

PERFORMANCE RIGHTS IN SOUND RECORDINGS: THE IMPACT OF
THE PERFORMANCE RIGHTS ACT ON RADIO, RECORDS,
AND PERFORMING ARTISTS

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Thesis Prepared for the Degree of
MASTER OF SCIENCE

UNIVERSITY OF NORTH TEXAS

May 2012

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Wright-Harmon, Joy. Performance Rights in Sound Recordings: The Impact of the Performance Rights Act on Radio, Records, and Performing Artists. Master of Science (Radio, Television, and Film), May 2012, 67 pages, 2 tables, 2 figures, references, 104 titles.

The original works of copyright holders included tangible creations, as music written on a page, thereby, extending copyright protection to songwriters and music publishers. Until 1995, absent from U.S. copyright law was protection for copyright owners of intangible sound recordings. The Performance Rights Act (PRA) seeks to amend the US copyright law in order to grant copyright holders of sound recordings the right to performance royalties from terrestrial broadcast radio. If passed, the legislation would be unprecedented in the United States. The PRA has implications for broadcast radio, record labels, and performing artists. This study includes historical and legal perspective of previous attempts at legislation of this nature and predicts outcomes of current legislation.

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CHAPTER I

INTRODUCTION

“If music did not pay, it would be given up. . . . Whether it pays or not, the purpose of employing it is profit and that is enough” (Herbert v. Shanley Co., 1917). Although United States copyright laws have been amended many times over since Justice Holmes wrote these words in the first United States Supreme Court decision addressing the payment of royalties to music copyright holders, protecting creators has remained a central tenet throughout copyright history. The original works of copyright holders included tangible creations, as music written on a page, thereby, extending copyright protection to songwriters and music publishers (Copyright Act, 1909). Until the Digital Performance Right in Sound Recording Act of 1995 (DPRSRA) was passed, conspicuously absent from U.S. copyright law was protection for copyright owners of the more intangible sound recordings – more specifically, recording artists and record labels (DeINero, 2004).

Still, the passing of the DPRSRA did not extend full performance rights protection to artists and record labels (Digital Performance Right in Sound Recording Act, 1995). As stated in the Digital Millennium Copyright Act of 1998 (hereafter DMCA), the DPRSRA created, for the first time in U.S. copyright law, although limited, a public performance right in sound recordings. “The right only covers public performances by means of digital transmission and is subject to an exemption for digital broadcasts (i.e., transmissions by FCC licensed terrestrial broadcast stations)” (Digital Millennium Copyright Act, 1998, p. 14). Section 402 of the DMCA expands the exemption to include “recordings that are made to facilitate the digital transmission of a sound recording where the transmission is made under the DPRSRA’s exemption for digital

broadcasts or statutory license” (Digital Millennium Copyright Act, 1998, p. 14).

Terrestrial radio remains exempt from paying performance royalties for sound recordings because they do not carry the same piracy concerns as digital formats (Kilgore, 2010), even though radio stations do pay public performance royalties to songwriters and music publishers through blanket licensing with the major performance rights organizations. Although U.S. copyright law does not afford the same level of protection to copyright holders of sound recordings as songwriters and music publishers, copyright holders of sound recordings do receive rights of distribution and reproduction, a limited adaptation right, in addition to digital performance rights (Martin, 1996).

The absence of performance rights for sound recordings has provided fodder for many legal scholars over the years (DeNero, 2004). Some conclude that such rights are “long overdue” (D’Onofrio, 1982, p. 168). Some argue that “granting copyright equality between the sound recording and the musical composition is constitutionally sound and economically fair” and the absence of such rights are “illogical,” while labeling the U.S. Congress a “failure” to their enactment (Kettle, 2002, p. 1044). Others contend that there are sensible compromises available, but the arguments on both sides are “too extreme” to have any real effect in the current climate (DeNero, 2004, p. 201). Performance rights for sound recordings have been passionately debated since the congressional hearings for the establishment of the U.S. Copyright Act of 1909 (Pallante, 2011), and the debate continues to this day.

The introduction of legislation by both houses of Congress in 2009 (S. 379, 2009; H.R. 848, 2009, collectively hereafter, the Performance Rights Act, or PRA) seeks to, once and for all, amend the copyright law at §106(6) of Title 17 in the *United States*

Code, in order to grant copyright holders of sound recordings (record labels and performing artists) the right to performance royalties from terrestrial broadcast radio. If passed, the legislation would be unprecedented in the history of performance rights in the United States, even though the battle has been ongoing for nearly a hundred years (Ryan, 1985). The PRA has implications for all involved – broadcast radio, record labels, and performing artists.

Purpose of the Study

This study seeks to explain, from an historical and analytical perspective, the trajectory of legal precedent established over the years with regard to performance rights, beginning with the establishment of United States Copyright Law. Further, the study examines the relationships between radio and records, radio and artists, artists and record labels, and the impact of the digital revolution as further motivation for the introduction, once again, of performance rights legislation. Finally, this thesis clarifies the Performance Rights Act and illuminates the players on both sides of the argument, drawing final conclusions about the success or failure of this most recent attempt to legislate performance rights from broadcast radio to artists and record labels.

Definitions

In order to fully understand the terminology used in this writing, the following definitions of some key terms are offered to assist in the reader's navigation:

"Copyright law" and/or the "Copyright Act" refer specifically to Title 17 of the *United States Code* and its subsequent amendments (Copyright Law of the United States, 2011). Within Title 17 are the five types of exclusive copyrights granted to

copyright owners, including the right to reproduce, the right to prepare derivative works, the right to distribute copies of the work, the right of public performance, and the right of public display (Rights Granted Under Copyright Law, 2011). The right of public performance is the foundation and principle discussion for this thesis.

“Performance rights,” as discussed in this thesis, refer specifically to a copyright owner’s right to collect royalties (payments) for public performance under the United States Copyright Law as expressed in Title 17. Under this section of the *U.S. Code*, a copyright holder is given control over their work being performed “publicly,” that is in a “place open to the public or at a place where a substantial number of persons outside of a normal circle of a family and its social acquaintances are gathered” (Copyright Law of the United States §101, 2011). Public performance is also implied when the performance is conveyed to multiple locations, as with radio and television (Rights Granted Under Copyright Law, 2011). Presenting a video in a public park or theater, then, would require permission from the copyright holder in the form of a license. For public performances of music, as another example, it would be a violation of the public performance right to play a personally owned compact disc in a public venue without obtaining a license from the copyright holder. In contrast, playing that same compact disc at a private party where friends and family are gathered would not be considered a public performance and would not require a separate license under the Copyright Act.

The “Performance Rights Act (PRA)” is the collective term used to refer to specific bills brought forth in both the United States House of Representatives and the United States Senate in 2009 (S. 379, 2009; H.R. 848, 2009) seeking to amend the Copyright Act at §106(6) of Title 17 in the *United States Code*, in order to grant

copyright holders of sound recordings the right to performance royalties from terrestrial broadcast radio for the first time in history.

“Mechanical rights,” as explained by the Harry Fox Agency (the largest purveyor of mechanical licenses in the United States), refers to the “licensing of copyrighted musical compositions for use on CDs, records, tapes, and certain digital configurations” (Mechanical Licensing, 2011). The Harry Fox Agency was established by the National Music Publishers Association in 1927 to act as an “information source, clearinghouse and monitoring service for licensing musical copyrights” (About HFA, 2011). Mechanical rights, then, are rights associated with publishing and not public performance.

Obtaining “synchronization rights” is necessary in order to “sync” music in timed relations for visual elements in film, TV, video and web cast production. A synchronization license is needed for a song to be reproduced onto a television program, film, video, commercial, radio, or even a phone message. Synchronization licenses must be obtained from the composer, publisher, music library, or master owner of a specific recorded version of the composition (Synchronization Rights, 2011). Synchronization rights are not specifically addressed in this thesis, but it is important to understand how they differ from public performance rights so as not to confuse one with the other.

“Performance royalties” are payments made to copyright holders through performance rights organizations (PROs) for public performances as deemed through Title 17 of the *United States Code*.

“Performance rights in sound recordings” were specifically left out of the Copyright Act due to the symbiotic relationship between the recording and radio

industries prior to 1998, when the Digital Millennium Copyright Act was enacted (The Digital Millennium Copyright Act, 1998). Thereafter, performance rights in sound recordings were granted to record labels and artists, but only for digitally transmitted works. Therefore, broadcast radio remained exempt from paying royalties for sound recordings to record labels and performing artists, though they continued to pay royalties to songwriters and music publishers through the major PRO organizations, as ever.

“Masters” are original sound recordings from which copies can be made (businessdictionary.com, 2011). Therefore, master rights are the rights given to those who own original sound recordings, whether in digital or analog format. Master rights are subject to royalties in every situation (e.g. sync rights, digital rights, and mechanical rights) except public performance (e.g. radio), and this anomaly is at the heart of the Performance Rights Act.

“Digital revolution” refers simply to the onset of digital media technology replacing analog media technology and the sweeping changes that have resulted across every aspect of modern life, most notably and for the purpose of this thesis, the music industry. Although there is no one specific incident that identified the beginning of the digital revolution, the recognition of its profundity seemed to appear in the early 1980s when *Time* magazine named “the computer” its 1982 Man of the Year (Friedrich, 1983).

“Digital rights” are granted to copyright holders for digital streaming sound recordings, such as Internet radio, satellite radio, cable TV music channels, and any other digital platform (SoundExchange, 2011). These rights are extended to “featured recording artists, master rights owners (like record labels), and independent artists who record and own their masters” (SoundExchange About).

“Digital piracy” or “piracy” refers to “illegal trade in software, videos, digital video devices (DVDs), and music. One concept of piracy occurs when someone other than the copyright holder copies the product and resells it for a fraction of the cost that the legitimate producer charges” (Digital piracy, 2010). Piracy also occurs in peer-to-peer format through which no money is exchanged, but digital copies are traded amongst users of a common file sharing web site, such as Napster.

Performance rights organizations (PROs) are organized collectors of royalty payments on behalf of copyright holders. There are four PROs in the United States. ASCAP (the American Society of Composers, Authors, and Publishers), BMI (Broadcast Music, Inc.), and SESAC (formerly an acronym for Society of European Stage Authors and Composers, but today the full name) are the PROs responsible for royalty collection for public performance rights on behalf of songwriters and music publishers. SoundExchange collects royalties for digital performance rights for copyright holders, including artists, record labels, and owners of master rights.

