATMENT OF PERFORMANCE RIGHTS IN AMERICAN COPYRIGHT LAW	346
A. The Status of Musical Performance as Copyrightable Subject Matter	347
B. Defining the Author's Right in a Music Performance	349
III. GENERAL PRINCIPLES OF EUROPEAN COPYRIGHT PROTECTION AND THE TREATMENT OF PERFORMANCE RIGHTS	352
A. The Moral Rights Tradition of European Copyright Law	352
B. The Rome Convention and Treatment of Performance Rights	354
C. Harmonized Performance Rights Policy Is Not a Practical Possibility	356
IV. COMPETING INTERESTS TO BE CONSIDERED IN DETERMINING THE FUTURE OF PERFORMANCE RIGHTS RECOGNITION	358

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V. THE PERFORMANCE RIGHTS ACT IS NOT NECESSARY TO PROVIDE THE UTILITARIAN INCENTIVE TO CREATE360

 A. Performance Can Survive in a World Without Copyright.....362

 B. Who Owns a Performance Right, and Does It Really Matter Anyway?363

VI. IS THE LOCAL RADIO FREEDOM ACT NECESSARY TO SAVE AMERICAN RADIO?.....365

 A. Determining the Performance Royalty for Broadcast Radio366

 B. The Detrimental Effects of Performance Rights on Broadcast Radio Stations366

VII. CONCLUSION368

INTRODUCTION

An accepted truth in the music industry is that not every pop artist writes his or her own songs.¹ Many artists make a name for themselves performing songs written specifically for them, either by songwriting teams or other musicians.² In the 1960s, The Monkees rose to stardom in part thanks to their hit single “I’m a Believer.”³ The song, and subsequent royalties, belong to a then unknown songwriter by the name of Neil Diamond.⁴ Fast-forward forty years and not much has changed in the music industry. A songwriting team wrote Rihanna’s Grammy-nominated 2007 hit “Don’t Stop the Music” for her.⁵ While the overwhelming majority of the population associates a song with its singer, Rihanna’s

1. Judy Faber, *Do Pop Stars Really Write Their Own Hits?*, CBS NEWS, July,23, 2007, <http://www.cbsnews.com/stories/2007/07/23/entertainment/main3089948.shtml> (last visited Apr. 19, 2010).

2. See generally Ashley Kahn, *Motown: Not the Same Old Songs, Morning Edition* (National Public Radio broadcast January 4, 2007). The story describes Smokey Robinson’s involvement with the Motown record label. Robinson wrote songs for his own group, the Miracles, while also writing material recorded by other groups, such as “My Girl” which was recorded by the Temptations. Motown also employed a number of songwriting teams. One of the most notable teams, comprised of Brian Holland, Eddie Holland, and Lamont Dozier, wrote songs recorded by the Supremes and the Four Tops.

3. THE MONKEES, *I’m a Believer*, on MORE OF THE MONKEES (Colgems Records 1967).

4. *Id.*

5. RIHANNA, *Don’t Stop the Music*, on GOOD GIRL GONE BAD (Def Jam Records 2007).

copyright in the United States does not currently give her the right to control the public consumption of her performance.⁶

Additionally, throughout the rock and roll era,⁷ “cover”⁸ versions of many songs far surpassed original recordings in terms of popularity. “Blinded by the Light” languished in relative obscurity when it was first released by Bruce Springsteen on his debut album *Greetings from Asbury Park, N.J.* in 1973.⁹ A version re-recorded by Manfred Mann’s Earth Band in 1976 sped up the tempo and added synthesizers and effects to the vocals.¹⁰ The result: the song shot to number 1 on the Billboard Hot 100 singles chart.¹¹ Under current copyright laws, Manfred Mann has only a limited exclusive right to his performance. Specifically, Mann may exercise exclusive control over his performance only when it is transmitted by means of a digital audio transmission.¹² Therefore, any compensation connected to the performance of any version of “Blinded by the Light” on the radio belongs exclusively to Springsteen, as the composer.¹³

Further, there are instances where the alterations to tempo and choices of instrumentation will cause a “cover”

6. See 17 U.S.C. §§ 106(4), (6), 114(a) (2006). Section 106(6) provides the owner of a copyright the exclusive right to perform and authorize the performance of a copyrighted sound recording by means of a digital audio transmission. However, § 114(a) explicitly denies the owner of a sound recording any additional right to publicly perform the copyrighted work.

7. Douglas Martin, *Milton Gabler, Storekeeper of the Jazz World, Dies at 90*, N.Y. TIMES, July 25, 2001, at A3. While the true “birth” of rock and roll is debated, it is generally agreed that a turning point in the development in the genre was the release of “Rock Around the Clock” by Bill Haley and the Comets in 1954.

8. See Candace J. Hines, Note, *Black Musical Traditions and Copyright Law: Historical Tensions*, 10 MICH. J. RACE & L. 463, 484 (2005). Recording a “cover” refers to the practice of a musician re-recording the words and music of a song previously recorded by another artist.

9. BRUCE SPRINGSTEEN, *Blinded by the Light*, on GREETINGS FROM ASBURY PARK, N.J. (Columbia Records 1973).

10. MANFRED MANN’S EARTH BAND, *Blinded by the Light*, on THE ROARING SILENCE (Warner Bros. Records 1976).

11. Billboard, Hot 100, Week of February 19, 1977, <http://www.billboard.com/#/charts/hot-100?chartDate=1977-02-19> (last visited Oct. 29, 2009).

12. 17 U.S.C. § 106(6) (2006) (specifically, “the owner of copyright under this title has the exclusive rights to do and to authorize any of the following: . . . (6) in the case of sound recordings, to perform the copyrighted work publicly by means of a digital audio transmission”).

13. 17 U.S.C. § 106(4) (2006) (specifically, “the owner of copyright under this title has the exclusive rights to do and to authorize any of the following: (4) in the case of . . . musical . . . works, to perform the copyrighted work publicly”).

version to supplant the original in the public consciousness, even if neither song becomes a hit record. Nearly anyone who has ever heard "All Along the Watchtower" associates the song with the sound of Jimi Hendrix's Fender Stratocaster and one of the most identifiable guitar solos ever put to tape.¹⁴ However, most are surprised to find out that the song was written and released by Bob Dylan a year before Hendrix's reinterpretation.¹⁵ Hendrix's version has been a staple on radio for nearly forty years; however, under current copyright laws, only Dylan receives compensation from radio stations airing the song. Arguably, without Hendrix, "All Along the Watchtower" might have been among the hundreds of songs hidden in relative obscurity on one of Dylan's forty-seven albums.¹⁶ Therefore, there is an equitable argument to also compensate Hendrix for his artistic contribution to the piece. However, principles of American copyright law, coupled with the current state of the radio industry, complicate the analysis of any proposal extending royalty payments to music performers.

This Comment introduces and assesses the current state of two competing pieces of legislation currently under consideration by Congress: the Performance Rights Act¹⁷ and the Local Radio Freedom Act.¹⁸ Part I discusses the legislative history of the respective acts. Part II analyzes the statutes in light of their predicted effect on American copyright law, particularly the performance rights extended to performers of musical works. Part III describes the copyright protections offered to performers under international copyright laws. Parallel to this analysis, this Comment compares the structure of the radio broadcast industry in Europe with the broadcast industry of the United States. From this parallel analysis, it should be clear that the broadcast industry in the United States is too dissimilar to its European counterpart and is unable to support the adoption of similar protection of performance rights.

14. THE JIMI HENDRIX EXPERIENCE, *All Along the Watchtower*, on ELECTRIC LADYLAND (Reprise Records 1968).

15. BOB DYLAN, *All Along the Watchtower*, on JOHN WESLEY HARDING (Columbia Records 1967).

16. Bob Dylan Albums, <http://www.bobdylan.com/#/albums> (last visited Oct. 30, 2009).

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

18. Local Radio Freedom Act, H.R. Con. Res. 49, 111th Cong. (2009).

Part IV explores the proposition that performers require the limited monopoly power granted by the copyright laws in order to create new performances. While the intent of copyright law may support the grant of performance rights, the potential adverse effects of the Performance Rights Act on the broadcast radio industry outweigh the potential benefits to performers. Part V further addresses the role of performance rights in a utilitarian copyright system. An analysis of the recording industry reveals that the compensation performers earn through alternative means, such as through touring and merchandise sales, renders an additional grant of a performance right unnecessary to ensure continued creation of musical works. Finally Part VI balances the interests most affected by the protection of performance rights under American copyright law. Particularly, the private interests of recording artists must be balanced against the private financial needs of the broadcast industry. The recognition of performance rights in American copyright law will create a financial burden on radio stations that may effectively bankrupt the industry. Therefore, the public interest in maintaining the broadcast radio industry presently in place in the United States outweighs the potential benefit provided performers through the protection of performance rights under federal copyright law.

I. THE PERFORMANCE RIGHTS ACT OF 2009 AND THE LOCAL RADIO FREEDOM ACT

A. *The Performance Rights Act of 2009*

Beginning in the summer of 2008, Greater Media¹⁹ began airing commercials on many of its radio stations urging listeners to “help save radio” and to “join us and fight the performance tax.”²⁰ This “performance tax” was advertised as the single greatest threat to the livelihood of the radio industry:

19. Greater Media Inc., is a communications company “focus[ed]...on its radio and newspaper operations.” The company owns and operates “23 AM and FM radio stations Boston, Charlotte, Detroit, Philadelphia and New Jersey.” Greater Media, Inc.—About Us, http://www.greatermedia.com/about_us/index.html (last visited Oct. 27, 2009).

