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## The Future of Music: Reconfiguring Public Performance Rights

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## ARTICLES

### **THE FUTURE OF MUSIC: RECONFIGURING PUBLIC PERFORMANCE RIGHTS**

*Gary Myers\**

*George Howard\*\**

#### TABLE OF CONTENTS

I.	HISTORICAL DEVELOPMENT OF THE MUSIC BUSINESS .....	210
A.	PERFORMANCE ROYALTIES .....	211
B.	MECHANICAL LICENSES .....	214
C.	THE EMERGENCE OF LABELS AND RECORD CONTRACTS .....	215
D.	RECENT DEVELOPMENTS AND CURRENT PRACTICES .....	218
II.	LEGAL ATTEMPTS TO ADDRESS THE SHIFTING LANDSCAPE .....	224
A.	THE SONNY BONO COPYRIGHT TERM EXTENSION ACT AND THE FAIRNESS IN MUSIC LICENSING ACT .....	224
B.	THE DIGITAL MILLENNIUM COPYRIGHT ACT OF 1998 .....	230
C.	THE DIGITAL PERFORMANCE RIGHT IN SOUND RECORDINGS ACT OF 1995 .....	233

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III. RECONFIGURING THE PUBLIC PERFORMANCE RIGHT .....	234
A. REPEAL OF THE FAIRNESS IN MUSIC LICENSING ACT .....	234
B. PUBLIC PERFORMANCE RIGHTS FOR SOUND RECORDINGS .....	237
IV. CONCLUSION .....	243

Music brings enjoyment to the lives of individuals in many different ways. From listening to the radio or an iPod, to attending a concert or playing Guitar Hero, to shopping at Starbucks or in a large mall store, music serves as a focal point or at least as a valuable background contribution to the overall experience. New technologies have expanded the ways in which music can be enjoyed. Yet technology and changing industry business models have also presented the music industry—songwriters, performers, record companies, and music publishers—with significant new challenges. Widespread unauthorized music downloading in particular has dramatically reduced the revenue available to support the industry,<sup>1</sup> thereby frustrating one of the fundamental purposes of the Copyright Clause<sup>2</sup> and the Copyright Act of 1976.<sup>3</sup> The music industry has slowly adapted to the changes wrought by technology, but the overall economic prognosis remains bleak. The market for paid digital downloads has grown significantly, but that new market has not prevented an overall contraction in the music industry's revenue stream.

This Article focuses on two concrete measures to improve the music industry prognosis. Public performance rights have long been an important piece of the economic pie that helps support the music business. This Article suggests that the scope of public performance rights should be fundamentally reassessed and expanded. This expansion involves two specific and complementary reconfigurations. First, the "Small Business" Exemption for Certain Public Performances, which was enacted in the Fairness in Music Licensing Act,<sup>4</sup> should be repealed. The exemption is unsound as a matter of copyright policy, as well as being contrary to international norms for copyright protection in musical works under the Berne Convention and the Agreement on Trade Related Aspects of Intellectual Property Rights (TRIPS).<sup>5</sup>

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<sup>1</sup> See generally STEVE KNOPPER, *APPETITE FOR SELF-DESTRUCTION: THE SPECTACULAR CRASH OF THE RECORD INDUSTRY IN THE DIGITAL AGE* (Free Press 2009); Ken Nicholds, Note, *The Free Jammie Movement: Is Making a File Available to Other Users Over a Peer-to-Peer Computer Network Sufficient to Infringe the Copyright Owner's 17 U.S.C. § 106(3) Distribution Right?*, 78 *FORDHAM L. REV.* 983, 989–90 & nn.38–43 (2009) (citing evidence of dramatic decline in CD sales).

<sup>2</sup> "To promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries." U.S. CONST. art. I, § 8, cl. 8.

<sup>3</sup> Pub. L. No. 94-553, 90 Stat. 2541 (codified as amended at 17 U.S.C. §§ 101–810).

<sup>4</sup> Fairness in Music Licensing Act of 1998, Pub. L. No. 105-298, tit. II, 112 Stat. 2827, 2830.

<sup>5</sup> See *infra* notes 82–87 and accompanying text.

Second, Congress should enact a version of the Performance Rights Act,<sup>6</sup> which would provide full public performance rights to sound recordings. The second-class treatment given to sound recordings under current copyright law is unwarranted and is contrary to the practice in any other industrialized nation. Moreover, some have contended—with a sound basis—that this expansion of the rights of musicians has implications as a matter of civil rights, given the contributions of minorities (particularly African-Americans) to American music.<sup>7</sup>

By reconfiguring the public performance right in the two ways suggested in this Article, the size of the economic pie available to support the music industry will be significantly expanded, which will help ameliorate the decline in overall revenues from CD and download sales. This rethinking of the public performance right would also promote copyright policy as contemplated by the Constitution and Congress. It would also serve to benefit musicians and songwriters who depend upon royalties for a significant portion of their livelihood.