Chapter II denotes the more extensive methodology utilized in the overall research of performance rights in sound recordings, the Performance Rights Act, and the relationships between the radio industry, the recording industry, and performing artists. Research into the artists’ role is significant to the history and to the future of performance rights and, thereby, is the addition of this study to the literature that is most relevant to the conversation regarding the Performance Rights Act.

In order to understand performance rights in sound recording more fully, it is important to begin with the history of copyright law in the United States. Chapter III provides the historical foundation from the original copyright documents on the U.S. Government web site, concentrating mostly on the Copyright Act of 1909 since it is the

foundation of today's copyright law. This chapter tracks and highlights the important legislation passed, as well as the many failed attempts for performance rights enactment with regard to sound recordings. Landmark cases are denoted throughout the historical analysis, and key legislation is highlighted, such as the Sound Recording Amendment of 1971, the Digital Performance Right in Sound Recording Act of 1995, and the Digital Millennium Copyright Act of 1998. The trajectory of this legislation has led to the Performance Rights Act of 2009.

Chapter IV outlines the significance of the relationships between records, radio, and performance artists, each to the other. It is important to understand the history of each of these relationships in the context of performance rights legislation so as to understand why performance rights for sound recordings have been passionately debated for nearly one hundred years, yet still have not been granted. Chapter V discusses the Performance Rights Act itself and focuses on the effects such an act will bring to bear on records, radio, and performance artists, articulating the players and the politics on both sides of the argument. Results of the study are presented in Chapter VI. Chapter VII offers conclusions based upon the research, suggested areas for further study, limitations of the study, and evaluation as to the likelihood of the PRA's passage.

Research Questions

Passage of the Performance Rights Act has implications for the radio industry, the record industry, and performing artists. The relationships that exist between each of the entities and the politics involved with the passage of such an act are important to the

ultimate outcome of the proposed PRA legislation. Thus, the following questions provide the foundation of this research:

RQ1: What is the predicted impact of the Performance Rights Act, if passed, on radio?

RQ2: What is the predicted impact of the Performance Rights Act, if passed, on the record industry?

RQ3: What is the predicted impact of the Performance Rights Act, if passed, on performing artists?

CHAPTER II

METHODOLOGY

Methods employed in this study included researching performance rights from an historical and analytical process in a legal context. Copyright law research was performed through extensive examination of government documents relating to copyright law. A great deal of electronic material exists on the U.S. Copyright web site (www.copyright.gov) that dates back to the beginning of copyright law in the United States. The *U.S. Copyright Act, Title 17 of the U.S. Code*, is accessible in its entirety, as well as any amendments to the law. The Registrant of Copyrights files an annual report outlining decisions that have been made with regard to copyright law and those reports are filed online by Congress number and date. The site also contains recently introduced copyright legislation, sponsors of the various bills, and status updates on any pending legislation. The government copyright web site was invaluable to this research.

Interpretations and opinions of copyright legislation with regard to performance rights were examined largely through peer-reviewed journal articles. Legal journals such as the *Journal of Law and Economics* and the *Journal of Legal Studies* provided insights, as did law review articles from several law schools with renowned entertainment law programs, such as Harvard, Vanderbilt, Cardozo, Fordham, UCLA and Loyola of Los Angeles. Following entertainment law journals on Facebook and Twitter also proved very useful in daily analysis of current events with regard to the PRA.

The Performance Rights Act, outlined on the government's copyright web site, was accessed for specificity. Since there is little academic research with regard to the PRA, research on performance rights in sound recordings was, ultimately, most relevant

to this study. Comparing the conclusions and salient points from journal articles on the subject were pertinent to understanding the profundity of the United States' lack of performance rights in sound recordings – the long-standing issue that led to the introduction of the PRA. Internet RSS (Rich Site Summary) feeds (whatisrss.com, 2012) enabled immediate updates from web sites, blogs, newspapers, and other online channels with regard to performance rights.

Aside from the legal research on the PRA, it was important to gain perspective from both sides of the argument. MusicFIRST's web site and the National Association of Broadcasters (NAB) web site were crucial to gaining insight into each argument and formulating the foundations for my own conclusions. Politicians' government web sites were also used to gain insights into the creators of legislation pertaining to performance rights and their reasons for the introduction of performance rights bills. Organizational web sites, such as the RIAA, AFTRA, SEIU, etc., were consulted for understanding the purpose and membership of the many organizations supporting both sides of the PRA argument.

Media industry history books (Barnouw, 1966 and Sterling & Kittross, 2002) were referenced for examination of historical events throughout the history of broadcasting that bore impact upon the relationships between radio, record labels, and performing artists. These historical references also contained the timing and importance of the technological trajectory that affected performance rights throughout history. ASCAP, BMI, and SESAC web sites were important to researching historical timelines and positions of each organization regarding not only performance rights, but also their relationships to broadcasting, artists, and one another.

Industry trade magazines, such as *Variety*, *Radio & Records*, *Billboard*, and *The Observer* were consulted on a regular basis. Hypebot.com, a cutting-edge new music industry web site, was referenced daily, and some of the artists' personal stories were shared in the conclusion where relevant. Facebook played a crucial role in daily research, as well, by "liking" pages germane to the topic and following Facebook news feeds of publications, organizations, artists, PROs, politicians, and personal friends in the industry. Twitter was also vitally important in daily research by "following" record and radio industry entities, as well as artists, PROs, and politicians. "Liking" and "following" on social media sites often led to very relevant articles and sources. Personal friends in the industry, who were aware of this research, often sent articles and links pertinent to the study, as well.

Several current books were referenced from music industry professionals, including artists, attorneys, music business, and PRO executives. These industry books were important in gathering up-to-date information on the status of record labels, artists, and radio in the changing business model of the new music industry. Economic texts were also consulted to gain an understanding of current trends with regard to the digital revolution's impact, not only in the music industry, but across all industries.

Analysis was performed through piecing together the many factors that led to the Performance Rights Act. The history of the relationship development that occurred between the radio and the recording industries, as well as the relationship between those industries and performing artists, was the foundation that built the arguments both for and against performance rights in sound recordings. The seemingly symbiotic association that developed between radio and records built the methods by which artists

have been compensated throughout history and is the primary factor affecting performance rights issues in the United States to date.

Politics has played and continues to play an important role in any performance rights legislation over the past 100+ years. Performance rights matters have always proved to be hot button issues with constituents on both sides of this argument lobbying in Washington, DC for their positions. Washington proves to be a slow-moving machine and even small changes in performance rights take vast amounts of time unless considered an emergency, as in the case of the digital revolution. The passage of the DPRSRA and the DMCA are evidence of the urgency that arose with the onset of the Internet and new digital technology.

Analysis also took place through examination of the many articles and blogs relating to performance rights in sound recordings and the opinions espoused regarding a solution to this quandary. Finally, it was through agreement and/or disagreement with positions taken until a fully formed conclusion emerged. Certainly, personal experience after many years of earning a living as a performing artist affected the opinions and conclusions drawn by the researcher.

CHAPTER III

HISTORY

United States Copyright Law

The First Congress enacted the first copyright law in 1790, which was subsequently revised in 1831, 1879, 1909 and, most notably, 1976. Regular revisions have taken place over time in various areas of the law. However, today's copyright law, Title 17 of the *United States Code*, encompasses the 1909 copyright law and all its ensuing amendments of general provisions (Pallante, 2011).

In 1905, President Theodore Roosevelt sent a memorandum to Congress, urging it to take up in earnest the revision of United States Copyright Law. Roosevelt indicated that the existing laws were “imperfect in definition, confused, and inconsistent in expression” (Goldman, 1955, p. 1). The president directed that modern reproductive processes should be entitled to protections that (then) current copyright law omitted, stating that the burden on copyright holders outweighed the fair protection of the public, and that the difficulty of the courts' interpretation mixed with the impossibility of the Copyright Office's administration begged not just for new amendments, but absolute overhaul (Goldman, 1955).

In response to the president's memorandum, the Librarian of Congress and the Register of Copyrights held a series of conferences in 1905 and 1906 to elicit opinions and positions from affected professionals on the various copyright issues at hand. Members of the assembled conferences included “authors, dramatists, theater managers, architects, artists, composers, book publishers, directory publishers, newspaper publishers, periodical publishers, photoengravers, photographers, print publishers, lithographers, music publishers, printers, educational institutions, public

libraries, advertising agencies, bar associations, and a few other miscellaneous groups” (Goldman, 1955, p. 2). The result of the conferences and the direct involvement of these professionals was a bill introduced in the House (H.R. 19853) and Senate (S. 6330) to overhaul the copyright law. Members of these various groups then testified at the 1906 hearings before a joint House and Senate Committee on Patents. Two issues arose as major controversy with the introduction of the bill: “the use of copyrighted music on mechanical instruments such as piano rolls and phonograph records, and the importation by public libraries of books printed abroad” (Goldman, 1955, p. 3). It is the first of these issues that remains at the heart of discussion for this thesis, some 106 years later, though the mechanical instruments are a bit more modern.

The copyright bill was redrafted for the 59th Congress in 1907 as H.R. 25133 and S. 8190, and was reported on favorably except for giving the “copyright owner of music the right to record his music for use on mechanical instruments” (Goldman, 1955, p. 3). No further action was taken with the 59th Congress; however, the 60th Congress picked it up again and the bill was reintroduced as H.R. 243 and S. 2499. Once again, hearings were conducted and many witnesses testified expressing opposing views specifically regarding the controversy of music and mechanical instrument use. Eight subsequent revised bills were introduced throughout 1908 and early 1909. Finally, on March 2, 1909, the whole U.S. House of Representatives agreed to certain amendments introduced by Representative Currier and passed copyright legislation; the U.S. Senate followed on March 3, 1909; and President Theodore Roosevelt signed into law the Copyright Act of 1909 on March 4, 1909 (Pallante, 2011).