20. Greater Media Inc., Help Save Radio, <http://www.helpsaveradio.org/index.html> (last visited Oct. 27, 2009).

The effects of a performance tax would be catastrophic, potentially forcing stations out of business, causing additional job cuts in the radio industry, stifling airplay for new artists, reducing our ability to contribute to community organizations that rely on radio for support, and harming the listening public who depend on local radio.²¹

The “performance tax” in question is the Performance Rights Act of 2009.²² A version of the bill has been introduced into both houses of Congress, sponsored by nearly fifty members of the House of Representatives and seven Senators.²³ It would be revolutionary in the realm of copyright law, as it would grant performers an exclusive right over the performance of a copyrighted work by means of an analog audio transmission.²⁴ Currently, performers do not hold a true exclusive right to fully control their performance in a copyrighted sound recording. Some protection does exist for these performers, but it is limited to only specific forms of transmission. The Digital Performance Right in Sound Recording Act (“DPRA”) of 1995 specifies that the unlicensed and unauthorized transmission of a copyrighted sound recording over a digital means is actionable copyright infringement.²⁵ The 2009 Performance Rights Act would effectively extend the protections of the 1995 DPRA to transmissions of copyrighted sound recordings over any means, including transmission over traditional broadcast radio. The “tax” feared by the radio industry would come in the form of a “reasonable royalty” rate assessed to each terrestrial broadcast radio station each calendar year for the broadcast of any and all copyrighted sound recordings.²⁶ The

21. *Id.*

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

23. Performance Rights Act of 2009, S. 379, 111th Cong. (2009). The bill was sponsored by Sen. Patrick Leahy of Vermont, and was co-sponsored by Sens. Hatch, Feinstein, Corker, Boxer, Alexander, and Schumer.

24. H.R. 848; *See also* 17 U.S.C. § 106(6) (2006) (currently guaranteeing the owner of copyright the exclusive right to perform the copyrighted work publicly by means of a digital audio transmission).

25. Digital Performance Right in Sound Recordings Act of 1995, S. 227 104th Cong. (1995).

26. *See* 17 U.S.C. § 114(f)(A) (2006). “Terrestrial” is a term used to describe traditional radio stations where analog signals are transmitted from transmitting towers via artificial radio waves to individual receivers. This is to be contrasted with satellite radio providers or broadcasts transmitted over other digital means, such as through the Internet; H.R. 848. The bill would allow broadcast stations the opportunity

Performance Rights Act was initially introduced in both the House and Senate on December 18, 2007²⁷ and was subsequently reintroduced on February 4, 2009.²⁸

B. Congressional Support for the Performance Rights Act of 2009

Members of Congress who support the Performance Rights Act stress that the legislation would create much needed parity in the treatment of music performers in the United States.²⁹ These supporters believe the bill will provide an “appropriate balance between promoting the creativity of music and fostering innovation.”³⁰ Assessing a performance license fee to traditional radio stations is viewed as a matter of fairness.³¹ Currently, the 1995 DPRA places the duty of paying performance royalties solely on digital broadcasters.³² Advocates of the Performance Rights Act believe that such a requirement should be borne by all broadcasting platforms.³³ Amending American copyright law to include a performance-based royalty would bring the United States in line with the overwhelming majority of other nations with regard to the treatment of musicians and other performers.³⁴ Presently, the United States is one of only five nations that do not require

to have the performance fee assessed on as a per program license. The other aspects of the proposed fee structures will be discussed in subsequent sections.

27. Press Release, Leach, Hatch, Berman, and Issa Introduce Bipartisan, Bicameral Legislation Give Fair Compensation to Musical Artists (Dec. 18, 2007) (http://house.gov./list/press/ca28_berman/perf_rts_intro.shtml).

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

29. Press release, Howard Berman, On the “Performance Rights Act” of 2007 (Dec. 2007) (http://house.gov./list/press/ca28_berman/intro_perf_rts.pdf).

30. *Id.*

31. *Id.*

32. 17 U.S.C. §§ 106(6), 114(f)(A) (2006). Paradigm examples of digital broadcasters include broadcasts transmitted entirely through the Internet, as well as the Sirius/XM satellite radio service. This note does not address whether new “HD-Radio” technology, which allows traditional radio stations to transmit content via a higher quality digital signal (as opposed to traditional analog signals), would qualify these stations as “digital broadcasters” under the language of the DPRA. Currently, a traditional radio station transmitting an “HD” signal continues to simultaneously transmit an analog signal containing content identical to the content contained on the digital signal.

33. *Performance Rights Act: Hearing on H.R.4789 Before the H. Subcomm. on Courts, the Internet, and Intellectual Property*, 110th Cong. 2 (2008) (statement of Rep. Howard Berman, Chairman, H. Subcomm. on Courts, the Internet, and Intellectual Property).

34. *Id.* at 1.

broadcasters to pay a performance royalty for music played over the air.³⁵

Currently, radio stations are not entirely exempt from paying fees for the music they play over the air.³⁶ Radio stations have traditionally been required to compensate songwriters for the use of their compositions.³⁷ Therefore, artists performing their own original compositions do receive measurable monetary benefits from radio stations and other broadcasters in the form of songwriter royalties. Under the Performance Rights Act, these artists would now also receive compensation for their roles as performers.³⁸ However, in the eyes of its supporters, the Performance Rights Act would most serve the interests of those musicians primarily performing someone else's composition.³⁹ The essence of a successful song lies in the contribution of both the songwriter and the performer. The performer undoubtedly needs words on a page and notes on a staff in order to create a performance. However, the artist's interpretation of the composition is also vitally important to the song. Performers stress that recognizing these contributions through the grant of performance rights is a matter of fundamental fairness.⁴⁰ The Performance Rights Act is the perceived vehicle through which this fairness can be achieved.⁴¹

35. Berman, *supra* note 29. ("During a recent meeting in Nashville [former] President [George W.] Bush was asked about this issue. When he was told that broadcasters in every country in the world except for China, Iran, North Korea and Rwanda pay a performance right, he rightfully observed, 'it sounds like we're keeping interesting company.'").

36. *Broadcast Music, Inc. v. Columbia Broadcasting System, Inc.*, 441 U.S. 1, 5 (1979) (holding that Broadcast Music, Inc.'s ("BMI") issuance of a blanket license to use copyrighted musical compositions to radio and television broadcasters for a negotiated fee was not a per se violation of the Sherman Antitrust Act).

37. *Id.* at 4-5 (noting that the owner of a copyrighted musical composition has held the exclusive right to perform the work in public for profit since 1909). The American Society of Composers, Authors and Publishers ("ASCAP") and BMI were organized as a songwriters' clearing-house. The organizations grant blanket licenses, which give licensees the right to perform any and all of the compositions owned by members for a stated term. Radio broadcasters are among the largest users of music, with almost all broadcasters purchasing a blanket license from both ASCAP and BMI.

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

39. *Id.* The Act would protect the contributions of all performers including session musicians.

40. *Performance Rights Act: Hearing on H.R.4789 Before the H. Subcomm. on Courts, the Internet, and Intellectual Property*, 110th Cong. 43 (2008) (statement of Nancy Sinatra).

41. *Id.*

C. Industry Opposition to the Performance Rights Act of 2009

Understandably, the Performance Rights Act faces serious opposition from members of the broadcasting industry. The National Association of Broadcasters (“NAB”),⁴² along with a coalition of broadcasting companies, took to the airwaves and the Internet in order to drum up opposition to the Performance Rights Act and its proposed “tax” on free radio.⁴³ The Free Radio Alliance⁴⁴ assailed the legislation as exceedingly detrimental to both the radio industry and listeners.⁴⁵ These broadcasters believe that radio stations will be forced to devote more airtime to advertisements in order to generate the additional revenue required to pay for the proposed performance royalties.⁴⁶ This would take away from time devoted to airing music, local and national news, community affairs programming, and public service announcements.⁴⁷ Further, broadcasters argue that the royalties assessed under the Performance Rights Act would be especially detrimental to small commercial radio stations and public radio stations.⁴⁸ Particularly, the broadcast industry fears these smaller market stations will not be able to sell the

42. The National Association of Broadcasters is a trade association for broadcasters and serves as a lobby group for the industry. It describes itself as “the voice for the nation’s radio and television broadcasters...NAB advances the interests of our members in federal government, industry and public affairs.” About NAB, http://www.nab.org/Content/NavigationMenu/AboutNAB/Message_From_Preside.htm (last visited Oct. 27, 2009).

43. *Performance Rights Act: Hearing on H.R.4789 Before the H. Subcomm. on Courts, the Internet, and Intellectual Property*, 110th Cong. 2 (2008) (statement of Rep. Howard Berman, Chairman, H. Subcomm. on Courts, the Internet, and Intellectual Property).

44. The Free Radio Alliance is a coalition of nearly 100 radio stations, broadcast associations and media companies, both public and private. Members include CBS Radio, Clear Channel Radio, Emmis Communications, and National Public Radio. Current Members, <http://www.freeradioalliance.org/aboutMembers.asp> (last visited Oct. 28, 2009).

45. Frequently Asked Questions, <http://www.freeradioalliance.org/faq.asp> (last visited Oct. 28, 2009).

46. Jim Offner, *Local Broadcasters Say Higher Fees Could Hurt Operations*, WATERLOO-CEDER FALLS COURIER, Apr. 4, 2010, http://wfcourier.com/business/local/article_68494abc-3dce-11df-ad84-001cc4c03286.html (last visited Apr. 19, 2010).