## I. HISTORICAL DEVELOPMENT OF THE MUSIC BUSINESS

The record industry as we conceive of it today began in the early decades of the twentieth century. Prior to this time, music publishers were the music industry. Music was performed live, and there were music publishers who created the songbooks that collected the popular songs of the day, as well as traditional and religious songs. As the twentieth century dawned, transistor technology (which led to the development of radio) and the advent of piano rolls led to the emergence of the music industry.<sup>8</sup> As we will see, while technology continues to alter the manufacturing and distribution of music, the business of music in its present form was largely formulated based upon systems and laws put into place in the late nineteenth and early twentieth century.

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<sup>6</sup> There are two very recent versions of the Performance Rights Act. See H.R. 4789, 110th Cong. (1st Sess. 2007), *available at* <http://www.opencongress.org/bill/110-h4789/text>; H.R. 848, 111th Cong. (1st Sess. 2009), *available at* <http://www.govtrack.us/congress/bill.xpd?bill=h111-848>. There are similar bills in the Senate. See S. 2500, 110th Cong. (1st Sess. 2007), *available at* <http://www.opencongress.org/bill/110-s2500/text>.

<sup>7</sup> See *infra* notes 105–07 and accompanying text.

<sup>8</sup> The introduction of piano rolls was responsible for the creation of the so-called mechanical license. Piano rolls were not deemed sound recordings, but rather mechanical reproductions of compositions. This development paved the way for future mechanical reproductions of compositions, such as on vinyl, CD, and as mp3 downloads.

## A. PERFORMANCE ROYALTIES

Prior to the advent of piano rolls and later phonorecords, the music business was essentially the publishing business. That is, there existed a regionalized group of music publishers who worked with songwriters and distributed songs via sheet music. During these early years, there was rampant abuse of the writers' work. A songwriter would often have his music sold via publishers with whom he had not contracted. Additionally, calculating and collecting the money owed to songwriters was, to put it mildly, an inexact science.

In 1914, Victor Herbert, a composer of operas, founded the American Society of Composers, Authors, and Publishers (ASCAP).<sup>9</sup> ASCAP's mission, broadly stated, was to protect the copyrighted musical compositions of its members. Prior to radio this meant attempting to ensure that writers of original works were compensated appropriately when their works were manufactured and distributed as sheet music. The inception of ASCAP (which operates to this day, alongside the two other principal United States Performance Rights Organizations (PROs)—BMI and SESAC) was the first pillar to emerge in the foundation of what we now conceive of as the music industry.<sup>10</sup>

ASCAP saw its role increase dramatically in the 1920s as radio broadcasts became more prominent. Importantly, as radio began its rapid growth and moved from a medium in which performers gladly played their music live on the radio for free (doing so because the exposure led to more ticket sales for live events, a premise to which the radio industry still clings today) to performers demanding compensation to perform on specific radio broadcasts, the role of the publisher changed. No longer did music publishers simply concern themselves with the creation of songs that could be sold in order to be played on pianos in the parlors of houses across the country. Instead they began matching a song with a performer who could interpret the song successfully.

Importantly, given the copyright laws, it was only the copyright holder of the song itself who was compensated, via the (unfortunately named) "performance royalty" collected by ASCAP when the song was broadcast over the radio.<sup>11</sup> The

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<sup>9</sup> See generally ASCAP, <http://www.ascap.com> (last visited Apr. 8, 2010).

<sup>10</sup> See generally BMI, <http://www.bmi.com> (last visited Apr. 8, 2010); SESAC, <http://www.sesac.com> (last visited Apr. 8, 2010).

<sup>11</sup> Section 101 states that

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

17 U.S.C. § 101 (2010). To understand the scope of this right, two other definitions in section 101 are relevant:

performer did not receive (and to this day generally still does not receive) any royalties associated with the broadcast of songs over terrestrial radio (as we will see below, there have been recent innovations requiring payment to the recording artist for public performance royalties for the broadcast of their music on the internet and other forms of digital transmission).<sup>12</sup> It therefore behooved the publishers to find performers who could “sell” the song.

As a result of the new streams of income being generated—via performance royalties—from the growth of radio, an entire industry began to develop around the writing of songs and the placing of these songs with performers. There indeed was a Tin Pan Alley.<sup>13</sup> The clamor of countless pianos—sounding something like the banging together of tin pans—could be heard in the area around West 28th Street between Fifth and Sixth Avenues in New York City. This is where some of the enduring American songs, by writers such as Irving Berlin, Hoagy Carmichael, George and Ira Gershwin, Scott Joplin, Johnny Mercer, Cole Porter, and Fats Waller, were written.