White-Smith Publishing Company v. Apollo Company

In the meantime, a very important U.S. Supreme Court case was decided in 1908. As has been the case throughout history, modern technology played an important role in the evolving interpretation of copyright law. The plaintiff in the case, White-Smith Publishing Company, was the copyright holder on two pieces of sheet music – “Little Cotton Dolly” and “Kentucky Babe.” The defendant in the case, The Apollo Company, was a manufacturer of player pianos. To simplify, player pianos utilize perforated rolls that pass over ducts emitting air pressure in order to activate the piano keys, resulting in the piano producing the actual sound of the music perforated into the rolls. The Apollo Company had used the two pieces of sheet music to perforate the songs’ melodies into piano rolls. The plaintiff argued that the intellectual property contained in any song’s melody is the real invention of the composer. The argument proceeded that music for the ear is equivalent to writing for the eye, and that the Copyright Act should protect the composer as it would the author (*White-Smith Company v. Apollo Company*, 1908).

The White-Smith case was the first real precursor to the issue of copyright protection for sound recordings. The Supreme Court’s decision in favor of the defendant was based on the idea that only “tangible results of mental conception” are dealt with in the copyright law, and its “multiplication or reproduction is all that is protected by the statute” (*White-Smith Company v. Apollo Company*, 1908). This meant that the Court’s decision protected tangible sheet music, but not the performance of that music through the sound emitted. Staykova (2004) argues that the Supreme Court’s decision in this case is the very reason sound recordings were omitted from the list of

protected works in the Copyright Act of 1909 and established the precedent that has, thus, omitted sound recordings from copyright protection ever since.

Music Performance Rights

Performance rights organizations (PROs) were born out of economic necessity. There was a need for a market response to copyright issues arising from high transaction costs. Copyright law dictated that public performance required permission from the copyright holder, and the high number of users, including radio, television, night clubs, hotels, restaurants, and so on, rendered one-on-one negotiations for performance rights infeasible. The idea of a clearinghouse to negotiate blanket licensing through the payment of an annual fee granting access to an entire catalog of music was the foundation for the development of PROs, beginning with the American Society of Composers, Authors, and Publishers (ASCAP) (Landes & Posner, 1989).

American Society of Composers, Authors, and Publishers (ASCAP)

Just a few years after the Copyright Act of 1909 was enacted, songwriter Victor Herbert founded ASCAP in February of 1914, along with founding members Irving Berlin, James Weldon Johnson, Jerome Kern, and John Philip Sousa. Within seven years of its creation, membership grew to include the likes of Hoagy Carmichael, Dorothy Fields, George and Ira Gershwin, Oscar Hammerstein II, W.C. Handy, Lorenz Hart, Jimmy McHugh, Richard Rodgers, Fred Rose and Harry Warren (ASCAP History, 2011). The founding members are among the most beloved songwriters in American history from the musical area of New York City known as “Tin Pan Alley” during the era between World Wars I and II (Furia, 1992). To this day, ASCAP continues its history as

a PRO that is 100% member-owned, and governed by a Board of Directors elected by and from the membership every two years. ASCAP has non-profit status and their main purpose is “to assure that music creators are fairly compensated for the public performance of their works, and that their rights are properly protected” (About ASCAP, 2011).

Herbert v. Shanley Company

By the time ASCAP was created, public performance rights were already outlined in the *U.S. Code* (Copyright Act, 1909), and it was on this foundation that Victor Herbert brought the first infringement suit before The United States Supreme Court (Herbert v. Shanley Co., 1917). Herbert composed a comic opera entitled “Sweethearts,” for which there was a title song by the same name. Herbert held copyrights for both the opera and the song. The Shanley Company, defendants in the case, owned a restaurant on Broadway in New York City at which the song was performed by a vocalist and orchestra. Herbert asserted that, if the proprietor of the restaurant was making money from the entertainment his song provided, Herbert also should be paid a percentage of that money for the public performance of his creative works. Justice Oliver Wendell Holmes and the U.S. Supreme Court agreed in the famous decision that established public performance rights for songwriters and music publishers:

If the rights under the copyright are infringed only by a performance where money is taken at the door, they are very imperfectly protected. Performances not different in kind from those of the defendants could be given that might compete with and even destroy the success of the monopoly that the law intends the plaintiffs to have. It is enough to say that there is no need to construe the statute so narrowly. The defendants' performances are not eleemosynary. They are part of a total for which the public pays, and the fact that the price of the whole is attributed to a particular item which those present are expected to order is not important. It is true that the music is not the sole object, but neither is the food, which probably could be got cheaper elsewhere. The object is a repast in

surroundings that to people having limited powers of conversation, or disliking the rival noise, give a luxurious pleasure not to be had from eating a silent meal. If music did not pay, it would be given up. If it pays, it pays out of the public's pocket. Whether it pays or not, the purpose of employing it is profit, and that is enough. (Herbert v. Shanley Co., 1917)

ASCAP won its first performance rights victory with this case and, thereafter, was permitted to seek royalties through the sale of licenses for public performances of their members' works. Several years later, the public performance license was extended to radio with the first license sold to KFI Radio in Los Angeles on February 1, 1923. Today, ASCAP licenses over 11,000 commercial and 3,400 non-commercial radio stations for public performance rights to their member songwriters and music publishers (ASCAP History, 2011).

Early Radio, Artists, and Performance Rights

The early 1920s saw a boom in public investment for radio equipment to be used in private homes. New radio stations began to fill the airwaves in response to growing demand – some partnering with manufacturers solely for the purpose of selling radios and others to satisfy curious new listeners. Radio stations resembled conservatories in order to attract performing artists to appear for free – WFAA in Dallas, chief among them. The station attempted to make its rooms so attractive that “even the most fastidious should welcome the opportunity to perform for WFAA” (Barnouw, 1966, p. 125). European conservatory music was featured in live performances, bringing rich culture to radio programming that became known as “potted palm music” (Barnouw, 1966, p. 126).

The advent of jazz, however, brought not only new music, but social ramifications, as well. Radio largely ignored this new phenomenon and continued its

conservatory-style programming as though jazz did not exist. As record labels began to expand their “race” catalogs, public demand grew stronger for jazz on the radio.

Through 1925, however, the potted palm ruled supreme, and the musicians were still largely unpaid. The few who were bucking the established system were looked upon as trouble-makers. Yet, the sentiment of something for something was prevalent, and payment began to appear in the form of newspaper reviews for radio performances. Lavishly worded articles, as long as they kept the applause coming, were meant to quell any notion that artists should actually be paid money for their performances. Soon enough, artists began to skip out on scheduled performances, blatantly demonstrating their resentment of publicity for pay as a “highly depreciated currency” (Barnouw, 1966, p. 134). In 1924, the American Federation of Musicians (AFM) union in Kansas City notified local stations that, in the future, musicians would be paid \$4.00 per program, and later \$120.00 per week as compensation. Singers would remain unpaid and, at minimum, three musicians could be hired at once. Radio stations began seeking alternatives and many unsuccessfully presented dramas in place of music. Radio, in general, was forced to accept the idea of jazz, technology, and playing recorded music on the air, even though network radio rejected recorded music until the 1940s and continued to pay ASCAP for live performance licenses (Barnouw, 1966).

The beginning of ASCAP’s relationship with broadcasters was contentious. Radio broadcasters believed that they played an important role in the popularizing of ASCAP members’ work by broadcasting their music, and they were stunned at the notion that radio should pay performance royalties. In 1922, ASCAP attorney, Nathan Burkan, distributed a letter to the radio industry stating that, in his opinion, a radio broadcast was a public performance for profit. Most radio stations opposed the idea

that they should be held accountable to ASCAP. Later that year, ASCAP issued a demand to the radio industry to acquire licenses or face infringement litigation (Ryan, 1985).

In 1923, ASCAP began to concentrate its efforts in the direction of specific radio stations, and chose WEAJ, RCA's flagship station in New York, as its first target. ASCAP was able to negotiate licensing fees with WEAJ, thereby enabling them to leverage other stations to also pay licensing fees. Meanwhile, the Justice Department was investigating ASCAP on the radio broadcasters' complaint that ASCAP acted in restraint of trade and engaged in unfair competition. After a lengthy two year investigation, the Justice Department concluded that ASCAP was not in violation of the existing antitrust legislation – another legal victory for ASCAP. Although some radio stations dropped ASCAP member music from airplay, others purchased the licenses to avoid litigation (Barnouw, 1966).

The case of *Witmark v. Bamberger* sealed the fate of radio stations in paying royalties to ASCAP through use of the song “Mother Machree” in an advertising spot on WOR in Newark, New Jersey. The court concluded that the performance had not been eleemosynary, or charitable, as many radio stations had alleged, but that it was for profit. Subsequently, many radio stations began to begrudgingly settle for the ASCAP-imposed fees (Barnouw, 1966).

National Association of Broadcasters, Inc. (NAB)

In April, 1923, a formal gathering of a small group of broadcasters took place in Chicago to create a common and united front against ASCAP (Sterling & Kittross, 2002). Broadcasters, up to this point, were not formally organized. The fight with

ASCAP steered the formation of what would become the National Association of Broadcasters (NAB) in 1923. Commander Eugene F. McDonald served as NAB's first president and led its first New York convention with representatives from about 20 radio stations. This new group was not only small, but relatively ineffective at first, and ASCAP was granted its royalties. However, years later these broadcasters would face ASCAP again and make manifest the groundwork that was laid for a growing powerful organization that would also bear a new PRO to compete with ASCAP. By 1939, radio executives in the NAB formed Broadcast Music Incorporated (BMI). Also a non-profit, BMI was "...the first to offer representation to songwriters of blues, country, jazz, rhythm & blues, gospel, folk, Latin and, ultimately, rock & roll" (BMI About, 2011).

Today, the NAB is "the voice for the nation's radio and television broadcasters" (NAB About, 2011). Growth in membership over the years has made the NAB the leading trade association for the broadcast industry. The organization represents its members in federal government, industry and public affairs, as well as consistently striving to improve the quality and profitability of broadcasting (NAB About, 2011).

SESAC

Although SESAC was founded in New York in 1930 (prior to BMI) in an effort to help European publishers with their American performance royalties, it is still considered the third PRO in the U.S. with regard to membership and size. In the 1930s, SESAC established important relationships with broadcasters by supplying them with quality recordings of SESAC's extensive gospel catalog. The company signed its first songwriter agreement in 1970, which marked a historic turning point for SESAC, as they had only signed publishers prior. SESAC began a new era in the 1970s by placing

emphasis on its Christian roster, helping to develop the Contemporary Christian format. A change of ownership in 1992 rearranged SESAC's roster with the addition of many film and television composers. SESAC now has offices in New York and Los Angeles and continues to grow rapidly with expansion into the Latin music scene (SESAC History). As of February, 2012, SESAC owners hired Goldman-Sachs to shop the company after a failed \$700 million attempt to sell in auction. The asking price dropped to \$500 million and several private equity firms are showing interest, as well as Warner Music. The loss of independence that would be created by selling the firm to a major music company is of importance, as there would be conflict of interest issues in that the music company might be suspected of maximizing revenue at the expense of the songwriters and music publishers (Koshman & Atkinson, 2012).