47. Frequently Asked Questions, *supra* note 45.

48. *Id.*

advertisements necessary to meet added financial obligations incurred due to the Performance Rights Act.⁴⁹ Such a fear is not entirely unwarranted.

The onset of the current financial downturn has created a revenue problem throughout the industry. Advertising is tied to the economic cycle:⁵⁰ As the market suffers, the advertising dollars radio stations rely on to generate revenue begin to disappear.⁵¹ Some of the biggest players in the broadcast industry have experienced a marked decline in revenue over the past year. CBS Radio⁵² has seen revenues decline by nearly thirty percent between the first quarter of 2008 and the first quarter of 2009.⁵³ Clear Channel, the nation's largest radio station operator, has fared much worse. The company has seen revenues fall by nearly twenty-five percent in the first quarter of 2009, and in the face of potential bankruptcy, was the target of the largest leveraged buyout of any media company in history.⁵⁴ Since October 2008, 265 radio stations have gone off the air due to financial shortfalls suffered by the stations and their parent companies.⁵⁵ Requiring stations to pay the royalties required by the Performance Rights Act would further strain station operating budgets and increase the number of radio stations forced to turn off their transmitters.

Commentators suggest that industry efforts may be succeeding in stifling at least some of the initial support for the Performance Rights Act.⁵⁶ Presently, the bill has stalled

49. *Id.*

50. Rob Cox et al., *Facing the Music of a Heavy Debt*, N.Y. TIMES, Feb. 19, 2009, at B2.

51. Bureau of Labor Statistics Career Guide to Industries: Broadcasting, <http://www.bls.gov/oco/cg/cgs017.htm#earnings> (last visited Oct. 17, 2009).

52. CBS Radio is the fourth largest owner of radio stations in the United States. Pew Project for Excellence in Journalism, "Audio Ownership," http://www.stateofthedia.org/2009/narrative_audio_ownership.php?cat=5&media=10 (last visited Oct. 27, 2009). The company currently owns and operates 130 radio stations throughout the United States. CBS Radio Facts At a Glance, <http://www.cbsradio.com/about/index.html> (last visited Oct. 29, 2009).

53. Martin Peers, *Investors Should Beware Tuning into CBS Stock*, THE WALL STREET JOURNAL, May 12, 2009, at C10.

54. Cox, *supra* note 50.

55. Seth Miller, *The Performance Tax Isn't Good for Anyone*, RADIO TELEVISION DIGITAL NEWS ASSOCIATION, Oct. 08, 2009, available at <http://www.rtdna.org/pages/posts/guest-blog-the-performance-tax-isn-good-fo-anyone696.php>.

56. Friday Morning Quarterback, Study Shows Resistance Growing to Radio

in Congress and reports suggest that some of the bill's initial support is waning.⁵⁷ Radio industry commentators attribute the decline in support for the bill to successful arguments made by broadcasters.⁵⁸ Namely, the industry's continued suggesting that any new fees would "have damaging consequences for a large number of radio stations. . . and that a disproportionate share of endangered stations are minority-owned."⁵⁹ However, this decline in support has not yet signaled the doom of the Performance Rights Act. Rather, support for the Performance Rights Act may have been suspended in anticipation of the impending Congressional election in November 2010. The broadcast industry has a powerful and influential presence in Washington D.C.⁶⁰ In 2003, the NAB reportedly spent \$3.7 million on lobbying efforts.⁶¹ Additionally, between 2000 and 2004 the NAB contributed \$2.2 million to candidates seeking federal office.⁶² Commentators suggest that these contributions have earned broadcast industry insiders access to the political process.⁶³ The broadcast industry has continually been a major source of contributions to both the Democratic and Republican parties.⁶⁴ Supporting legislation, such as the Performance

Royalty Bill, <http://www.fmqb.com/article.asp?id=1601209> (last visited Jan. 16, 2010). The article cited a report issued by research firm, Concept Capital, which suggested that Congressional support for the Performance Rights Act had decreased from 60 percent down to 40 percent; Concept Capital, <http://www.conceptcapital.com> (last visited Jan. 16, 2010). Concept Capital is a "leading institutional broker and total solutions provider for global investment managers," providing "a full suite of prime brokerage services, proprietary research, fund administration, real-time risk management, and portfolio analytics."

57. *Id.*

58. *Id.*

59. *Id.*

60. Charles Layton, *Lobbying Juggernaut: The Broadcast Industry Has Become One of Washington's Most Feared Economic Special Interests, Creating More and More Ethical Conflicts for News Outlets., and Too Many Journalists Are Playing Right Along*, AM. JOURNALISM REV., October/November 2004, at 26.

61. *Id.*

62. *Id.*

63. *Id.* The article notes that former-NAB president, Edward O. Fritts, was named to former-President George W. Bush's FCC transition team following the 2000 election. It is argued that the broadcast industry was placed in a powerful position, because the president of its largest lobby group was in a position to influence the federal agency responsible for regulating the broadcast industry.

64. Robert Molino, *Broadcast Lobbying Tops \$186 Million*, The Center for Public Integrity, <http://projects.publicintegrity.org/telecom/report.aspx?aid=406> (last visited Jan. 18, 2010). In a report analyzing campaign contributions made by the broadcast

Rights Act, which hurts the financial interest of these key donors may cost members of Congress key donations. With midterm elections approaching in November 2010, many members of Congress may be hesitant to support a bill that is diametrically opposed to the interests of the broadcast industry lobby.⁶⁵

D. The Local Radio Freedom Act

In early 2009, a group of Representatives and Senators introduced a bicameral piece of legislation as a response to the Performance Rights Act. The Local Radio Freedom Act (“LRFA”)⁶⁶ would discourage Congress from imposing:

...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.⁶⁷

Those in support of the LRFA do not unilaterally oppose granting performance rights to musicians; rather, they feel that the potential economic impact on the radio industry far outweighs any benefits to performers. These members of Congress believe that the preservation of the local radio industry is a matter of public good. Radio stations, particularly those serving smaller communities, offer vital services to citizens and local businesses.⁶⁸ Local radio broadcasters provide “tens of thousands of hours of essential local news and weather information... public affairs programming... and hundreds of millions of dollars of time for public service announcements.”⁶⁹

One reading the text of the LRFA may suggest a bar on

industry to political campaigns between 1998 and 2004, 50.1 percent of total contributions were made to Republican candidates, and 49.6 percent were made to Democratic candidates.

65. Friday Morning Quarterback, *supra* note 56.

66. Local Radio Freedom Act, H.R. Con. Res. 49, 111th Cong. (2009).

67. *Id.*

68. See e.g., Maurice E. Stucke and Allen P. Grunes, *Toward a Better Competition Policy for the Media: The Challenge of Developing Antitrust Policies that Support the Media Sector’s Unique Role in Our Democracy*, 42 CONN. L. REV. 101, 120 (2009) (when analyzing radio station mergers as part of its Horizontal Merger Guidelines, the Department of Justice acknowledged radio stations provide advertising services to local businesses and in many instances provide value-added features to advertisers such as remote broadcasts from the advertiser’s place of business).

69. *Id.*

the implementation of any performance royalty or tax on radio stations as a measure aiding the preservation of American radio at a time where the entire industry is struggling financially.⁷⁰ Further, the Act's supporters argue that both the record industry and performers that would benefit from these royalties already receive substantial economic and intangible benefits from radio stations. Particularly, radio stations provide free advertising to artists either by playing their songs, interviewing the artist on the air, or by giving away concert tickets to a local performance.⁷¹ Radio and musicians have a mutually beneficial relationship. While radio stations sell music and musicians to the public, that same music and those same artists draw listeners to a radio station. Listeners, in turn, attract advertisers, who generate revenues for the radio station. These revenues allow stations to remain on the air and to continue to play music.

Both the LRFA and the Performance Rights Act have hit an impasse in Congress. The Performance Rights Act was voted out of the Senate Judiciary Committee on October 15, 2009 and but has not continued much further through the legislative process.⁷² As interest in the Performance Rights Act has been renewed, so has the opposition to it. Senator Blanche Lincoln, sponsor of the LRFA, has recently reached out to Senate majority and minority leaders, urging them to support the LRFA.⁷³ Lincoln argues that performance royalties fail to serve the interests of the radio industry, the public, or the artists the fee is designed to benefit.⁷⁴

In early 2010, various special interest groups appealed for expedited Congressional action on the issue of performance

70. H.R. Con. Res. 49 (particularly, the bill suggests that the community focused news and other programming would be "jeopardized if local radio stations are forced to divert revenues to pay for a new performance fee."); Letter from Senator Blanche Lincoln and Senator John Barrasso, M.D., to Senator Harry Reid and Senator Mitch McConnell (Oct. 16, 2009), *available at* <http://lincoln.senate.gov/newsroom/2009-10-21-1.cfm> (where Senators opposed to the Performance Rights Act note that "local over-the-air-radio stations...have been hit by both long-term systemic declines in revenue and an even more dramatic pull back in advertising dollars as a result of the current economic environment.").

71. H.R. Con. Res. 49.

72. 111th Congress: Bills Considered by the Senate Judiciary Committee, <http://judiciary.senate.gov/legislation/111thCongress.cfm> (last visited Oct. 30, 2009).