Performers like Bing Crosby (who popularized Irving Berlin’s “White Christmas,” but wrote a sum total of fifteen original songs in his long, storied career),<sup>14</sup> popularized these songs on their own radio broadcasts. They were being compensated for their hosting duties, but received none of the performance royalties that were generated when the songs were broadcast over the airwaves.

To perform or display a work “publicly” means —

(1) to perform or display it at a place open to the public or at any place where a substantial number of persons outside of a normal circle of a family and its social acquaintances is gathered; or

(2) to transmit or otherwise communicate a performance or display of the work to a place specified by clause (1) or to the public, by means of any device or process, whether the members of the public capable of receiving the performance or display receive it in the same place or in separate places and at the same time or at different times.

...

To “transmit” a performance or display is to communicate it by any device or process whereby images or sounds are received beyond the place from which they are sent.

*Id.*

<sup>12</sup> See *infra* notes 76–79 and accompanying text.

<sup>13</sup> See Edward Pessen, *The Great Songwriters of Tin Pan Alley's Golden Age: A Social, Occupational, and Aesthetic Inquiry*, 3 AM. MUSIC 180 (1985).

<sup>14</sup> See <http://www.oldies.com/artist-songs/Bing-Crosby.html> (listing songs written by Bing Crosby).

As noted, the PROs endure to this day.<sup>15</sup> Specifically of concern is the copyright owner's exclusive right to perform a musical composition. This performance right emerges any time music is broadcast. This broadcast can occur on radio or television, in a restaurant, bar, or any other place open to the public in which "a substantial number of persons outside of a normal circle of a family and its social acquaintances is gathered."<sup>16</sup> This performance need not be a live performance to infringe upon the copyright holder's performance right if a royalty is not paid; the performance may be recorded.

The PROs issue blanket licenses to broadcasters and businesses where music is either performed or played, which allows these music users to broadcast without having to negotiate directly with the copyright holders.<sup>17</sup> The amount of the blanket license fees is based upon the revenues of the broadcaster/size of the business.<sup>18</sup> Recently exemptions were put in place for places of business that were below a certain size.<sup>19</sup> After deducting overhead costs, the fees collected by the PROs are distributed to their affiliated writers and publishers.<sup>20</sup> The amount each writer receives is based upon the frequency and reach of the broadcast of the composition.<sup>21</sup> Therefore, a writer whose work is played on large commercial radio stations and is frequently used in television programs will receive significantly more so-called performance income than the writer whose work is broadcast only from small radio stations.

While these institutions endure, much of their ethos remains consistent with their humble beginnings. As we will discuss, there is great possibility for expansion of the income of musicians to be had via modernizing the performance royalty paradigms. As technology has evolved, broadcast music is no longer limited to just radio and television. Not only have new revenue streams emerged, principally the performance income from the streaming of music from web sites, but unprecedented approaches to the collection and distribution of income

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<sup>15</sup> Section 101 of the Copyright Act defines PROs as follows: "an association, corporation, or other entity that licenses the public performance of nondramatic musical works on behalf of copyright owners of such works, such as the American Society of Composers, Authors and Publishers (ASCAP), Broadcast Music, Inc. (BMI), and SESAC, Inc." 17 U.S.C. § 101.

<sup>16</sup> *Id.*

<sup>17</sup> *Broadcast Music, Inc. v. Columbia Broadcasting System, Inc.*, 441 U.S. 1, 4–6, 20–24 (1979) (discussing blanket licenses). See also BMI.com, About BMI, <http://bmi.com/about/?link=navbar> (last visited Mar. 20, 2010).

<sup>18</sup> *Broadcast Music, Inc.*, 441 U.S. at 31 & nn.16–17 (discussing pricing of blanket licenses). See also BMI.com, Music Licensing for Bars, Restaurants, and Other Eating and Drinking Establishments, [http://bmi.com/licensing/entry/C1162/pdf533759\\_1/?link=navbar](http://bmi.com/licensing/entry/C1162/pdf533759_1/?link=navbar) (last visited Mar. 20, 2010).

<sup>19</sup> Fairness in Music Licensing Act of 1998, Pub. L. No. 105-298, tit. II, 112 Stat. 2827, 2830.

<sup>20</sup> *Broadcast Music, Inc.*, 441 U.S. at 4–6, 20–24 (discussing blanket licenses). See also BMI.com, How We Pay Royalties, <http://www.bmi.com/royalties> (last visited Mar. 20, 2010).