SoundExchange

With the combined passing of the DPRSRA and the DMCA, a 501 (c) (6) non-profit entity, known as SoundExchange, was established in 2000 as an unincorporated division of the Recording Industry Association of America (RIAA) to collect and distribute royalties on behalf of artists and copyright owners of sound recordings (SoundExchange About). Statutory royalties are collected through SoundExchange from satellite and Internet radio, cable TV music channels, and other similar platforms for streaming sound recordings. In 2003, SoundExchange became an independent entity with a Board of Directors overseeing all operations. This board is comprised of representatives from each of the major labels, two independent labels, executives from both the RIAA and an independent label association, and artist organizations such as American Federation of Television and Radio Actors (AFTRA), American Federation of

Musicians (AFM), and others. The board is responsible for approving both administrative expenses and distribution methodology.

It is important to note that ASCAP, BMI, and SESAC do not, nor did they ever, represent artists or record labels. From the outset, the three traditional PROs have focused solely on the representation of songwriters and music publishers. Today, SoundExchange is the only PRO that represents artists and record labels. Additionally, though ASCAP, BMI, SESAC, and now SoundExchange are the only performing rights organizations in the United States, there are many “royalty-free” services that offer music catalogs for professional use that do not require PRO licenses. This music is known industry-wide as “production music.” One such catalog can be found at royaltyfreemusic.com, for reference (Royalty Free Music Homepage, 2011). Production music, once purchased, can be broadcast publicly without seeking additional permission from the copyright holder for public performance rights; hence the royalty-free classification. However, production music does require mechanical and synchronization licenses for its use in those situations that would necessitate such licensing, and that is how production music is profitable.

The Sound Recording Amendment of 1971

The process of creating sound recordings includes three stages. First, the actual production of the recording involves the creative stages of writing and conceiving of the arrangement, rehearsing, and recording the performance through mechanical devices onto a master tape or, as today, a digital program. The second stage involves the replication of the master recording to various physical or digital formats. The last stage

is the distribution, or placement, of the recording in the marketplace for sale (Staykova, 2004).

Until 1971, there was absolutely no copyright protection for owners of sound recordings. Music piracy became widespread in the 1960s, by some trade estimations, at a volume of \$100 million, representing a full third of estimated cassette tape sales at the time. Unauthorized duplication of records and tapes led Congress to enact the Sound Recording Amendment of 1971. The purpose of this legislation was two-fold: to make piracy illegal and to subject those who infringe on copyrights to the full extent of the law, including criminal prosecution (Kastenmeier, 1971). In order to enact this legislation, it became necessary to grant limited protection to copyright holders of sound recordings.

The House Report on the Sound Recording Amendment of 1971 acknowledged that piracy was “not only depriving legitimate manufacturers of substantial income, but of equal importance [was] denying performing artists and musicians of royalties and contributions to pension and welfare funds and Federal and State governments [were] losing tax revenues” (Kastenmeier, 1971, p. 2). The Committee on the Judiciary, authors of the House Report, was convinced that the matter was “immediate and urgent,” and sought to deal with the problem irrespective of any other copyright law issues at that time. Ultimately, however, the copyright protection given to sound recording was partial and “the exclusive right created thereby [was] limited to the duplication in tangible form of the specific recorded performance copyrighted: it does not include imitation or simulation of that performance” (Kastenmeier, 1971, p. 8).

Virtually every Congress put forth legislation for the next ten years (see Table 1).

Table 1

History of Performance Rights Legislation

Legislation	Year	Congress	Purpose	Outcome
H.R. 11258	1925	68 th	Protection for sound recordings within terms of copyright (Register of Copyrights, Annual Report of the Register of Copyrights, 1924-1925)	No action
H.R. 10434	1926	69 th	Protection for sound recordings; no copyright term limits (Register of Copyrights, 1925-1926)	No action
H.R. 12549	1930	71 st	Changes to Vestal bill included “public performance, exhibition, or transmission,” still excluding sound recordings (Register of Copyrights, 1929-1930)	No action
H.R. 10364	1932	72 nd	Intent to protect all writings in literature, art, and science (Register of Copyrights, 1931-1932)	Referred to Committee on Patents – no action
H.R. 10740	1932	72 nd	Modification of specific sections with reference to meaning of “miscellaneous works” (Register of Copyrights, 1931-1932)	Referred to Committee on Patents – no action
H.R. 10976	1932	72 nd	Modification of specific sections with reference to the meaning of “writings” (Register of Copyrights, 1931-1932)	Referred to Committee on Patents – no action
H.R. 10632	1936	74 th	Sought to give copyright protection to all “renditions and interpretations” of the performer (Register of Copyrights, 1935-1936)	Referred to Committee on Patents – no action
H.R. 11420	1936	74 th	Sought to grant protection for recordings with permission of author (Register of Copyrights, 1935-1936)	Referred to Committee on Patents – no action
H.R. 52745	1937	75 th	Sought to protect performing artists in the renditions of their works for phonograph records, soundtracks, and other mechanical media (Register of Copyrights, 1936-1937)	Referred to Committee on Patents – no action

(table continues)

Table 1 (continued).

Legislation	Year	Congress	Purpose	Outcome
S. 2240	1937	75 th	Senate version of H.R. 52745 (Register of Copyrights, 1936-1937)	Referred to Committee on Patents – no action
H.R. 4871	1939	76 th	Sought to extend copyright to performers' interpretive renditions of musical works (Register of Copyrights, 1938-1939)	Referred to Committee on Patents – no action
H.R. 9703	1940	76 th	Similar to H.R. 52745; reintroduced (Register of Copyrights, 1939-1940)	No action
H.R. 7173	1942	77 th	Proposed copyright for acoustical recording with permission of copyright holder (Register of Copyrights, 1941-1942)	No action
H.R. 1570	1943	78 th	Proposed copyright for acoustical recording (Register of Copyrights, 1942-1943)	Referred to Committee on Patents – no action
H.R. 3190	1945	79 th	Proposed copyright for acoustical recordings (Register of Copyrights, 1944-1945)	No action
S. 1206	1945	79 th	Senate version of H.R. 3190 (Register of Copyrights, 1944-1945)	No action
H.R. 1270	1947	80 th	Sought performance royalties with permission of copyright holder (Register of Copyrights, 1946-1947)	Referred to Subcommittee on Patents, Trademarks, and Copyright – no action after hearings
H.R. 2464	1951	82 nd	Sought copyright protection for acoustic recordings (Register of Copyrights, 1950-1951)	No action
S. 597, Amdt. No. 131	1967	90 th	Sought copyright protection for jukebox recordings and CATV transmission (Register of Copyrights, 1966-1967)	Passed by Senate, but removed from House floor after contentious debate – no action
S. 543, Amdt. No. 9	1969	91 st	Sought to give performers and record labels right to royalties for public broadcasting of sound recordings (Register of Copyrights, 1968-1969)	No action
S. 644	1971	92 nd	Substantially identical to S. 543 (Register of Copyrights, 1970-1971)	No action
S.1361	1973	93 rd	Substantially identical to S. 644 (Register of Copyrights, 1972-1973)	Hearings scheduled for next year, but no action

(table continues)

Table 1 (continued).

Legislation	Year	Congress	Purpose	Outcome
H.R. 8186	1974	93 rd	House version of S. 1361 (Register of Copyrights, 1973-1974)	No action
H.R. 14922	1974	93 rd	House version of S. 1361 (Register of Copyrights, 1973-1974)	No action
H.R. 15522	1974	93 rd	House version of S. 1361 (Register of Copyrights, 1973-1974)	No action
H.R. 14636	1974	93 rd	Sought copyright protection for all prints or reproductions of any sound recordings of a particular performance of a musical work (Register of Copyrights, 1973-1974)	No action
S. 1111	1975	94 th	Senate bill introduced seeking an amendment to the Copyright Act for performance rights for sound recordings (Register of Copyrights, 1974-1975)	No action
H.R. 5845	1975	94 th	House companion bill for S. 1111 – first in series (Register of Copyrights, 1974-1975)	No action
H.R. 7059	1975	94 th	Second in series (Register of Copyrights, 1974-1975)	No action
H.R. 7750	1975	94 th	Third in series (Register of Copyrights, 1974-1975)	No action
H.R. 8015	1975	94 th	Fourth in series (Register of Copyrights, 1974-1975)	No action
H.R. 6063	1977	95 th	Sought public performance rights for sound recordings (Register of Copyrights, 1976-1977)	House hearings; Senate Judiciary Committee hearings – no action
H.R. 997	1979	96 th	Sought public performance rights for sound recordings (Register of Copyrights, 1978-1979)	Suspended before completion – no action
H.R. 1805	1981	97 th	Sought public performance rights for sound recordings (Register of Copyrights, 1980-1981)	Public hearings by House Judiciary Subcommittee on Courts, Civil Liberties, and Administration of Justice – expected to “mark up” these bills at a “later date” – no action

Source: Compiled from government documents (www.copyright.gov)

Each attempt to arrive at a more favorable outcome for performance rights in sound recordings either failed or stalled in committees. Meanwhile, the next major technological event arrived with the personal computer and would change the trajectory of the entire music industry over the course of the following ten years and through today.

The Digital Revolution

The Digital Revolution has brought a sea change to the modern world and has revolutionized the way people access, consider, and consume all media content (Kusek & Leonhard, 2005). In the music industry, the replacement of physical formats (records, tapes, or CD's) with digital formats (MP3's and other digital audio files) has transformed music from a product to a service and thus, has altered the way consumers are influenced in their pursuit to listen to and discover new music. Simply stated, the record and radio industries, in tandem, have historically had control over music content and its distribution to audiences across the world. In contrast, the digital revolution has brought about not only changes in audio formats, but also in an artist's ability to more economically record and distribute their own music via the Internet (Owsinsky, 2009). One result is that the consumer has access to more music outlets than ever before, bringing with it diminishing influence from the record and radio industries (Tschmuck, 2009). Peer-to-peer file sharing across Internet platforms, while regarded as infringement, has also increased consumer access. Record labels, the RIAA, and the music industry, at large, have fought these platforms since their inception (*A&M Records, Inc. v. Napster, Inc.*, 2001).