73. Letter from Sens. Lincoln and Barrasso, *supra* note 70.

74. *Id.*

rights in radio broadcasts.⁷⁵ Recording artists, broadcasters, and record companies expressed their views regarding the Performance Rights Act and Local Radio Freedom Act to the public over the airwaves and on the steps of Congress.⁷⁶ However, these efforts did not spark immediate Congressional action on the legislation.⁷⁷

II. THE CURRENT TREATMENT OF PERFORMANCE RIGHTS IN AMERICAN COPYRIGHT LAW

Copyright protection in the United States, in its most basic form, traces its roots to the Constitution itself. Article I, Section 8, Clause 8 grants Congress the power to enact copyright statutes in order to:

... promote the progress of science and the useful arts, by securing for limitedtimes, to authors and inventors, the exclusive right to their respective writings and discoveries.⁷⁸

As is the case with much American jurisprudence, copyright protection in the United States is derived from the English copyright system.⁷⁹ The original Statute of Anne,⁸⁰ passed in 1710, attempted to accomplish two distinct objectives in one act of Parliament. First, the statute extended legal protection to “printers, booksellers, and other persons [in order to encourage] learned men to compose and write useful books.”⁸¹ At the same time, the statute limited this protection to a term of fourteen years.⁸² By denying authors and printers the right to hold perpetual control over the dissemination of written works, the statute ensured the

75. Joseph Plambeck, *Dispute Heats Up Over Proposed New Fees for Playing Songs on the Radio*, N.Y. TIMES, Mar. 8, 2010, at B3.

76. *Id.*

77. *Id.*

78. U.S. CONST. art. I, § 8, cl. 8.

79. The common law system that has developed in the United States is of English origin. The individual states as well as the Framers of the Constitution incorporated these elements of English common law into the various state constitutions as well as the U.S. Constitution. *See generally* *Wheaton v. Peters*, 33 U.S. 591 (1834).

80. 8 Anne, ch. 19 (1710) *cited in* MELVILLE B. NIMMER, *Nimmer on Copyright*, app. 7[A] (2009).

81. *Id.*

82. *Id.* The statute allowed the printer to renew the fourteen year term of protection once if the original author was still living at the expiration of the term of years: “after the expiration of the said term of fourteen years, the sole right of printing or disposing of copies shall return to the authors thereof, if they are then living, for another term of fourteen years.”

public domain from perpetual legal monopolies over these “useful books.”

Determining the scope of copyright protection in a creative work requires three inquiries: (1) is the work of the type entitled to copyright protection; (2) to whom is the protection granted; and (3) what is the extent of the protection offered to that author?

A. The Status of Musical Performance as Copyrightable Subject Matter

Since the first consideration of copyright protection in the Constitution, advances in technology have offered new media through which authors can create new creative works. In response, the current copyright statute, Title 17 of the United States Code, has expanded the definition of copyright-eligible material to include:

original works of authorship fixed in any tangible medium of expression, now known or later developed, from which they can be perceived, reproduced, or otherwise communicated, either directly or with the aid of a machine or device.⁸³

Works of authorship, as defined in §102, can include musical works, music accompanying dramatic works, as well as sound recordings.⁸⁴ Congress has noted that the seven enumerated categories of authorship in §102 do not constitute an exhaustive list, but rather set forth the general area of copyrightable subject matter with sufficient flexibility to free the courts from rigid or outmoded concepts of the scope of particular categories.⁸⁵

To earn copyright protection, a work of authorship must meet one basic condition: it must be fixed in a “tangible medium of expression...now known or later developed.”⁸⁶ Fixation can be achieved in any medium “from which [the expression] can be perceived, reproduced, or otherwise communicated either directly or with the aid of a machine or device.”⁸⁷ Congress lowered the threshold requirements to meet the fixation criteria in order to ensure fixation is not

83. 17 U.S.C. § 102(a) (2006).

84. *Id.*

85. H.R. REP. No. 94-1476, 94th Cong. (1976).

86. *Id.*

87. 17 U.S.C. § 102(a) (2006).

unduly tied to particular forms of media.⁸⁸ Unfixed expressions of authorship are the only type Congress intended to bar from federal copyright protection.⁸⁹ Improvised and unrecorded performances and broadcasts are identified as paradigm examples of unfixed works of authorship.⁹⁰

To better understand the distinction between fixed and unfixed works, consider performances at the Village Vanguard, the venerable New York City nightclub referred to as the “Carnegie Hall of Jazz.”⁹¹ Many jazz performances are based upon “standards”⁹² or other well-known compositions. The jazz musician’s “map” is a “fake” book, such as *The Real Book*,⁹³ which provides only the most basic information required to play a standard, such as the key, the melody and chord changes. However, at the heart of the jazz performance is the improvisation—those spontaneous bursts of musical expression that are based on the chord structures of a song.⁹⁴ The decision to play a particular note or scale between each chord change is entirely unique to the performance and the performer.⁹⁵ Under the current copyright regime, unless the

88. H.R. REP. NO. 94-1476.

89. *Id.*

90. *Id.*

91. Ashley Kahn, *After 70 Years, the Village Vanguard Is Still in the Jazz Swing*, THE WALL STREET JOURNAL, February 8, 2005, at D9.

92. Note, *Jazz Has Got Copyright Law and That Ain't Good*, 118 HARV. L. REV. 1940, 1942 (2005). The traditional “standard” is any number of songs originally “written in the 1930s, 40s, or 50s for film and Tin Pan Alley or Broadway musicals by non-jazz musicians such as George Gershwin, Cole Porter, and Harold Arlen. Today, the definition of the “standard” has been broadened to include original compositions written famous by jazz musicians such as Dave Brubeck, John Coltrane, Miles Davis, Duke Ellington, just to name a few.

93. THE REAL BOOK (Hal Leonard Corp., 6th ed. 2004). The *Real Book* is described as the first authorized “fake” book. The publishers received permission from each composer to reprint the song transcriptions included in the collection. Previously, “fake” books were published without the composers’ consent and violated copyright protections guaranteed under Title 17 of the U.S. Code.

94. Marc Sabatella, *Applying the Theory to Improvisation*, <http://outsideshore.com/primer/primer/ms-primer-5.html> (last visited Jan. 15, 2010).

95. *Id.* Sabatella explains the basic theory behind jazz improvisation: “at the most basic levels, the notes you choose for your improvisation are partially dictated by the scale associated with each chord. This is called playing changes. More advanced forms of improvisation give the performer more melodic and harmonic freedom, either by reducing the number of chord changes, or by making the chords progressions more ambiguous in tonality, to the point of eliminating these structures entirely.” So while there is a theory on which improvisations are based, the decision of which notes to play, and when to play them is completely unique to the individual performer, and would, but for the fixation requirement, qualify as copyrightable subject matter.

performer transcribes every note she intends to play, or records the performance, the artist's copyright protection for that performance expires as soon as the sound of each note fades into the angled walls of the Vanguard.⁹⁶

The creator of an unfixed work of authorship is not entirely barred from receiving protection; rather, these authors are only barred from the protections guaranteed by federal copyright laws.⁹⁷ Authors of unfixed works, as well as performers of musical works fixed to tangible media, are not entirely precluded from legal protection for their art. Congress has indicated that the scope of protection of creative works can be expanded beyond the federal limitation in the form of state statutory and common law protections.⁹⁸

B. Defining the Author's Right in a Music Performance

Copyright law in the United States encourages authors, artists, musicians, and other creators to promote the progress of knowledge⁹⁹ through economic incentives. These incentives come in the form of a grant of a private property right, specifically a limited monopoly.¹⁰⁰ Broadly speaking, the term of copyright protection commences on the date of creation and extends throughout the author's life, and then for seventy years following her death.¹⁰¹ In the case of works created by

96. 17 U.S.C. § 102(a) (2006) (an artist may also be limited in potential copyright protection by the derivative works protections granted by copyright statute).

97. *Id.*

98. *Id.*

99. U.S. CONST. art. I, § 8, cl. 8.

100. MARK A. LEAFFER, UNDERSTANDING COPYRIGHT LAW 15 (Matthew Bender & Co., Inc. 1997) (1995); *See also* Mazer v. Stein, 347 U.S. 201, 219 (1954) ("the economic philosophy behind the clause empowering Congress to grant patents and copyrights is the conviction that encouragement of individual effort by personal gain is the best way to advance the public welfare through the talents of authors and inventors in science and the useful arts.").

101. 17 U.S.C. § 302(a) (2006). The copyright term granted by the current enactment of § 302(a) applies to works of authorship created on or following January 1, 1978. Radio stations, do however, continue to broadcast performances created prior to 1978. The present Copyright Act generally grants the following term of protection to works of authorship in existence on January 1, 1978: (1) for works created prior to October 27, 1970, a single term of protection is granted for ninety-five years from the date of initial protection or (2) for works created between October 27, 1970 and December 31, 1977, an initial term of protection enduring for twenty-eight years from the date of authorship and an additional term of protection extending for sixty-seven years following the expiration of the original copyright term.; *See also* 17 U.S.C. § 304(a)(1)(A), (b) (2006).

more than one author, the term of copyright protection extends for seventy years following the death of the last surviving author.¹⁰² The grant of a copyright provides the author a bundle of exclusive rights to the work.¹⁰³ Five fundamental rights are included in this bundle: the right to reproduce, the right to prepare derivative works, the right to distribute the work to the public, the right to perform, and the right to publicly display the work.¹⁰⁴

Interpreting the scope of copyright protection held by authors of musical works, Congress has generally created two types of copyrights in a musical recording. The first copyright is granted for the underlying musical work—the transcribed musical notes and written lyrics.¹⁰⁵ The composer/songwriter, as the author of the written music, therefore holds the exclusive rights afforded under 17 U.S.C. § 106(4), including the exclusive right to public performance.¹⁰⁶ The second copyright lies in a recorded musical performance.¹⁰⁷ A sound recording is a performance of a musical work affixed to a tangible medium.¹⁰⁸ The author of that performance therefore has met the fixation requirement and is afforded an exclusive right in that performance. However, Congress has not generally recognized an exclusive right to the public performance of that sound recording.¹⁰⁹

The sole exception is the exclusive right to “perform the copyrighted work publicly by means of a digital audio transmission.”¹¹⁰ In order for a radio station to be able to broadcast such a copyrighted performance, a royalty must be paid to the proper copyright holder. Traditional terrestrial

102. 17 U.S.C. § 302(b) (2006).