<sup>21</sup> BMI.com, How We Pay Royalties, <http://www.bmi.com/royalties> (last visited Mar. 20, 2010).



derived from the exploitation of copyright have begun. These new methods call into question the efficacy of the historical methods.

## B. MECHANICAL LICENSES

Just as radio fundamentally changed not only the way people were listening to music in the early part of the twentieth century, but also the music business as a whole, so too did the advent of piano rolls. In 1911, through the introduction of piano rolls by companies such as Welte-Mignon,<sup>22</sup> the music industry was faced with an equally disruptive innovation as the radio. Prior to the introduction of piano rolls, music publishers simply negotiated with composers for the rights to create a visual representation of the songwriters' copyrighted works, as well as the right to distribute the works. Frequently, of course, the music that was being transcribed—often liturgical—had fallen into the public domain, and thus required no copyright royalties or negotiations. As noted above, this sheet music was sold primarily to individuals and churches, and music publishing was principally defined by the sale of this sheet music. Piano rolls changed things.

With their introduction, the music business was forced to confront another, but certainly not its last, disruptive technology. No longer did the publishers (those who had heretofore exclusively concerned themselves with sheet music) have control over the manufacture, distribution, and sale of music. Instead, music was now being mechanically reproduced, in the form of piano rolls, and sold by new entrants into the music business.

As has been the case many times since, the music publishers were forced to address the strain that this emergent technology was placing on copyright generally and their business model specifically. The solution was to create a so-called compulsory mechanical license. The 1909 Copyright Act<sup>23</sup> overturned the Court's finding that piano rolls and phonographs were unprotected under United States copyright law.<sup>24</sup> The 1909 Act granted the copyright owner the exclusive right to make a sound recording of a musical composition and introduced the compulsory mechanical license. In response to passage of this Act, major piano roll manufacturer Aeolian Company created mechanical licensing deals with the music publishers. Fearing a monopoly by copyright owners, Congress stipulated in the 1909 Copyright Act that once the copyright holder had authorized mechanical reproduction of his work, and that reproduction had been publicly distributed, the copyright holder was compelled to grant a license for mechanical reproduction of

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<sup>22</sup> See The Pianola Institute, *The Reproducing Piano: Welte-Mignon*, [http://www.pianola.org/reproducing/reproducing\\_welte.cfm](http://www.pianola.org/reproducing/reproducing_welte.cfm) (last visited Apr. 8, 2010).

<sup>23</sup> Act of Mar. 4, 1909, Pub. L. No. 60-349, 35 Stat. 1075.

<sup>24</sup> *White-Smith Music Publ'g Co. v. Apollo Co.*, 209 U.S. 1 (1908).

the composition to anyone who wished to reproduce it.<sup>25</sup> The compulsory mechanical license, which sets the terms for such usages—notification and maximum royalty rate—was thereby introduced.<sup>26</sup>

Piano rolls, of course, preceded acetates and vinyl recordings. Soon consumers were not only getting their music over the airwaves and from player pianos, but also from Victrolas playing these new “sides.” Just as the piano rolls generated a mechanical royalty for the writer, so too did these new formats; each time a record was sold, the writer was due a mechanical royalty from the issuer of the record.<sup>27</sup>

Much in the way ASCAP and the other PROs emerged to become clearinghouses for performance royalties, a similar organization, The Harry Fox Agency (HFA), was started in 1927 to act as a clearinghouse for the licensing of copyrighted works to be mechanically reproduced. HFA continues to act on behalf of copyright holders (publishers or individual artists) to issue mechanical licenses to and collect from those (historically record labels) who reproduce the songs in a mechanical manner.<sup>28</sup> These licenses involved first acetates/phonorecords, and has carried through to today’s digital downloads.<sup>29</sup>

### C. THE EMERGENCE OF LABELS AND RECORD CONTRACTS

As the technology continued to emerge, movie studios began to realize that they could sell artifacts in the form of sound recordings from the movies they produced. Suddenly, soundtracks from these films became a healthy adjunct business to the films themselves, and divisions were created within the movie studios to capitalize upon this new market. These were the first record labels. Warner Bros. records (now Warner Music Group) is an example of a label that began as part of a film studio.

As radio stars, such as Bob Hope and Bing Crosby, moved from radio to movies, these emergent record labels (divisions of the movie studios) were quick to offer them contracts to release their records. The contracts that were developed during this era continue to set the standard for artist contracts to this day. Typically, the label owns the copyright to the actual collection of songs and

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<sup>25</sup> See I. Trotter Hardy, *Copyright and “New-Use” Technologies*, 23 NOVA L. REV. 659 (1999); Stephen W. Feingold, Note, *Parallel Importing Under the Copyright Act of 1976*, 17 N.Y.U. J. INT’L L. & POL. 113 (1984); see also Scott L. Bach, Note, *Music Recording, Publishing, and Compulsory Licenses: Toward a Consistent Copyright Law*, 14 HOFSTRA L. REV. 379 (1986).