The relatively recent phenomenon of increased consumer access has been described as “Music 3.0,” and asserts the notion that the middleman (e.g. records, radio, promoters, distributors, etc.) has been eliminated in the new music industry model (see Figure 1). The artist and the fan are now engaging in a direct relationship with one another via the Internet and mobile networking (see Figure 2). Owsinsky (2009) posits, through the lens of Chris Anderson’s (2008) long tail theory, that music audiences have become more niche-oriented and, thereby, more stratified. Hence, it is possible for more artists to be recognized and more audiences to be satisfied, but also means fewer big “hits” as the industry once knew them. Music 3.0, in short, is rendering both the record and radio industries fragile by dramatically altering the traditional music business model. Artists that self-promote, self-market, and self-manage are reaping higher monetary rewards per sale in this new model than in the traditional industry model.

The Digital Performance Right in Sound Recordings Act of 1995 (DPRSRA)

The Digital Revolution also brought changes in legislation that would impact the future of performance rights in sound recordings. At the time of the DPRSRA’s passage, oddly, neither Congress nor any other involved parties recognized that the Internet would be the testing ground for this legislation. Ultimately, it was because of music services on the Internet that the DPRSRA needed amending in 1998. Prior to the DPRSRA’s enactment, sound recordings were the only copyrighted works not accorded a federal right of public performance. As mentioned, songwriters and music publishers had rights when a song was publicly performed, even on broadcast radio, but the artist performing the song did not enjoy similar rights (Marks, 2000).

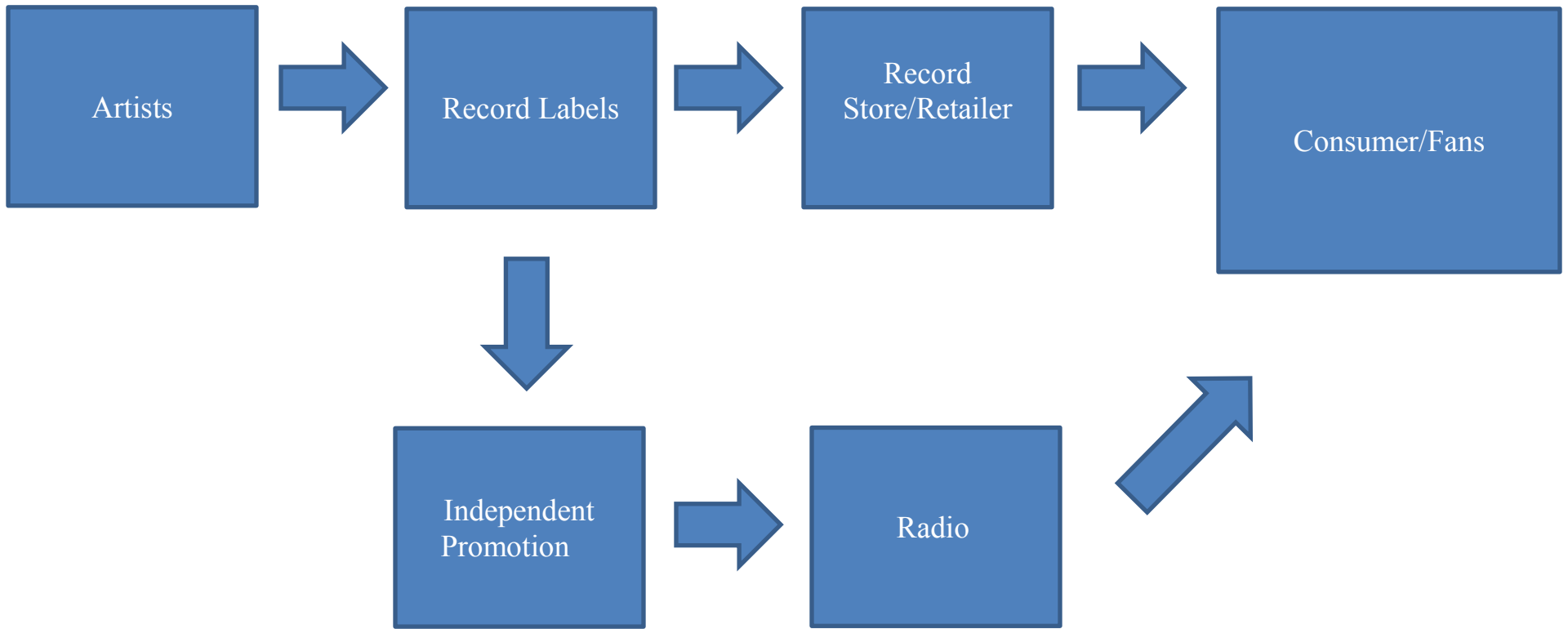


Figure 1. Historical economic control from artist to end user (Owsinsky, 2009).

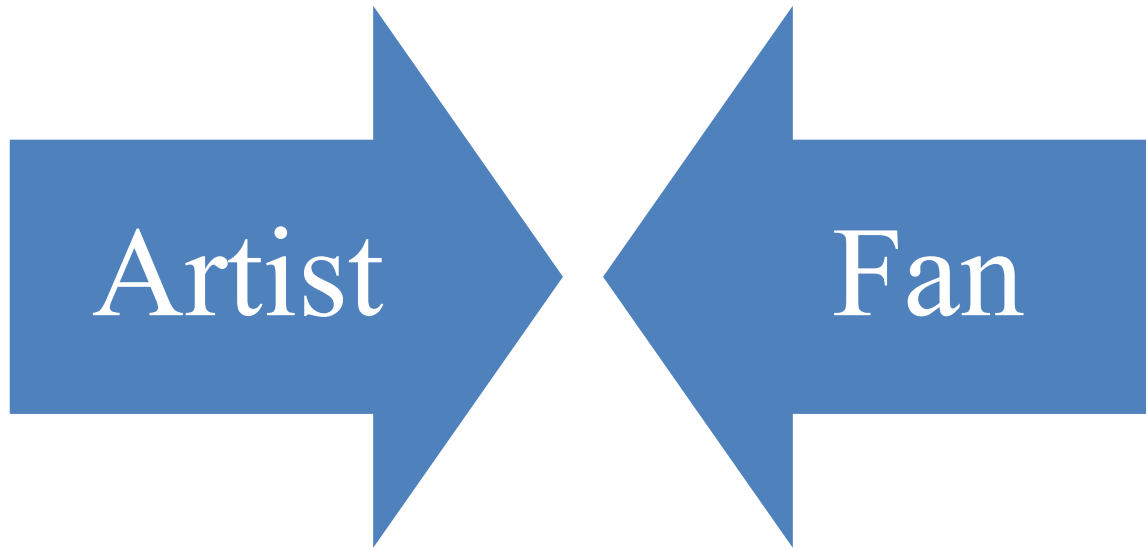


Figure 2. Current economic control from artist to end user (Owsinsky, 2009).

The DPRSRA granted an exclusive right to perform sound recordings, but limited that right to digital transmissions. The legislation also had several exemptions and a statutory license for certain subscription, non-interactive services (Digital Performance Right in Sound Recording Act, 1995). Shortly after the DPRSRA was passed, however, the digital landscape began to rapidly change. “Webcasting,” a means of streaming music live over the Internet via personal computer, bypassed the need for significant infrastructure previously necessary to broadcast music over-the-air. Suddenly, anyone with a personal computer could broadcast via the Internet without any obligation to copyright holders under the current law. Further, confusion over the DPRSRA’s provisions and how they were applied to non-subscription services brought new challenges to the interpretation of the law (Marks, 2000).

The Digital Millennium Copyright Act of 1998 (DMCA)

The DMCA became necessary to remedy the unintentional gaping holes in the DPRSRA due to rapid technological advances through the Internet. The U.S. Congress enacted the DMCA: “to create fair and efficient licensing mechanisms that address the complex issues facing copyright owners and copyright users as a result of the rapid growth of digital audio services” (Digital Millennium Copyright Act, 1998). Basically, the idea was to extend existing licensing for subscription services to non-subscription services and to add several definitions to the meaning of the terminology, “interactive services” (Marks, 2000). Obviously, terrestrial radio would fall under the guise of “non-subscription services” and, because terrestrial radio is not a digital format it, thereby, remained exempt from paying royalties to copyright holders of sound recordings once again.

The history of copyright legislation, as well as the trajectory of performance rights legislation leading up to the Performance Rights Act of 2009, is important to understand in tandem with the relationships between the affected entities, e.g. radio, records, and performing artists. It is this history of over 100 years in the making that embodies the current status of performance rights in the United States. Through examination of the relationships, a clear understanding of the arguments presented on either side of the Performance Rights Act begins to emerge.

CHAPTER IV

THE RELATIONSHIPS: RADIO, RECORDS, AND ARTISTS

The Relationship between Radio and Records

Some say that the recording and radio industries have been connected to one another in a “symbiotic” fashion since the dawn of radio broadcasting (Sterling, 2004). Others say that there is no evidence of such, though the notion is widely regarded (Liebowitz, 2004). Still, others regard the idea of symbiosis as an “over-simplification of a complex set of relationships” (Percival, 2011, p. 1). Either way, the history of the relationship is contentious and, at first, the two media were even considered separately due to incompatible technology.

Records were played experimentally and on some smaller stations during the 1920s; however, the mechanical nature of recorded performances was far inferior to the live sounds of radio, where the emerging techniques of microphone placement and studio design were becoming issues of “scientific analysis” (Sterling, 2004). Live radio performances initially devastated the record industry because of this differing technology. Radio stations hired live musicians and other talent, leaving the record industry to attempt selling records without the benefit of airplay. There was also a prevalent sentiment that radio should not offer pre-recorded songs that consumers could just go out and buy. As a result, record sales sharply declined and many firms left the business during the radio boom of the 1920s (Sterling, 2004).

It was radio’s technology, electrical transcription (ET) that, ironically, assisted in the revitalizing of record manufacturing. ET discs provided longer playing times – up to 15 minutes per side. The discs were used to record and archive radio shows and provided an all-electronic means of recording – a much higher quality alternative for the

record industry. However, because the technology arrived in the late 1920s, it was difficult to get consumers to purchase the discs because of The Great Depression – most consumers were too poor to invest in a new record player at the time (Sterling, 2004).