103. 17 U.S.C. §§ 101, 106(1), (2) (2006). A derivative work, is “a work based upon one or more preexisting works, such as a translation, musical arrangement, dramatization, fictionalization, motion picture version, sound recording, art reproduction, abridgment, condensation, or any other form in which a work may be recast, transformed, or adapted.”

104. See 17 U.S.C. § 106 (1)-(6).

105. *SoundExchange, Inc. v. Librarian of Cong.*, 571 F.3d 1220, 1222 (D.C. Cir. 2009).

106. 17 U.S.C. § 106(4).

107. 17 U.S.C. § 106(6).

108. 17 U.S.C. § 101.

109. 17 U.S.C. § 106(6).

110. *Id.*; 17 U.S.C. § 114(d) (2006) (Specifically, § 114(d)(2) reads: “The performance of a sound recording publicly by means of a subscription digital audio transmission...made by a preexisting satellite digital audio radio service shall be subject to statutory to statutory licensing.”).

broadcast radio stations and satellite radio providers (such as Sirius Satellite Radio or XM Radio) carry different royalty payment obligations. A traditional broadcast station is required to negotiate a royalty arrangement with the composer (the author of the musical work) exclusively.¹¹¹ However, under the current implementation of § 106 and § 114(d), a satellite radio broadcaster has to negotiate a broadcast royalty with both the composer and the performer in order to legally broadcast a song.¹¹²

In *SoundExchange, Inc. v. Librarian of Congress*,¹¹³ the United States Court of Appeals for the D.C. Circuit described the objectives to be achieved in the negotiation and determination of a performance royalty agreement:

- (A) To maximize the availability of creative works to the public.
- (B) To afford the copyright owner a fair return for his or her creative work and the copyright user a fair income under existing economic conditions.¹¹⁴

Presently, if composers or their representatives are unable to successfully negotiate a royalty payment schedule with satellite radio providers, Copyright Royalty Judges are authorized to establish a royalty agreement that most accurately represents the agreement “that would have been negotiated in the marketplace between a willing buyer and a willing seller.”¹¹⁵

Congress has recognized a musical performance featured in a sound recording as a “work of authorship fixed in any tangible medium of expression.”¹¹⁶ However, in limiting the musician’s bundle of exclusive rights and privileges, Congress has intentionally stopped short of granting these performers a true “copyright” in the spirit of the copyright subject matter provisions set forth in 17 U.S.C. § 102.¹¹⁷

111. See *Broadcast Music, Inc. v. Columbia Broadcasting System, Inc.*, 441 U.S. at 5.

112. See *SoundExchange, Inc. v. Librarian of Cong.*, 571 F.3d at 1221.

113. *Id.* The case heard a petition from SoundExchange, a company organized to collect a distribute royalties to copyright owners. After SoundExchange was unable to successfully negotiate a royalty agreement with Sirius Satellite Radio and XM, Copyright Royalty Judges set the royalty rate to be paid during the years 2007-2012. SoundExchange alleged that the royalty agreement was “arbitrary, capricious and not supported by substantial evidence.”

114. *SoundExchange, Inc. v. Librarian of Cong.*, 571 F.3d at 1222.

115. 17 U.S.C. § 114(f)(2)(B) (2006).

116. 17 U.S.C. § 102 (2006).

117. *Id.*

Understanding the distinction between the differing copyrights in a musical work is made easier by examining the case of “Round Midnight,” considered to be one of, if not the, most recorded jazz song in history.¹¹⁸ Thelonious Monk¹¹⁹ composed the song and therefore holds the copyright to any sheet music or chart transcribing the notes that comprise the song. Miles Davis’ recording of the song anchored his debut album on Columbia Records,¹²⁰ the label that would later release his seminal albums *Kind of Blue*,¹²¹ *Sketches of Spain*,¹²² and *Bitches Brew*.¹²³ Davis, as the performer on his recording of “Round Midnight” holds all but one of the copyrights in his version of Monk’s song. Under the current copyright statutes, Monk retains all of the rights to public performance of the song as the songwriter. Therefore, Davis does not hold the exclusive right of public performance in his recording. Practically speaking, any royalties paid for the broadcast of any recorded version of “Round Midnight” go only to the estate of Thelonious Monk and not to the estate of Miles Davis or any other artist who has recorded a version of the song. By expanding the rights afforded to performers, the Performance Rights Act would create parity between performers and composers.

III. GENERAL PRINCIPLES OF EUROPEAN COPYRIGHT PROTECTION AND THE TREATMENT OF PERFORMANCE RIGHTS

A. *The Moral Rights Tradition of European Copyright Law*

The American copyright system is founded on a utilitarian rationale. Its purpose is to serve the greater public good.¹²⁴ This “good,” first introduced in the Statute of Anne, and later

118. Jeremy Wilson, “Round Midnight: Origin and Chart Information,” <http://www.jazzstandards.com/compositions-0/roundmidnight.htm> (last visited Jan. 15, 2010).

119. *Id.*

120. MILES DAVIS, *Round Midnight, on ROUND ABOUT MIDNIGHT* (Columbia Records 1955).

121. MILES DAVIS, *KIND OF BLUE* (Columbia Records 1959).

122. MILES DAVIS, *SKETCHES OF SPAIN* (Columbia Records 1960).

123. MILES DAVIS, *BITCHES’ BREW* (Columbia Records 1970).

124. DANIEL CHOW & EDWARD LEE, *INTERNATIONAL INTELLECTUAL PROPERTY* 77 (2006).

reaffirmed in the Constitution was the encouragement of learning through the wider availability of written works.¹²⁵ In other words, the goal of Anglo-American copyright protection is to offer the bare minimum amount of incentive required to inspire a continued stream of creative expressions.¹²⁶

Continental European nations following a civil law tradition have developed a different rationale for granting copyright protection for creative works.¹²⁷ In addition to offering the economic incentives found in the American/Anglo system, European law recognizes that authors are entitled to their creations as a matter of natural right.¹²⁸ John Locke, arguably the most famous proponent of natural rights theory, believed that persons have a natural right of property in their bodies.¹²⁹ Locke believed that this right extended to the labors of a person's body, and by extension to the creative fruits of that labor.¹³⁰ In practice, the natural rights existing in copyright take the form of a series of moral rights that are believed to exist separately from the economic rights in a work. Further, these moral rights are considered inalienable and reside in the author posthumously.¹³¹ The nations following the civil law tradition do not agree on an exhaustive list of moral rights residing in a creative work.¹³² Nonetheless, all civil law nations appear to recognize two fundamental moral rights: the right of paternity and the right of integrity.¹³³ The right of paternity allows the author to

125. *Id.*

126. *Id.*

127. *Id.*

128. *Id.*

129. See JOHN LOCKE, TWO TREATISES OF GOVERNMENT 150 (Printed for C. and J. Rivington, 1824) (1690) available at http://books.google.com/books?id=K1UBAAAYAAJ&pg=PP5&dq=john+locke&source=gbs_selected_pages&cad=5#v=onepage&q&f=false.

130. *Id.*

131. See generally *Huston v. Societe Turner Entertainment*, 1991 Bull. Civ. I, No. 172 (May 28, 1991) (Fr.) (a French court held that director John Huston held an inalienable moral right of integrity in his film *The Asphalt Jungle*. Huston's heirs were able to exercise this right of integrity to stop Turner Entertainment from releasing a colorized version of the film in France even though Turner had acquired the film's copyright).

132. See CHOW & LEE, *supra* note 124, at 241 citing Adolf Dietz, *ALAI Congress: Antwerp 1993 the Moral Right of the Author: Moral Rights and the Civil Law Countries*, 19 COLUM. VLA J.L. & ARTS 199, 203-05, 213-27 (1995) (detailing differing approaches to protection as enacted by France, Germany, and Italy).

133. *Id.* at 238.

choose whether to take credit for the work under her own name or to release the work under a pseudonym.¹³⁴ The right of integrity allows an author the right to object to a “distortion, mutilation, or other modification” of her work.¹³⁵

B. The Rome Convention and Treatment of Performance Rights

The civil law nations have been more liberal in the extension of copyright protections to performers than the United States. The Rome Convention,¹³⁶ first approved in 1961, extended minimum economic protections to performers. Residents of the signatory nations to the Rome Convention are granted the right to prevent unauthorized broadcasting or reproduction of their fixed performances.¹³⁷ Additionally, musicians who are nationals of these signatory nations are also granted the right to prevent the unauthorized fixation of unfixed live performances.¹³⁸ In practice, this provision would allow an artist to prevent the creation and sale of unauthorized “bootleg”¹³⁹ recordings of concerts, plays, or other performances by a third party. Whereas most of the civil-law-based European nations were early adopters of the Rome Convention, the United States is one of the few nations that have not signed the treaty.¹⁴⁰

Performers were initially limited to exclusionary rights defined in the Rome Convention. A performer was not initially believed to be a true flesh and blood creator.¹⁴¹ Rather, a performer merely reinterpreted the songwriter’s

134. *Id.*

135. *Id.*

136. Rome International Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organisations, art. 7, Oct. 26, 1961, 496 U.N.T.S. 43, available at http://www.wipo.int/treaties/en/ip/rome/trtdocs_wo024.html, [hereinafter “Rome Convention”].