<sup>26</sup> 17 U.S.C. § 115 (2010).

<sup>27</sup> *Id.*

<sup>28</sup> HarryFox.com, What Does HFA Do?, <http://www.harryfox.com/public/WhatdoesHFA.do.jsp> (last visited Mar. 20, 2010).

<sup>29</sup> See generally HFA, <http://www.harryfox.com> (last visited Apr. 8, 2010).

its related artwork, and it licenses—via a mechanical license—the rights to release the version of the songs performed (but, at this stage, not yet written by) the artist signed to the label.<sup>30</sup>

The writer of the song thus receives a mechanical royalty based upon the rate statutorily set at the time of the release of the record multiplied by the number of songs sold. The performer (the artist signed to the label who records the songs) is paid a so-called “artist royalty” typically based on a percentage of the list price of the recording. Although both the rates for the statutory mechanical license (currently set at \$.091 per song for songs under five minutes in length) and the percentage paid to the performer (originally in the low single digits, and now routinely between 10% and 20% of the retail price) have risen, the procedures for compensation have not changed.<sup>31</sup> Additionally, just as the movie stars who signed deals with the label arm of the studio were deemed exclusive recording artists to that label, and thus barred from either releasing music via their own or any other label, artists today are routinely signed to exclusive, multi-record contracts.

Though the mechanisms for payment and record label contracts have largely remained constant, what did begin to change in the fifties, and gained inexorable momentum in the sixties and seventies, was the move from the performer-as-distinct-from-writer model to the performer-as-writer standard. While artists such as The Beatles and Bob Dylan rightly receive credit for ending the era of the performer-as-distinct-from-writer best exemplified by Frank Sinatra and even Elvis Presley, neither of whom wrote their own songs—it was artists such as Little Richard, Chuck Berry, Fats Domino, Buddy Holly, Del Shannon, Jerry Lee Lewis, Smokey Robinson, and others who laid the foundation that Dylan and the Beatles built upon.

Many of the artists mentioned above began their ascendance on the regional “independent” (in that they were not connected to any of the “major” studios) labels that began to explode upon the scene. It was, of course, Memphis’ Sun records that gave the world, among others, Elvis Presley, Johnny Cash, and Jerry Lee Lewis. Although, as noted, Presley did not write his own material, many of these artists did. These artists represented the future of the music business, and for some period of time there seemed to be a new artist—with a regional independent label to support him—cropping up daily. During this era, radio was at its heyday, for it had not yet been eclipsed by television. As the labels sprouted

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<sup>30</sup> See generally George Howard, *Royalty Streams*, 1 BERKLEE C. MUSIC BUS. J. 1 (2005) (discussing royalty streams).

<sup>31</sup> See generally GEORGE HOWARD, *GETTING SIGNED! AN INSIDER’S GUIDE TO THE RECORD INDUSTRY* 150 (Berklee Press 2004).

so did distribution companies and other elements of the industry—such as publicists and radio promotions people—that exist to this day.

With the Beatles, of course, everything changed. What was once either the exclusive domain of the labels attached to the movie studios or the small regional independent labels began to be seen as a viable business of its own. Many of the labels that are thought of as majors today began as regional independent labels. Atlantic, for example—so named because the Turkish emigrant brothers Ahmet and Nesuhi Ertegun who founded the label in 1947, wanted to give the perception that it was bigger than its modest beginnings—started as a tiny regional label.<sup>32</sup> Of course, many of these labels did not last long; even Sun Records was sold to Mercury Records (founder Sam Phillips had sold Presley's contract to RCA records in 1955 for \$35,000).<sup>33</sup>

The labels that made the jump from either feisty independent to major, or film studio adjunct to stand-alone entity largely comprise today's landscape. There are currently four major labels: Sony/BMG, Warner Music Group, EMI (a British Company), and Universal. These five subsumed many of the smaller indies—such as Elektra, Atlantic, Stax, and Motown—to become the behemoths that they are today, representing approximately 70% of all recorded music sales.<sup>34</sup> The remainder of record sales is made up primarily by independent labels—those not wholly owned by one of the above—or individual artists self-releasing their music. Additionally, the big four largely control the physical distribution of music. Even the larger independents—such as SubPop (the label that discovered Nirvana) and Concord—still rely upon the majors for distribution.<sup>35</sup>