The 1930s and 1940s saw a demand for big band music, both in live venues and on records. Radio carried many of the live shows at which the artists' records were promoted, which also helped to revive record sales. The American Federation of Musicians (AFM) union became very concerned that recordings were going to replace musicians working in live radio and staged two strikes in the 1940s to prevent that from happening. Their actions were futile, however, as the trajectory appeared to be set. Once singing star Bing Crosby heard about audio recording, he struck a deal with ABC (a then-new network) to carry his very popular program, providing they would allow him to record the show in order to avoid two live performances – one for the east coast and one for the west coast. ABC, in an urgent run to build a competitive position, agreed to Crosby's terms. This occurrence, coupled with burgeoning new recording technology, set the stage for radio and records to enter into what has become known as a "symbiotic" relationship (Sterling, 2004).

Technology kept a rapid pace with the introduction of the 33 1/3 rpm long play album, allowing the change of records to occur less frequently, thus, leaving the listener undisturbed by the sounds of the records changing every few minutes. As the 78 rpm disappeared, expensive new home consoles were equipped with both a record player and a radio, with televisions soon to follow. The radio industry quickly learned that live music was much more expensive to produce than playing recordings. The number of radio stations expanded greatly during the late 1940s and early 1950s and helped lead

to the rise of rock and roll music, striving to implement programming that would appeal to both listeners and advertisers.

Another important technological innovation – the television – caused the single-most important event in the history of the relationship between radio and records when radio stations shifted from programs to formats in the early 1950s. Major radio talent like Jack Benny, Bing Crosby, and Ozzie and Harriet began moving to television in the “talent raids” (Douglas, 2004, p. 220) of the late 40s, and there was fear in the industry that radio would be replaced by television. This shift rendered recorded music indispensable to radio programming and sealed the interdependent relationship that would last into the 2000s, whereby radio promotion propped up record sales, and one industry seemed to need the other to survive (Sterling, 2004).

Payola

Not only did records need radio, they were willing to bribe and barter – indeed; they would do most anything to get their records on the air. This concept is known as “payola” and, in the United States, it goes all the way back to the Tin Pan Alley composers paying to get their songs performed in Vaudeville acts (Dennison, 1998). By definition, payola is “a secret or private payment in return for the promotion of a product, service, etc., through the abuse of one's position, influence, or facilities” (dictionary.com). Payola has been practiced for decades, and was not regulated by the FCC until 1960, after several payola scandals involving disc-jockeys across the nation (Coase, 1979). The FCC still has rules regarding payola, laid out in §§ 317 and 507 of The Communications Act (FCC Enforcement Bureau-Broadcast). Stations are mandated to reveal any measurable association related to products or services given

on-air promotion. Violations are punishable by a fine of up to \$10,000 and up to one year in jail. However, rumors of payola continued into the 1990s when megastar Madonna's record label was accused by the *New York Daily News* of using strippers and call girls to influence major radio market programmers. The label denied those reports (Dennison, 1998). The latest FCC enforcement actions regarding payola are dated March 24, 2011, illustrating that it is still a very significant issue (FCC Enforcement Bureau-Broadcast). State laws also come into play and sometimes do not involve the FCC at all. As recently as 2005, artist Jennifer Lopez's label, Sony, was forced into a \$10 million settlement with Eliot Spitzer, then New York Attorney General, in a highly publicized payola scandal (Friedman, 2005).

The Relationship between Record Labels and Artists

Unconscionable contracts in the music industry can be traced all the way back to opera in the early 20th Century, when singers signed contracts giving them royalty rights for reproduction on only the original matrix (Gruenberger, 2006). Once copies were released and re-copied, the artists had no recourse for further compensation.

In 2002, major label artists such as Sheryl Crow, Don Henley, Billy Joel, and other members of the Recording Artist's Coalition (RAC), referred to contracts with their record labels as "indentured servitude" (BBC News, 2002). In May, 2000, Courtney Love berated the RIAA at the Digital Hollywood online entertainment conference.

Love's speech began,

Today I want to talk about piracy and music. What is piracy? Piracy is the act of stealing an artist's work without any intention of paying for it. I'm not talking about Napster-type software. I'm talking about major label recording contracts. (Wolff, 2004, p. 48)

Love proceeded to outline, in an easily understandable mathematical equation, the nature of the unconscionable standard contract between artists and labels. Although these types of sentiments are common to the industry, most unsigned, struggling musicians in the early 2000s still considered a major label contract the best possible path to commercial success (Brereton, 2009).

A string of major label artists also have sought bankruptcy protection as a result of unconscionable contracts, arguing that they lack the clout necessary to force changes to their recording contracts (Letowsky, 2002), and that labels took advantage of their desire to “make it” and forced upon them contracts that were not favorable to the artist (Wolff, 2004). The exclusivity and exploitation clauses that are written into artists’ contracts with record labels have always sought to gain maximum dependence of the artist on the record company (Tschmuck, 2009), resulting in record labels most often holding ownership of any given sound recording’s copyright. On the other hand, it is noted that some artists “go into sensory shutdown” at the mere mention of the business side of their brand, while most are only moderately involved in order to make intelligent career decisions on their own behalf (Passman, 2003, p. 3). Therefore, it is possible to ride the wave of stardom without ever really knowing anything about the industry. According to Courtney Love, record companies exploit that fact (Wolff, 2004).

The Relationship between Radio and Artists

Since the late 1920s, when radio ceased to air live performances, artists have been historically represented by record labels and, thereby, any relationship between records and radio was extended by proxy to radio and artists. Until the digital revolution, few artists had direct relationships not only with radio, but also with the end

users of their music. Since the digital revolution, artists are more directly involved in their own marketing and promotion, and have much more control over not only their relationships with radio, but also their fans. Artists who self-publish and still consider radio a viable outlet for their music now send digital files directly to radio stations, hoping for airplay. The standard paradigm of pay-for-play, therefore, is becoming outdated (Owsinsky, 2009).

Technology, once again, has been the primary factor leading to pervasive changes in music industry paradigms from fear-based grounds. Just as the introduction of television was perceived to threaten radio, the digital revolution is perceived to threaten both the record and radio industries, from piracy issues to performance rights. The introduction of the Performance Rights Act is further evidence that this paradigm shift is taking place and pitting one industry against the other.

CHAPTER V

THE PERFORMANCE RIGHTS ACT

The Performance Rights Act – The Arguments, the Legislation, and the Politics

For the first time in the history of United States copyright law, if passed, the Performance Rights Act will require radio stations to not only pay royalties to songwriters and music publishers, as they do today, but also to pay royalties to record labels and performing artists – the holders of the rights to sound recordings. The argument ultimately breaks down into two factions – radio and records (with artists) – and each side presents valid reasons as to why their position is the correct one.

The MusicFIRST (Fairness in Radio Starting Today) Coalition was formed in 2007 to “ensure that struggling performers, local musicians, and well-known artists are compensated for their music when it is played both today and in the future” (MusicFIRST). Branding slogans such as “Fair Pay for Air Play,” MusicFIRST has entered into the war for performance rights on behalf of record labels and performing artists. The coalition purports that “Big Radio” has been thieving performers for years, and they intend to see it stop (MusicFIRST).

MusicFIRST describes itself as a coalition of “musicians, recording artists, managers, music businesses and performance right advocates” that are lobbying Washington DC in an effort to pass Senate Bill 379 and House Bill 848 (Performance Rights Act, 2009). However, closer investigation reveals that the “performance rights advocates” among MusicFIRST’s member list consists of a vast array of political organizations, unions, and the recording industry itself (MusicFIRST). Among the “partners” are not only the RIAA and AFM (American Federation of Musicians), but also organizations such as the AFL-CIO (American Federation of Labor - Congress of

Industrial Organizations), SEIU (Service Employees International Union), Teamsters Union, and the NAACP (National Association for the Advancement of Colored People). Some argue that the RIAA created this “coalition of the willing” because “cash isn’t flowing the way it once did, and digital music sales aren’t picking up the slack” (Mennecke, 2007, p. 1). It is also worth noting that some of the very same artist members of the RAC, such as Sheryl Crow, Don Henley, and others, are now aligning themselves with the record industry in this very public show against terrestrial radio (MusicFIRST).

The MusicFIRST Coalition argues their position on a few different levels. First, the coalition points out that “terrestrial radio’s competitors - Internet, satellite, and cable radio - all pay a performance right when they use the creative property of artists and rights owners” (MusicFIRST). Second, MusicFIRST asserts that the United States is the only industrialized nation in which there is no performance right for artists and, therefore, artists in the U.S. are prohibited from collecting international royalties. Third, the coalition maintains it is inequitable that terrestrial radio has been required to pay songwriters for so many years, “but have so far succeeded in stiffing the artists who bring recordings to life” (MusicFIRST). MusicFIRST seeks to substantiate the economic argument with a 2007 study in which “...results indicate that radio play does not have the positive impact on record sales normally attributed to it and instead appears to have an economically important negative impact, implying that overall radio listening is more of a substitute for the purchase of sound recordings than it is a complement” (Liebowitz, 2007).

The NAB disagrees:

For more than 80 years, record labels and performers have thrived from radio airplay – what is essentially free advertising – from local radio broadcasters.

Free, broadcast radio touches 239 million listeners a week, a number that dwarfs

the reach of Internet and satellite radio. Free radio airplay provides the recording industry increased popularity, visibility and record sales. In fact, 85 percent of listeners of all audio services identify radio as the place they first heard new music. And the promotion by local radio does not just include the music; it includes concert promotion, on-air interviews with bands, and ticket and CD giveaways. (NAB About, 2011)

Radio broadcasters argue that the record industry is reacting to their own failure to effectively monetize and meet the challenges created by the digital revolution, and are pushing for this new “tax” on the backs of local radio stations – ironically, their most important source of promotion (NAB About, 2011). The NAB is unequivocally opposed to the PRA legislation and, in fact, has countered with both House and Senate resolutions to ensure that “...Congress should not impose 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, or on any business for such public performance of sound recordings” (H.Con.Res.21.IH, 2011) (S.Con.Res.7, 2011). These resolutions, combined, are known as the “Local Radio Freedom Act.” To date, the House bill has been referred to the House Judiciary Committee and the Senate bill has been referred to the Committee on Commerce, Science, and Transportation.