137. *Id.*

138. *Id.*

139. See 17 U.S.C. § 1101 (2006) (the unauthorized fixation of the sounds of a live music performance in a copy is commonly known as making a “bootleg” recording).

140. World Intellectual Property Organization, Contracting Parties: Rome Convention, http://www.wipo.int/treaties/en/ShowResults.jsp?treaty_id=17 (last visited Oct. 30, 2009) (Denmark, France, Germany, Italy, and Spain were all original signatories to the Rome Convention).

141. CHOW & LEE, *supra* note 124, 77.

creation.¹⁴² Fixing that interpretation in a tangible medium did not guarantee the performer the same set of inalienable moral rights granted to a songwriter.¹⁴³ However, over the past twenty years, nations have changed course on their approach to performers. Signatories to the World Intellectual Property Organization Performers and Phonograms Treaty of 1996 (“WPPT”) acknowledged the importance of sound recordings and the necessity to offer a wide range of legal protection to their creators.¹⁴⁴ In addition to guaranteeing the performer’s right to prevent unauthorized broadcasts and fixation of performances, the treaty grants performers limited moral rights of paternity and integrity.¹⁴⁵ While the United States has not jointed the Rome Convention, it is a signatory to the WPPT.¹⁴⁶ The national treatment provision of the WPPT requires the United States to recognize the economic and moral rights of performers from other signatory nations.¹⁴⁷ However, the national treatment provision does not require the United States to recognize treaty rights in its own citizens.

The enactment of the Rome Convention and WPPT indicates that an overwhelming number of industrialized nations recognize performers as the creative equals of literary authors, composers, and photographers. The United States is sending mixed signals regarding its stance on the issue of performance rights. By signing onto the WPPT, the U.S. appears to be inching close to uniformity with Europe on the issue, but the country remains noticeably absent from the Rome Convention. The passage of the Local Radio Freedom Act would discourage Congress from enacting performance royalties as part of the copyright statute. Such a move would certainly send a message to the rest of the world that the United States still stands alone on the issue.

C. Harmonized Performance Rights Policy Is Not a

142. *Id.*

143. *Id.*

144. World Intellectual Property Organization Performances and Phonograms Treaty, Dec. 20, 1996, http://www.wipo.int/treaties/en/ip/wppt/trtdocs_wo034.html#P89_8626 [hereinafter “WPPT”]. Sixty-nine nations, including France, Germany, Italy, Spain and the United States are signatories to the treaty.

145. *Id.*, art. 5.

146. *See* Rome Convention; WPPT.

147. WPPT, art. 4.

Practical Possibility

Just how important is harmonization between the United States and Europe on the issue of performance royalties assessed to radio broadcasters? Arguably, the fundamental organization of radio stations in the United States and Europe is so drastically different that total agreement on broadcast royalty fees should never be expected, nor needed, to show international solidarity on intellectual property policy.

Radio stations in the United States are quasi-public, quasi-private organizations. A private entity owns, operates, and programs the individual radio stations.¹⁴⁸ However, the Federal Communications Commission (“FCC”)¹⁴⁹ grants operating licenses to stations and regulates content.¹⁵⁰ There is no true “public” radio network in the United States in the sense that the United States government does not own or operate traditional radio stations. The closest example, National Public Radio (“NPR”), is a privately supported, not-for-profit network of non-commercial radio stations.¹⁵¹ While the network does receive grants from the federal government,¹⁵² the government does not actually control the programming. Individual programming decisions remain with the individual member stations, which can purchase up to 130 hours of programming from NPR each week.¹⁵³

In contrast, the British Broadcasting Company (“BBC”) is a public service broadcaster established by the government of the United Kingdom via a Royal Charter.¹⁵⁴ Each resident of the U.K. pays a monthly licensing fee that finances eight television stations, ten national and forty regional radio

148. Who Own’s America’s Radio Stations, <http://www.airtalents.com/broadcasting-schools.html> (last visited Apr. 22, 2010).

149. About the Federal Communications Commission, <http://www.fcc.gov/aboutus.html> (last visited Jan. 18, 2010).

150. See 47 U.S.C. § 303 (2006).

151. National Public Radio: About NPR, <http://www.npr.org/about/> (last visited Oct. 30, 2009).

152. David Folkenflik, *Congress Looks to Cut Funding for Public Broadcasting, All Things Considered* (National Public Radio broadcast June 10, 2005) (the Corporation for Public Broadcasting provides roughly one percent of National Public Radio’s broadcast budget.).

153. National Public Radio: About NPR, *supra* note 151.

154. What is the BBC?, <http://www.bbc.co.uk/info/purpose/what.shtml> (last visited Oct. 30, 2009).

stations, and the BBC's online presence.¹⁵⁵ The inclusion of a performance royalty for broadcasters in the U.K. does not pose the same challenges that such a royalty would pose for American radio stations. The BBC could easily pay for such a royalty through an increase in the monthly licensing fee. In essence, this would shift the burden for compensating performers to the entire taxpaying population.

The broadcast system in place in the U.K. is not unique. Similar state-funded media organizations exist in Italy, France, and Germany.¹⁵⁶ The German Constitution guarantees state funding for public broadcasting.¹⁵⁷ According to the German Constitutional Court, the right to access broadcast services is based on free speech principles.¹⁵⁸ Expanded further, this right guarantees broadcasters a constitutional right to develop and grow.¹⁵⁹ It is reasonable to infer that, under the German system, the constitutional guarantee to provide public broadcasts would result in the government financing any additional royalty payments imposed on public broadcasters. American radio stations, on the other hand, are private businesses subject to market forces. There is no similar compulsory media license fee to absorb the increased cost of performance royalties.

Even such a rough-grained comparison of American and European media organizations reveals a fundamental truth: harmonization of common law and civil law copyright policy regarding performance rights first requires a comprehensive study of the comparative economic effects of the broad policy change. It is likely that Congress has not harmonized performance rights in the United States in accord with the rights granted by European nations because the various national broadcast industries themselves are not harmonized. In New York City, public radio stations drew less than five percent of the total audience share in December 2008.¹⁶⁰ At

155. *Id.*

156. See generally Radio France Internationale, <http://www.rfi.fr> (last visited Jan. 15, 2010) and Radiotelevisione Italiana, <http://www.rai.it> (last visited Jan. 15, 2010).

157. Peter Hettich, *YouTube to be Regulated? The FCC Sits Tight, While European Broadcast Regulators Make the Grab for the Internet*, 82 ST. JOHN'S L. REV. 1447, 1468 (2008).

158. *Id.*

159. *Id.*

160. New York Radio Guide, New York Radio Stations Arbitron Ratings, <http://www.nyradioguide.com/ratings.htm> (last visited Jan. 18, 2010).

the same time, the Public Broadcasting System drew only 1.5 percent of the primetime television audience in the United States during the 2006-2007 season.¹⁶¹ Comparatively, public European broadcasters had market shares ranging from twenty-six percent in Germany, to thirty-five percent in France, to over forty-three percent in Italy.¹⁶² Even if the United States government were to fund public broadcasters on the same level as their European counterparts, it would alleviate the financial stress only of media outlets, which capture less than ten percent of the overall audience.

Therefore, the Local Radio Freedom Act is not necessarily a clear message that the United States disregards the rights of performers. Instead, it is an indication that performance rights should be recognized in ways that do not impose substantial financial burdens on struggling broadcasters. The differences between the United States and European nations appear, at present, to be irreconcilable. This division between the common law and civil law systems suggests that the extension of performance rights in the United States should be evaluated only through the prevalent underlying theory driving the development of American copyright law—the utilitarian rationale.

IV. COMPETING INTERESTS TO BE CONSIDERED IN DETERMINING THE FUTURE OF PERFORMANCE RIGHTS RECOGNITION

When evaluated through the utilitarian lens, the Performance Rights Act of 2009 and the Local Radio Freedom Act raise two concerns deserving consideration. First, whether a statutory grant of economic rights to performers in the form of compulsory broadcast license fees conflicts with the goals of existing copyright law.

Prevalent theories suggest that copyright protection is necessary to solve the “public goods problem.”¹⁶³ A “public good” is both non-rivalrous (many people can simultaneously consume the good without interfering with another person’s

161. Hettich, *supra* note 157.

162. *Id.* at 1470.