Even as technology has moved from piano rolls to MP3 downloads, the legal underpinnings formulated in the early part of the twentieth century continue to dictate the record industry's practices. If a terrestrial radio station wants to broadcast music, it pays a blanket license fee to the PROs, who, in turn, pay their affiliated writers (the performers are still left out in the cold). If a record company wants to manufacture and sell an MP3 download of a song, it must enter into a mechanical license agreement with the copyright holder of the song (either the writer or the publisher), and then remit payment to this writer—typically because the HFA is prepared to audit them if they do not. Similarly, the record contracts that emerged during the boom of regional labels and labels connected to studios

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<sup>32</sup> See Ahmet Ertegun's Atlantic Records, [http://www.history-of-rock.com/atlantic\\_records.htm](http://www.history-of-rock.com/atlantic_records.htm) (last visited Apr. 8, 2010).

<sup>33</sup> See generally RCA Purchases Elvis' Contract, <http://www.history.com/this-day-in-history.do?action=Article&id=3796> (Sun-RCA deal); Sun Record Company, <http://www.myspace.com/sunrecordcompany> (company history).

<sup>34</sup> See <http://www.bemuso.com/musicbiz/labelsandpublishers.html>.

<sup>35</sup> See <http://www.musicbizacademy.com/knab/articles/majorindie.htm>.

continue to dominate the way business is done between artists and labels. It was only within the last ten years or so—long after the fragile vinyl LP had been replaced by the less fragile CD—that breakage clauses, which reduced the amount of records an artist would receive royalties on, were stricken from standard label contracts.<sup>36</sup>

In fact, even while the big four major labels are increasingly threatened by illegal downloads and a customer base with far more choice with regard to where to spend their entertainment dollars (such as DVDs and video games), the labels not only continue to cling to their old practices, but have in fact attempted to tighten their grasp around artists. Specifically, the so-called 360 deals, in which artists sign over not only the rights to the versions of the songs they have recorded to the label, but also a percentage of their merchandising income and live touring revenue, have become commonplace.<sup>37</sup>

The impact of this continued adherence to outmoded laws and practices is a declining relevance of these labels. There is also potential room for innovation that will bring new and improved revenue streams to artists.

#### D. RECENT DEVELOPMENTS AND CURRENT PRACTICES

Above we described the historic development of the record business to its commonly understood state. Although this commonly understood state may have seemed fairly immutable from the outside, much has transpired over the past twenty years. Many of these developments, as one would guess given the history of the business, have occurred from the rise of new technological advances. This Part of the Article will examine the impact of these technological advances on the record business and the laws that govern the business.

As mentioned above, labels are now contracting with artists under a recently developed deal structure called a “360 deal.” These deals require the artist who signs to the label to share revenue from touring, merchandise sales, record sales,

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<sup>36</sup> See Alan S. Bergman, *Anatomy of a Record Deal: A Guide to Negotiating the Record Company Contract*, <http://www.alanbergman.com/Anatomy%20of%20a%20Record%20Deal.doc> (last visited Apr. 8, 2010) (discussing the breakage clause or fee).

<sup>37</sup> See Mark F. Schultz, *Live Performance, Copyright, and the Future of the Music Business*, 43 U. RICH. L. REV. 685 (2009) (discussing 360 deals and questioning the extent to which live performance revenue can sustain a diverse and robust music business); Patrick Fogarty, *Major Record Labels and the RIAA: Dinosaurs in a Digital Age?*, 9 HOUS. BUS. & TAX L.J. 140 (2008) (discussing 360 deals and questioning the new business model given technological change); Ian Brereton, Note and Recent Development, *The Beginning of a New Age?: The Unconscionability of the “360-Degree” Deal*, 27 CARDOZO ARTS & ENT. L.J. 167 (2009) (contending that 360 deals are unconscionable).

and often even publishing income with the label.<sup>38</sup> These types of deals thus lay claim to assets that heretofore had been sacrosanct for the artists.

Though not directly articulated, the previous underlying logic was that even though the labels knew that their marketing and promotion efforts were raising the profile of the artist, which led to greater opportunity for the artist to monetize tickets to live performances and merchandise, the labels did not attempt to profit from these streams because they already had such a healthy revenue stream from their percentage of the record sales. It was a sort of unspoken *quid pro quo*. Recent events, however, that threaten the label's ability to generate revenue from the sale of records have led to this inclusive (hence, 360) deal. Specifically, the decreased revenue for the labels has led them to attempt to increase the number of revenue streams.