Free Radio Alliance, a lobbying group formed to oppose the PRA, includes membership from the smallest to largest of radio stations and media corporations, as well as National Public Radio (NPR) and the American Hotel and Lodging Association (Free Radio Alliance). Educators are also involved in fighting the PRA. The Broadcast Education Association (BEA) and College Broadcasters, Inc. (CBI) partnered with Free Radio Alliance in 2009 opposing the PRA on the grounds that it would impose an annual fee on college and high school radio stations that would threaten their very existence (McIntyre, 2010).

The Free Radio Alliance lists on their web site each state's statistics relating to number of stations, number of employees, payroll, and charitable giving, including donated airtime and average number of public service announcements (PSAs) per week, to substantiate its case that real people stand to lose their livelihoods and assistance if the PRA is enacted (Free Radio Alliance). The coalition argues that a large amount of the performance tax collected would line the pockets of record label executives, a large percentage of which are owned by foreign-based conglomerates. Further, the coalition states that those already required to purchase public performance licenses from ASCAP, BMI, and SESAC, such as hotels, restaurants, and retail stores, stand to lose a significant amount by the implications of the expansion of a performance "tax." Finally, leaning on the widely understood notion that peer-to-peer file sharing has crippled the record industry's failing business model, the Free Radio Alliance asserts that perfect digital copies of local radio and music played in bars, hotels, or restaurants, cannot be obtained and, thus, create no competition for the sale of music.

More than twenty-five bills have sought to grant public performance rights to sound recordings since 1926, and all have been futile (DeINero, 2004) (See Table 1). The adoption of the DPRSRA and DMCA, however, lead some to believe that the PRA's time has come, now more than ever. The initial bipartisan legislation, the "Performance Rights Act of 2007," was introduced by Senators Patrick Leahy (D-VT) and Orrin Hatch (R-UT) and Representatives Howard Berman (D-CA) and Darrell Issa (R-CA). Almost in tandem, the bipartisan resolution recognizing the value of free radio airplay, the Local Radio Freedom Act, was introduced by Reps. Gene Green (D-TX) and Mike Conaway (R-TX) and co-sponsored by 51 additional members of Congress. Within 20 days, that number doubled. By February of 2008, 148 members of Congress backed the Local

Radio Freedom Act. The current form of the PRA was introduced in both the House and Senate in February, 2009. Both sides began to gather support from every side of the issue. Not every successful artist has bought into Music First's arguments. For example, at the 2008 Grammy Awards, artist Alicia Keys showed her support for terrestrial radio as she publicly thanked "...every DJ, every radio guy, every promotions guy, everybody who ever put up a poster for me and spread the word," as she accepted her Grammy for Best Female R&B Performance (NAB About, 2011).

In August, 2009, MusicFIRST filed a complaint with the FCC that broadcasters were using public airwaves to oppose the PRA. Also in the petition was a request to force broadcasters to accept its advertising endorsing the PRA. Standing on a precedent of the Supreme Court (*Columbia Broadcasting System, Inc. v. Democratic National Committee*, 1973), NAB Executive Vice President Dennis Wharton stated that radio is under "no obligation to carry everything that is offered or suggested to them," citing that "neither the Communications Act nor the First Amendment requires broadcasters to accept paid editorial advertisements" (NAB About, 2011). By March 12, 2010, a majority (260) in the U.S. House of Representatives were in support of the Local Radio Freedom Act. Artist Chris Brown was publicly begging his fans to keep him relevant by requesting his material be played by local broadcast radio. The legendary rock band Pink Floyd was suing their London-based record label, EMI, over online royalty payments and the sale of single tracks. Pink Floyd is just one in a long line of musicians seeking alleged unpaid royalties from their labels, including the Beatles, Cher, Dr. Dre, Eminem, and the estates of Count Basie and Benny Goodman (NAB About, 2011).

By request from members of Congress for negotiation between parties and from a perceived position of strength, the NAB board approved and delivered a legislative term sheet to MusicFIRST in October, 2010, that endorsed the conditions upon which the NAB would resolve the issue of performance rights to artists and labels (NAB Press Release, 2010). The terms would ensure broadcasters a footing in imminent digital platforms by including radio chips in future mobile devices so that consumers can receive emergency alerts that are broadcast on terrestrial radio; adopting sample-reporting similar to that of ASCAP/BMI; explicitly acknowledging the promotional value of terrestrial radio; adopting specific rate requirements that accommodate small broadcasters, noncommercial broadcasters, religious programming, and incidental uses by news, talk and sports stations; and more complex issues relating to the elimination of the Copyright Royalty Board's jurisdiction and AFTRA (American Federation of Television and Radio Artists, a division of the AFL-CIO) issues with regard to simulcasting over-the-air radio commercials on the Internet (NAB Term Sheet, 2010).

On October 26, 2010, MusicFIRST rejected the term sheet out-of-hand by accusing broadcasters of undermining an agreement they had struck the previous July (MusicFIRST). NAB President and CEO, Gordon Smith, immediately shot back: "We are disappointed by comments from our friends at MusicFIRST representing that there was a definitive July agreement or a handshake settlement with NAB on terms for resolving the performance royalty issue. This is demonstrably false. If this were [sic] true, why would our two sides have continued with negotiations in August, September and October" (NAB response to MusicFIRST, 2010)?

On March 15, 2011, the U.S. Intellectual Property Enforcement Coordinator (IPEC) at the White House issued a white paper fully endorsing the passage of the

Performance Rights Act and urged Congress to move forward, mostly citing the payment of international royalties as the foundational issue (Obama Administration White Paper, 2011).

Reactions from both sides were predictable. NAB's Wharton released a statement inferring that the NAB was hardly surprised at this policy position from the White House; that the NAB remains "unalterably opposed" to legislation of this nature, and arguing that it would be "onerous and job-killing" for America's radio stations. Wharton referred to the legislative offer the NAB had made in 2010 which MusicFIRST rejected, and stated that their offer still stands (NAB statement responding to White House, 2011).

MusicFIRST's Mattzie also released a statement thanking the White House for its important display of support for artists, stating that the performance right issue is non-partisan in nature, gaining support from every ideological corner. Mattzie stated that the performance right is important for the economic growth of the United States and the MusicFIRST looks forward to fair compensation for artists, finally (MusicFIRST response to White House, 2011).

Performance Rights for Sound Recordings in Foreign Markets

It is often argued, by those sympathetic to the desire for legislation to enact performance rights legislation for sound recordings, that the United States is one of a very few developed nations not to recognize the vital necessity for such legislation. The vast majority of the global community, both with international conventions and with domestic legislation in foreign countries, has responded to this need. Approximately seventy-five nations grant public performance rights for sound recordings. The World

Intellectual Property Organization (WIPO) and others have also initiated a policy debate on the implications of digital technology for international copyright. The WIPO has proposed new Protocol to the Berne Convention, the largest international copyright treaty, outlining a possible new international instrument. The WIPO has also recommended that an exclusive right to authorize or prohibit the public performance of sound recordings be granted to copyright owners (O' Dowd, 1993).

Certainly, the payment of royalties is at the forefront of this issue. The international market has always been very lucrative for the U.S. recording industry. However, many of the countries that pay performance royalties for sound recordings do so only in reciprocity with other nations that do the same. Thus, because the U.S. copyright laws do not recognize performance rights for sound recordings, American copyright owners are often unable to share in international royalty pools (O' Dowd, 1993). Passage of the PRA would categorically bring more revenue to the United States in the form of foreign performance royalties.

Latest Development: H.R. 2933 – The Sound Recording Simplification Act

On September 14, 2011, Colorado Congressman Jared Polis introduced H.R. 2933 and on September 23, 2011, the bill was referred to the House Subcommittee on Intellectual Property, Competition, and the Internet. The proposed Sound Recording Simplification Act, very simply, seeks to strike Section 301 from Title 17 of the *U.S. Code*, the exemption of copyright protection for sound recordings (Polis, 2011). The entire history of U.S. copyright law could be negated by striking a single line in the original document. This is precisely what MusicFIRST is hoping for after so much argument, publicity, and hype. However, it should be noted that the bill was given no

acknowledgment, whatsoever, on the MusicFIRST web site, nor on the NAB web site. There has been little press regarding the bill and, as of February, 2012, nothing more has transpired with regard to H.R. 2933 or the PRA.

CHAPTER VI

RESULTS

Resolving the Performance Rights Issue for Sound Recordings

The PRA, in its current form, has been negotiated and altered to meet some of the concerns of broadcasters, particularly with regard to fees for smaller stations, in order to appear more fair (Performance Rights Act, 2009) (see Table 2). As can be seen from both sides, “fair” is in the eye of the beholder. There are different ideas about how the performance rights issue might be resolved.

Table 2

Statutory License Royalty in the Proposed Performance Rights Act (H.R. 848)

Type of broadcast radio station	Radio station annual revenue	Proposed royalty
Commercial	\$1.25 million and above	Royalty rate to be negotiated between broadcast radio stations and copyright holders or set by the copyright royalty judges*
	\$500,000 to \$1,249,999	\$5,000 per year
	\$100,000 to \$499,999	\$2,500 per year
	Less than \$100,000	\$500 per year
Noncommercial	\$100,000 and above	\$1,000 per year
	Less than \$100,000	\$500 per year

Source: GAO analysis of H.R.848.

*The copyright royalty judges are housed in the Copyright Royalty Board, an establishment created within the Library of Congress for this purpose. The judges are responsible for determining and adjusting the rates and terms of statutory copyright licenses and determining the distribution of royalties from the statutory license pools.

One basic precept of American copyright law is to try and maintain the balance between creating incentives for new works and providing the public with access to those works (Metro-Goldwyn-Mayer Studios, Inc. v. Grokster, Ltd., 2005). Courts have had a difficult time determining how much incentive would be created or increased through the granting of copyright protection for sound recordings. There is basically no way to

conclude what works would or would not be produced if “artists had more or less money.” (DeINero, 2004)

On the other hand, Sen (2007) contends that even the digital performance right should be repealed on the grounds that, if we accept that the primary purpose of copyright is to support a democratic civil society, the denial of a performance right for sound recordings, in and of itself, creates incentive for performers to compose. Sen argues that “...those creative practices, in turn, have turned popular music into a driving force behind the ‘free trade in ideas’ that forms the foundation of our democracy” (p. 267). Sen maintains that a self-composing artist is more likely to dig deeper and create something much more personal that will lead to the addressing of key social issues. As an example, Sen asserts that jazz legend John Coltrane may never have mined the potential that brought the world his transformational offering, *A Love Supreme*, if he had received royalty payments for his pioneering rendition of Rodgers & Hammerstein’s *My Favorite Things* a few years earlier. The overriding idea seems to be that having money might have rendered Coltrane lazy. This notion leaves room for argument over whether or not the government could or should economically manipulate a group of people (artists) to obtain an outcome of their choosing (social discourse).