163. See generally David W. Barnes, *A New Economics of Trademarks*, 5 NW. J. TECH & INTELL. PROP. 22, (2006) (discussing the potential applicability of the public goods theory to trademark law and outlining leading scholarly approaches to the public goods problem as applied in copyright law.).

ability to use the good)¹⁶⁴ and non-excludable (once the good is produced there is no way to enjoin others from using it).¹⁶⁵ Once a sound recording is broadcast over the air, there is no limit to the number of people who can simultaneously listen to that broadcast. At the same time, one listener's enjoyment of the broadcast will not foreclose any other listener from enjoying that broadcast. The "problem" with public goods is purely economic. Performers invest significant resources to create sound recordings. At the same time, thousands of people can listen to the same recording, simultaneously, for free. Therefore, there is no guarantee that the performer will be able to recoup the cost associated with creating that recording.¹⁶⁶

To solve the public goods problem, Congress provided copyright owners a legal, temporary monopoly, allowing them to exclude others from having total access and enjoyment of their works.¹⁶⁷ The purpose of this monopoly is to provide economic incentives to ensure a continuous stream of creative works.¹⁶⁸ Economic incentives and property rights that are too protective create a similar danger. The monopoly power afforded by copyright allows artists to maintain an artificially high cost of entry into the market. Without limits to the monopoly power, artists will be tempted to overproduce creative works initially and, over time, will have less incentive to produce additional works.¹⁶⁹ Therefore, expanding the copyright protections afforded to performers can be justified only if those performers do not presently have a sufficient economic incentive to produce a regular stream of creative works.

Second, while a grant of performance rights may be in line

164. *Id.* at 35.

165. JULIE E. COHEN ET AL., *COPYRIGHT IN A GLOBAL INFORMATION ECONOMY* 5-6 (2d ed. 2006).

166. Barnes, *supra* note 163, at 40. In explaining the public goods "problem" Professor Barnes writes: "Non-excludability raises two efficiency concerns. The first is that producers may be unable to cover their total costs if unable to collect payment from those who benefit from their activity...The second efficiency concerns arising from non-excludability is demand revelation. When people can enjoy the benefits of the provision of a good (public or private) without payment, there is no mechanism, such as a market, that encourages people to reveal how much they would be willing to pay to use that good."

167. COHEN ET AL., *supra* note 165.

168. *Id.*

169. *Id.*

with the goals of American copyright law, the public policy implications of the predicted effects on the radio industry may still not justify a grant of such rights. Moreover, the indirect and non-economic benefits already provided to performers because of radio airplay could be sufficient compensation to performers to incentivize the perpetual creation of new creative performances.

A radio station is more than a jukebox; it provides other services to its listeners. Whether through news and weather reports, community affairs programming, or public service announcements, radio stations offer a service to the communities where they broadcast. Therefore, a balancing test must be applied. On balance, does the potential additional benefit to performers justify the potential loss in the benefits that radio provides to local communities? The simplest solution to this problem is also an unworkable one: the broadcast industry could avoid the payment of performance fees only by no longer playing sound recordings not presently in the public domain. The effects of this proposition would prove disastrous. In New York City alone, seven of the top ten radio stations are music stations.¹⁷⁰ A smaller variety of programming will tend to draw a smaller and less diverse audience. Advertisers who cannot reach target audiences would spend less, station revenues would decrease, and the radio industry would find itself in dire straits.

V. THE PERFORMANCE RIGHTS ACT IS NOT NECESSARY TO PROVIDE THE UTILITARIAN INCENTIVE TO CREATE

In practice, copyright laws provide a private financial benefit to writers, composers, and other artists. However, maximizing private benefit was not the Framers' intent when the copyright clause was written into the United States Constitution. Rather, the goal of copyright law is "to secure for the public the benefits derived from the labors of authors."¹⁷¹ In *Sony Corp. v. Universal City Studios Inc.*, the Supreme Court elaborated on the rationale for providing

170. New York Radio Guide, New York Radio Stations Arbitron Ratings, <http://www.nyradioguide.com/ratings.htm> (last visited Jan. 18, 2010).

171. Mark S. Nadel, *How Current Copyright Law Discourages Creative Output: The Overlooked Impact of Marketing*, 19 BERKELEY TECH. L.J. 785, 795 (2004).

private monetary benefits to authors.¹⁷² A private monopoly right granted to authors was designed to be:

A means by which an important public purpose may be achieved. It is intended to motivate the creative activity of authors and inventors by the provision of a special reward, and to allow the public access to the products of their genius after the limited period of exclusive control has expired.¹⁷³

The Court in *Sony Corp.* recognized that copyright laws require the preservation of a constant balance between the interests of authors and the public interest in a free flow of information and ideas.¹⁷⁴ As the balance of interests has shifted, Congress has amended the copyright laws in response. However, the Court acknowledges that the impetus behind expansion of the copyright laws traditionally has been the emergence of new technology and new forms of expression.¹⁷⁵ This history of copyright law suggests that there is no need to separately protect the rights of performers under the American system. There is no apparent shortage of public access to musical performance, nor an apparent lack of incentive to create musical works; on the contrary, there is a steady stream of musicians and performers. Furthermore, musical performance is not a form of expression born from a recent technological breakthrough. Additionally, the rationale to deny copyright in music performance may find basis in the argument that copyright in some facets of recorded music has become obsolete.¹⁷⁶

Artists may argue that it is only fair to compensate them for their performances. However, fairness is a lackluster utilitarian justification for providing a performance right and also lies outside of the Framers' intent. *ABKCO Music, Inc. v Harrisongs Music Ltd.*, is one of the most cited cases in copyright infringement outlining the doctrine of subconscious copying.¹⁷⁷ In that case, Ronald Mack, composer of the song "He's So Fine," sued George Harrison for copyright

172. *Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417, 429 (1984).

173. *Id.*

174. *Id.* at 429.

175. *Id.* at 430-431.

176. See generally Raymond Ku, *The Creative Destruction of Copyright: Napster and the New Economics of Digital Technology*, 69 U. CHI. L. REV. 263 (2002).

177. *ABKCO Music, Inc., v Harrisongs Music, Ltd.*, 722 F.2d 988 (2d Cir. 1982).

infringement.¹⁷⁸ Mack alleged that Harrison's hit "My Sweet Lord" infringed on his song. At trial, Harrison admitted that he had access to The Chiffon's recording of "He's So Fine" and subconsciously copied the song when he wrote "My Sweet Lord."¹⁷⁹ The case did not reach a conclusion for seven years following the determination of Harrison's infringement because Allen Klein, Harrison's former manager, acquired the copyright to "He's So Fine" during the course of the litigation and the parties could not settle on damages.¹⁸⁰ Absent from the proceedings are The Chiffons, the source of Harrison's supposed hidden inspiration to record "My Sweet Lord." Fundamental fairness would suggest that The Chiffons should receive some compensation from Harrison for their contribution. However, fundamental fairness is not a tenet of the American copyright regime.

A. Performance Can Survive in a World Without Copyright

In his analysis of the digital copyright "dilemma" brought on by the emergence digital technology, Professor Ray Ku convincingly argues that copyright protection in sound recording is not "a necessary, or even the most efficient, means of encouraging creation."¹⁸¹ Ku points out that advances in technology have significantly reduced the cost of creating music.¹⁸² Coupled with the fact that the vast majority of artists do not make money from the sale of music through traditional distribution channels,¹⁸³ this suggests that most musicians look beyond copyright for the necessary financial incentive to create. A musician derives the income

178. *Id.*

179. *Id.* at 992.

180. *Id.* at 992-993.

181. Ku, *supra* note 176, at 305.

182. *Id.* at 306. Specifically, Ku points to figures that suggest that where an artist could have previously expected to pay an average of \$200,000 to produce an album released on a major label, relevant advances in technology now offer an artist the ability to purchase equipment allowing her to create an album of similar production value for under \$1,000.

183. *Id.* at 307. "Traditional distribution channels" refers to an industry model where an artist signs a contract with a record label. The record label, in turn, finances the production, distribution and promotion of the album. A record company retains all of the proceeds from sales of the album until all of its costs are recovered. At that point, the artist will begin to receive a small percentage of any future retail sales as dictated by the terms of the record contract.

that allows the music profession to continue to be an economically feasible endeavor from live concerts, merchandising, and endorsements.¹⁸⁴

B. Who Owns a Performance Right, and Does It Really Matter Anyway?

Determining whether the Performance Rights Act is necessary to further the utilitarian goals of copyright law hinges on identifying the recipient of the proposed benefits. Two candidates emerge: the artists and the recording industry. Initially, it appears that the performers themselves are the likely beneficiaries of the Performance Rights Act. In his Note, *In Support of Performance Rights in Sound Recordings*, Stephen D'Onofrio notes that "most performers are suffering from depressed economic conditions as a result of a displacement by their own recordings."¹⁸⁵ D'Onofrio argues that a performer receives a substantially smaller benefit from her performance compared to commercial broadcasters or even songwriters.¹⁸⁶ For every Bob Dylan or Bruce Springsteen who have sold millions of albums, there are countless studio musicians who are compensated only once by a record company during the initial recording of a song. A performance royalty would, in essence, act as a forced revenue-sharing arrangement between broadcasters and performers. Compensating an artist each time a record is played over the air would undeniably provide monetary benefits to performers.

However, even a cursory examination of the economic state of the music industry suggests that recording companies are more likely to reap the rewards of extending a performance right in American copyright law. A recording contract is a notoriously complex arrangement between the musician and the record label. The parties will generally agree on a long-term contract, with the record label usually holding the power to exercise renewal options.¹⁸⁷ The key to a

184. *Id.* at 309.

185. Stephen D'Onofrio, *In Support of Performance Rights in Sound Recordings*, 29 UCLA L. REV. 168, 181 (1981).

186. *Id.*

187. Risa C. Letowsky, Note *Broke or Exploited: The Real Reason Behind Artist Bankruptcies*, 20 CARDOZO ARTS & ENT. L.J. 625, 632 (2002).

record contract is the royalties agreement. Typically, an artist receives between ten and twenty percent of the revenue derived from retail sales of an album.¹⁸⁸ However, before an artist can receive royalty payments from a record label, the artist must reimburse the label for the costs associated with creating, producing, manufacturing, and promoting the album.¹⁸⁹ An examination of the fine print on a CD case reveals other rights signed away by an artist in a recording contract: the copyright in the recording is usually owned by the record company, not the artist.¹⁹⁰ Therefore, the record company would initially receive the entire performance royalty and the artist would receive only a percentage equal to her pre-negotiated royalty rate.