The current position that the labels find themselves in, though often blamed on technological advances, such as the development of the MP3, is actually a confluence of events. Certainly, the technological advances have played a significant role in disrupting the labels' core business, but even prior to the emergence of this technological disruption, the practices of the labels were beginning to show cracks in the foundation. The retailers, exhibiting that the last vestige of marketing is in fact sales pricing, began to pressure the labels to lower their suggested retail prices. From a high of nearly twenty dollars a CD in the late '80s and early '90s, the retailers began applying pressure to reduce these prices. This pressure was applied in direct proportion to the number of releases being churned out each week by the labels. More releases meant less shelf-space for the retailers, and thus an increasing need to "turn" the product.

In addition to the downward price pressure, the retailers began to find other ways to leverage the shelf space, which was becoming such a premium in their stores. Specifically, the retailers demanded what is truly the *bête noire* of the record business: co-op advertising. Though little-known outside of the industry, co-op advertising, short for cooperative, was the true driving force of the industry. In short, the retailers began to charge the labels (via the labels' distributors) for so-called price and positioning in the stores.<sup>39</sup>

What for some period of time actually provided value to those labels who would pay these co-op fees and get prominent placement in the store soon deteriorated to a point where, unless you paid co-op, you did not get your record stocked. As everyone was forced to pay, the best positioning went to the highest bidder. Of course, it was the major labels that could pay the most, and thus the

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<sup>38</sup> Wayne Rosso, *Recording Industry Should Brace for More Bad News*, CNET NEWS, Jan. 16, 2008, [http://news.cnet.com/Recording-industry-should-brace-for-more-bad-news/2010-1027\\_3-6226487.html](http://news.cnet.com/Recording-industry-should-brace-for-more-bad-news/2010-1027_3-6226487.html).

<sup>39</sup> HOWARD, *supra* note 31, at 152.

diversity of record stores began to erode. As with the payola-induced homogenization of radio, no longer were retail outlets carefully curated stores where regional successes could emerge. Instead, they, more and more, began to resemble off line versions of radio stations: stocking only those releases that the major labels would pay the most money for placement. For the retailer, this only furthered their resolve to lower the prices. Their real profit was no longer coming from a margin between what they bought the records for from the labels/distributors and what they sold them to the customers for, but rather from these co-op programs. The faster they could move the records off the shelves, the faster they could institute yet another co-op program.

In the media, the price decline was attributed to any number of things: competition from video games, and later DVDs, for example. What had really happened, however, was that the psyche of the buying public had been altered. No longer was there any perceived value for music.<sup>40</sup> More and more customers began to wonder why they should pay nearly \$20 for a CD that cost a few dollars at most to make. A disconnect was created between the object (the CD), and the actual writing, recording, and marketing that went into the CD.

Unfortunately, just as the perceived value of the CD began to fall due to the above-mentioned co-op and sale pricing, new technology began to emerge, which would threaten to reduce the perceived value of music to near zero. While co-op and sales pricing began the slide for music with respect to perceived value, it was ultimately the combination of widespread adoption of high-speed internet connectivity, improved compression algorithms (MP3), and peer to peer (p2p) file sharing services which massively accelerated this decline.

The story of Napster neatly summarizes these elements. Sean Fanning was a Northeastern University student who, in 1999, developed a technology in his dorm room that allowed him to easily find and share music.<sup>41</sup> Again, it is important here to note that the thought that trading files would constitute some sort of crime might not have ever entered these early p2p developers' minds. The value of music had been so far reduced that this was probably, in their opinions, simple retribution for being forced for years to purchase expensive albums with possibly only one or two good songs on the album. Motivation aside, the reason these developers were able to create such a p2p network was purely due to technological advances. It is not a coincidence that the early p2p networks, such as Napster, originated on college campuses. In addition to having a high population of disenfranchised music consumers, these campuses also were some

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<sup>40</sup> See generally <http://www.prospectmagazine.co.uk/2007/08/offtherecord/>.

<sup>41</sup> *Napster's Highs and Lows*, BUS. WK., Aug. 15, 2000, available at [http://www.businessweek.com/2000/00\\_33/b3694003.htm](http://www.businessweek.com/2000/00_33/b3694003.htm).

of the first places in the world to have high speed internet access. Add in a compression algorithm called MP3, which greatly reduces the file size of a music (or other) file, while not severely affecting audio quality, and it is natural to see how these p2p networks began to proliferate.