RQ1: What is the Predicted Impact of the Performance Rights Act on Radio? and RQ2: What is the Predicted Impact of the Performance Rights Act on the Record Industry?

Because of the “symbiotic” nature of the relationship between records and radio, these questions are best answered together. Both industries are struggling to find new business models that work in the 21st century digital age. The idea of performance rights legislation for sound recordings seems to emerge throughout history whenever there are dramatic technological advances. The digital revolution certainly is the most dramatic to date, as physical formats are becoming less and less relevant in today’s

marketplace. Until the record industry finds an acceptable monetization for survival, it is likely that labels will continue to vigorously go after radio for performance rights royalties merely to avoid extinction. The problem with this tack is that it is likely to devastate the radio industry and, thereby, do little to enhance record label revenue.

Digital technology also renders terrestrial radio fragile because of competition from streaming Internet radio, as well as MP3 players, subscription services, and satellite radio. The radio industry, arguing that it simply cannot afford the financial blow that PRA legislation would impose, must also find a way to monetize itself in the new digital era. It is, therefore, important that an agreement be reached between two industries that truly do need each other. History shows that every time there is a technological breakthrough, readjustment is necessary, and this is another of those times in history. Certainly, innovation is required for records and radio to remain relevant, but cannibalization should not be a serious option.

Kilgore suggests that granting a performance right might spur broadcasters to regard record labels and artists as any other advertiser by simply selling them time to promote new songs, arguing that such a practice would not be difficult to employ, as their rates for a thirty- or sixty-second spot are already established, and labels/artists could just be plugged into the same system (Kilgore, 2010). Payola would certainly lose some of its appeal if the PRA were enacted. Engaging such a system could prove, although in hindsight, the real value of radio to record labels and artists through advertising frequency and expenditure statistics.

DeNero suggests that Congress should pass a limited version of the PRA – one that recognizes the value of radio airplay and closely bears the royalty structures employed by ASCAP/BMI/SESAC, placing a ceiling on the royalty rate. DeNero also

proposes a statutory period in which new sound recordings could be publicly performed without the payment of royalties to artists or labels (DeINero, 2004), driving the idea that there is a period of time when radio is of significant promotional value to new recordings but, after a while, the roles are reversed, and radio's need for the song outweighs the artist's need for exposure. This is, perhaps, the most sensible suggestion that has been presented.

At the time of this writing, the Obama Administration is nearing the end of its first term, with the 2012 election campaign in high gear. The IPEC waited until March, 2011 to formally weigh in on the performance rights debate, just as the President announced his billion dollar campaign for re-election. The rest of Washington, DC is also heavily immersed in the 2012 election. It is unlikely that there is momentum enough to bring the PRA to a vote during this administration. The political climate of the country is such that every member of the House and Senate who are up for re-election will begin to focus almost solely on their own campaigns, and "hot button" issues, such as the PRA, will get pushed into the next administration. If this debate were clean-cut on party lines, the bill would be more likely to get traction. However, the support for both sides of the argument is truly bipartisan at this point in time. Even though personal research suggests that the majority of support for the NAB comes from Republicans and the majority of support for MusicFIRST comes from Democrats, the vote would almost certainly be very close.

RQ3: What is the Predicted Impact of the Performance Rights Act on Performing Artists?

It would appear that the performing artist seems to derive the most benefit from passage of the PRA. In the cacophony of PRA arguments, most artists have

metaphorically slipped out the door, and no one seems to notice yet that they are gone. Digital media truly has brought a revolution to artists and performers and, with a digital royalty structure already in place up-and-coming artists have little concern for radio and records.

YouTube stars Pomplamoose have proven that radio and record labels are neither a help nor a hindrance in earning a living as an artist in today's music economy. Using cover tunes to initially trend higher in YouTube searches, Pomplamoose's originality led those who watched their cover videos to seek out their original works, as well. This resulted in heavy YouTube traffic that led to a Christmas commercial and two free cars from the Hyundai Corporation. Pomplamoose is a husband and wife musical team that records, produces, and distributes their music from the comfort of their own home, and they keep 100% of their money (Port, 2011).

Amanda Palmer, of the Dresden Dolls, made \$19,000 in ten hours using Twitter in an impromptu self-promotion amongst her fans during a very vocal campaign to separate from her contract with Warner Music. Palmer posted her story to hypebot.com and concluded her piece with a "screaming," all-caps announcement, "TOTAL MADE THIS MONTH USING TWITTER = \$19,000; TOTAL MADE FROM 30,000 RECORD SALES = ABSOLUTELY NOTHING" (Hypebot, 2009).

Dirty Loops, a three-piece band from Sweden, have also become cover sensations on YouTube. Never performing their own music, Dirty Loops re-harmonizes and arranges pop tunes from famous artists, such as Britney Spears and Justin Bieber. A December 21, 2011, post on their web site, www.dirty-loops.com, touts their recent video cover of Bieber's song, "Baby," that received over 100,000 hits on YouTube in only two hours (Dirty Loops, 2011).

Alex Day, an “unsigned social media star” (Smith, 2011), hit #4 with his song “Forever Yours” on top United Kingdom singles charts, with multiple versions on iTunes top 100 charts, for the final sales week of 2011. Day’s chart performance outranked rock legends, Coldplay, even though Day has no record label affiliation and his main objective with the song was to raise money for charity (Smith, 2011).

CHAPTER VII

CONCLUSION

Anecdotal information suggests that more and more artists are turning down label offers and using a more do-it-yourself (DIY) approach for the new music industry model. It would appear that artists have almost nothing to lose in the performance rights battle – they can only gain. Performers who are fortunate enough to own a piece of the copyright to their sound recordings stand to gain through a performance royalty if they side with the record labels in this particular argument. If the PRA does not pass, artists cannot possibly miss something they never had anyway. Further, because they can engage more directly with fans in the new economic model, artists truly do not need record deals and the standard contracts therein. Digital technology enables artists to record and produce their work with an economically viable and high quality approach, free of the common grievance that labels are “watering down” their music. Outlets such as YouTube, MySpace, Facebook, Twitter, CD Baby, iTunes, Amazon.com, SoundCloud.com, and ReverbNation.com, among others, make self-promotion easy and inexpensive. Digital platforms and social networking enable artists to keep more money from every sale they make. Additionally, thanks to the DMCA, artists need only sign up with SoundExchange to reap royalties from any plays they might get on digital formats. Thus, artists can maintain a satisfactory lifestyle without the help of records or radio – they do not need to be megastars in order to earn an equivalent living to an artist with a label contract. Today’s artists can find success with fewer fans, while keeping more of what they earn by self-marketing and promotion, direct fan communication, and self-publishing.

Contribution

There is ample research regarding the lack of performance rights in sound recordings in the United States. There is little research as to the impact of the 2009 PRA legislation on the record and radio industries. This study incorporates both and also looks at the artists' role and relevance. Further, this study seeks to combine history with current perspectives from the radio and record industries, as well as their relationships to one another and with artists, to draw conclusions about the future of the music industry.

Areas for Further Study

As technology continues to rapidly advance, piracy continues to be an important issue for copyright holders. History has shown that these entities have always lagged behind and played catch-up where innovation is required to keep pace with new technological formats. Digital Rights Management technology, though it has altered the way copyright holders do business digitally, is imperfect. Computer corporations, such as Apple and Microsoft, are outpacing both records and radio as to how music is used and monetized. Artists are, generally, keeping pace with technology, thereby needing records and radio less and less. Future research into the outcomes of the PRA legislation and how it changes or affects the business model of the industry with regard to monetization and piracy is recommended for further study.

Self-publishing is a fast-growing arena with music, as with books, using tools such as Amazon.com, due to the new "cloud" technology. With unlimited digital space, Amazon, for example, can store hundreds of thousands of digital files on their "cloud" that can be accessed by consumers through a simple web site search. Authors and

musicians can upload their works for free and set a price for the digital content.

Amazon then takes care of the transaction, keeping a fee for the company and returning the rest to the copyright owner. As self-marketing becomes more the norm for today's creators, the success of this technology for niche markets – the everyday musician or author – might be an area for further research, perhaps in comparison to megastars like Lady Gaga or J.K. Rowling.

Anecdotal information suggests that today's young musicians conceive of the music industry in a completely different way than their predecessors. Again, as a result of the digital revolution, the relationship between record labels and broadcast radio has little meaning for today's youth. Young musicians appear to have a different set of criteria for what makes a successful musician in the larger industry picture, inclusive of diversification, self-marketing, management, and promotion, more intimate fan relationships, and less expensive production. It can also be argued that this type of diversification will impact the quality of music of the next generation, as these young musicians will have less time to perfect their artistry than those who were managed, promoted, and marketed by the professional record industry. Another area of further study might include in-depth interviews with musicians of both the younger generation and their predecessors. The results might show a predictable paradigm shift that will, ultimately, impact radio and records far beyond any outcome of the Performance Rights Act. Music creators now hold the key to how, when, and where their music will be made available.

Limitations

Little research exists with regard to the PRA legislation. Therefore, a unique

approach was required in assessing its potential impact and passage. Piecing together historical, technological, and legislative events with historical and current relationships amongst the players was necessary and challenging for arriving at a conclusion. Certainly, it could be considered a limitation that I am a performing artist and, thereby, my approach was affected by my experience as such.

The rapid pace of technology combined with the snail's pace of government can also be considered a limitation in this study. The PRA, stalled in committee and re-introduced in other forms, runs the risk of fizzling out just as every piece of legislation before it with regard to performance rights in sound recordings. Forced with the choice of waiting for the government to regulate or innovating to keep up with technology, the radio and record industries will probably be required to find some sort of compromise. I do not believe, however, that this issue will ever go away. Over 100 years of history shows us that technology leads and, somehow, the entertainment and media worlds adapt and even thrive.

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