The recording industry has traditionally had few qualms with the fact that radio stations are allowed to broadcast a copyrighted sound recording without providing any remuneration to the owner of the sound recording.¹⁹¹ In return for relatively free access to a limitless catalogue of music, radio stations provide the recording industry with countless hours of free advertising.¹⁹² This strategy aimed squarely at turning radio station listeners into recording industry customers and had been successful for many years.¹⁹³ Gradually, the recording industry pushed for additional protection in the form of a performance copyright.¹⁹⁴ As noted in Part I of this Comment, Congress relented in 1995 and granted limited copyright in performance through the Digital Performance Right in Sound Recording Act.¹⁹⁵ In a decision interpreting the scope of the DPRA, the Second Circuit noted Congress' intent in providing the added protection.¹⁹⁶ Digital broadcast services:

might adversely affect sales of sound recording and erode copyright owners' ability to control and be paid for use of their work, [and

188. *Id.* at 634 (stating that the artist does not receive royalties for promotional copies of albums sent to radio stations, or any albums returned from a retailer).

189. *Id.*

190. *See e.g.* LIVING COLOR, VIVID (Epic Records 1988).

191. *Bonneville Int'l Corp. v. Peters*, 347 F. 3d 485, 487 (7th Cir. 2003).

192. *Id.*

193. *Id.*

194. *Id.* at 488.

195. Digital Performance Right in Sound Recordings Act of 1995, S. 227 104th Cong. (1995).

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

were], likely to have a significant impact on traditional record sales, and therefore pose the greatest threat to the livelihoods of those whose income depends upon revenues derived from traditional record sales.¹⁹⁷

Congress correctly predicted that record sales were about to enter a period of serious decline. Between 2000 and 2006, album sales fell from 785.1 million to 588.2 million.¹⁹⁸ As noted by Professor Ku, the record company, not the musician, had the most to lose as a result of declining sales.¹⁹⁹ In turn, it is reasonable to infer that record companies have the most to gain from royalties collected under the Performance Rights Act. Record contracts that allow record companies to retain revenues earned from the sale of music would likely allow those same companies to retain revenues earned from the performance of music. The poor economic climate of the music business is a strong argument against providing a performance right. Musicians and performers, while the target of the incentive, are the least likely to be able to enjoy the economic benefit of a performance royalty. If Professor Ku's is correct that artists do not need the incentives offered by copyright law to continue to create new musical compositions and musical performances,²⁰⁰ there is no rational justification under the utilitarian theory of copyright for a performance right in musical performance.

VI. IS THE LOCAL RADIO FREEDOM ACT NECESSARY TO SAVE AMERICAN RADIO?

Valid arguments made by commentators suggest that performers do not require additional economic incentives to ensure the continued creation of new musical performances. Therefore, the Performance Rights Act, by extending the exclusive right to perform sound recordings to all media,²⁰¹ appears on its face to juxtapose the utilitarian rationale of the

197. *Id.*

198. Brian Hiatt and Evan Serpick, *The Record Industry's Decline*, ROLLING STONE, June 28, 2007, available at http://www.rollingstone.com/news/story/15137581/the_record_industrys_decline/1.

199. Ku, *supra* note 176, at 307 (Professor Ku notes that the record industry generally retains all of the revenues from album sales in order to recoup the costs of recording, marketing, distribution, promotion and other expenses).

200. Ku, *supra* note 176.

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

copyright laws. Before fully proscribing to the Performance Rights Act as contrary to the intent of copyright law, one must also consider the effect of the proposed royalties on the broadcast industry as a whole.

A. Determining the Performance Royalty for Broadcast Radio

Proponents of the Performance Rights Act argue that the legislation would effectively repeal the royalty exemption granted to traditional broadcasters under the DPRA, now codified at 17 U.S.C. §114.²⁰² Presently, § 114(e) provides that performers and broadcast entities are generally free to negotiate a performance royalty for satellite subscription services.²⁰³ In an instance where the parties cannot agree on a royalty payment schedule, Copyright Royalty Judges will establish terms that would best reflect a true market based royalty rate.²⁰⁴ The text of the Performance Rights Act provides that such a review provision would also apply to the determination of performance royalties for broadcast entities.²⁰⁵ The statute requires Royalty Judges to base their decisions on “economic, competitive and programming information presented by the parties.”²⁰⁶ Two exceptions to the fee assessment structure would be applied under the Performance Rights Act. First, private stations earning less than \$1.25 million per year in revenue could elect to pay a flat fee of \$5,000 per calendar year.²⁰⁷ Second, public radio stations could elect to pay a flat royalty fee of \$1,000 per year.²⁰⁸ For stations that do not qualify for a flat fee or choose to negotiate royalties, the financial impact of the performance royalty is a great unknown.

B. The Detrimental Effects of Performance Rights on Broadcast Radio Stations

The traditional public radio fundraising model in the

202. 17 U.S.C. §114(d) (2006).

203. 17 U.S.C. § 114(e) (2006).

204. *Id.*

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

206. 17 U.S.C. §114(f)(2)(B) (2006).

207. H.R. 848.

208. *Id.*

United States appears to be broken.²⁰⁹ In light of the current economic recession, public radio stations are experiencing a decline in donations received during pledge drives.²¹⁰ Successful stations, such as Washington D.C.'s WAMU-FM, are also moving away from the traditional listener pledge format of fundraising as the model is proving unworkable.²¹¹ With future revenue streams in doubt, even a \$1,000 additional financial burden for these stations could have an impact on the amount and quality of programming offered.

As great a concern as this may seem, the potential effect on large market radio stations, not subject to a royalty rate cap²¹², creates an even more interesting, potentially unworkable, paradox. For performers, royalty fees charged to radio stations in the country's top markets present the greatest potential short-term benefit, but in the long term could create the greatest harm. Radio stations in the nation's top three markets, New York, Los Angeles, and Chicago, generate the highest revenues and would theoretically be able to afford the highest royalty rates.²¹³ However, based on the recent decline of advertising revenue experienced by CBS Radio and Clear Channel, which operate a large number of stations in those markets, the payment of high royalty rates would force some stations to close and other stations to either partially or completely abandon music programming.²¹⁴ Potentially, fewer stations playing less music, in the markets that reach the most Americans, would turn off those audiences. At the same time, a loss of music stations in a given market could force those remaining stations to adopt a format that appeals to the largest cross-section of the audience. This format switch could drive away advertisers who either cannot or will not compete in such a market. Lower ratings or fewer advertisers result in lower revenues,

209. Steve Hendrix, *Public Radio Fundraisers Dial It Back; As Listeners Pinch Pennies, On-Air Personalities Perfect the Pitch*, THE WASHINGTON POST, Feb. 14, 2009, at B1.

210. *Id.*

211. *Id.*

212. Performance Rights Act of 2009, H.R. 848, 111th Cong. (2009) (the text of the Performance Rights Act would cap the royalty paid by commercial radio stations earning a yearly revenue of less than \$1,250,000 at \$5,000 per year, while the bill does not include a royalty limit for stations generating more than \$1,250,000 in revenues).

213. Arbitron, Inc., Radio Market Rankings Fall 2009, <http://www.arbitron.com/home/mm001050.asp> (last visited Jan. 18, 2010).

214. Cox, *supra* note 50; Peers, *supra* note 53.

increased difficulty to finance royalty rate payments and eventually less music played on fewer stations. This, of course, is the worst-case scenario predicted by media companies, but it is not entirely implausible.

VII. CONCLUSION

Congress has reignited the debate over performance rights in sound recordings through the Performance Rights Act of 2009 and Local Radio Freedom Act. After examining the performance rights issue through the lens of copyright policy and in light of the broadcast industry's current financial struggles, it is clear neither of Congress' solutions provides a perfect answer. Economic recognition of performance rights, as advocated by the Performance Rights Act, should be delayed until an equitable method of distributing economic incentives can be formulated. It is evident that requiring terrestrial radio broadcasters to pay compulsory royalty fees could potentially bankrupt hundreds of radio stations. At the same time, an outright ban on performance royalties, as advocated by the Local Radio Freedom Act, continues the United States' trend of ignoring the moral rights of performers. Performance rights are recognized in nearly every other industrial nation, but bringing the United States in line with other countries does not justify passing the Performance Rights Act.

American copyright law grants a monopoly to the authors of creative works in order to ensure the continued creation of creative works. Performers have not yet needed this economic incentive to create musical performances, and there is no evidence to suggest that incentive is needed now. Technology is making it increasingly easier and cheaper for musicians to create. A lower barrier of entry into the market of musical creation thus requires a lower return on investment in order to spur creation. In addition, many royalty payments generated from a performance fee charged to radio stations would never reach the artists for whom they are intended. This makes the argument for the Performance Rights Act even harder to justify. The Performance Rights Act is not the proper way to implement recognition of the performance rights of musicians into the American copyright scheme. The Local Radio Freedom Act, by discouraging the implementation of new fees on radio stations in connection

with the broadcast of copyrighted sound recordings, is most in line with the United States utilitarian rationale of copyright.