As the p2p networks made their way from college campuses to the mainstream, not only was the value of music further reduced, but the very nature of copyright began to come under pressure. Copyright owners in general, and the music business in particular, have always been faced with challenges from unauthorized copying. The technology has evolved from piano rolls to cassette tapes to burned CDs and downloaded music files. What has changed is that unauthorized music file sharing today involves nearly instantaneous copying of songs with almost perfect sound quality. The recent history of the music industry's attempt to prevent this activity is well known and widely reported.<sup>42</sup> In short, the industry began with successful copyright suits against companies such as Napster, which in its early incarnations involved file sharing through centralized servers—a key feature that made it simple to prove knowledge and control over infringement by the third parties who used the software.<sup>43</sup>

Later incarnations of file sharing software, such as Grokster, Kazaa, Morpheus, and Limewire, avoided this problem by eliminating the central servers. These software providers allowed third parties to search for, download, and upload songs directly to one another. This decentralization made litigation more challenging, although the industry prevailed in the Supreme Court against Grokster on a theory of knowing inducement of copyright infringement in *MGM v. Grokster*.<sup>44</sup>

Because of the sheer number of places where consumers could locate file-sharing software—often from sources that were offshore, untraceable, or impecunious—the industry saw fit to begin a massive campaign of suits against individuals engaged in file sharing. Whether the music industry's litigation strategy was viable is questionable, particularly when combined with the negative publicity that resulted from the 30,000 suits filed. Moreover, the strategy was ineffective, as sales of recorded music dropped considerably since 2005, when 618.9 million units were sold.<sup>45</sup> In contrast, 2008 album sales—including both CDs and digital downloads—totaled only 428.4 million.<sup>46</sup> This figure includes a 14% decline from

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<sup>42</sup> See generally Electronic Frontier Foundation, *RIAA v. The People*, <http://www.eff.org/riaa-v-people> (last visited Mar. 20, 2010) (documenting the RIAA's litigation efforts).

<sup>43</sup> See *A&M Records, Inc. v. Napster, Inc.*, 239 F.3d 1004 (9th Cir. 2001).

<sup>44</sup> See *Metro-Goldwyn-Mayer Studios, Inc. v. Grokster, Ltd.*, 545 U.S. 913 (2005).

<sup>45</sup> Chris Morris, *Universal Tops '05 Market Share With 31.7%*, RADIO MONITOR, Jan. 5, 2006, <http://www.allbusiness.com/services/motion-pictures/4475383-1.html>.

<sup>46</sup> Jonathan Cohen, *Lil Wayne Notches Top-Selling Album of '08*, BILLBOARD, Dec. 31, 2008,



2007.<sup>47</sup> Three categories saw increased sales in 2008: digital downloads, concert tickets, and vinyl LPs.<sup>48</sup> Digital download sales were up 27% in 2008, reaching 1.07 billion and accounting for 32% of all music purchases.<sup>49</sup>

In December 2008, the RIAA announced a shift in its strategy regarding music filesharing.<sup>50</sup> The music industry will be shifting its focus away from bringing new copyright infringement suits against individuals suspected of engaging in unauthorized music filesharing. Instead, the RIAA is seeking to obtain the cooperation of internet service providers (ISPs) in terminating the accounts of those engaged in large-scale file-sharing activity.<sup>51</sup> Under the new policy, the RIAA would inform the ISP of the IP address of the file-sharer, and the ISP would then notify the consumer of the potential violation. After three or more such notices, the ISP would presumably terminate the user's account. The movie industry is said to be looking into a similar arrangement with ISPs.<sup>52</sup>

The decline in sales of recorded music has impelled the industry to seek new sources of revenue. One proposal, which is embodied in the Performance Rights Act,<sup>53</sup> would expand the scope of public performance rights in musical works. Under current United States law, songwriters receive broad public performance rights for their musical compositions, but recording artists have only very limited rights as to their sound recordings. Thus, for example, Mick Jagger and Keith

<http://www.billboard.com/news/lil-wayne-notches-top-selling-album-of-08-1003926030.story#/news/lil-wayne-notches-top-selling-album-of-08-1003926030.story>.

<sup>47</sup> James Callan, *U.S. Album Sales Declines 14% While Online Track Sales Surge*, BLOOMBERG, Jan. 1, 2009, <http://www.bloomberg.com/apps/news?pid=20601103&sid=aC7ekniUw9Fs&refer=us>.

<sup>48</sup> Ecoustics.com, *Music Listening and Digital Downloads Increase*, Mar. 17, 2009, <http://news.ecoustics.com/bbs/messages/10381/558096.html> (discussing increased sales of digital downloads); Kate Holton, *Global 2008 Live Music Turnover Rose 10 Percent*, REUTERS, Mar. 26, 2009, <http://www.reuters.com/article/idUSTRE52P3GT20090326> (discussing increased sales of concert tickets); Eliot Van Buskirk, *Vinyl May Be Final Nail in CD's Coffin*, WIRED, Oct. 29, 2007, [http://www.wired.com/entertainment/music/commentary/listeningpost/2007/10/listeningpost\\_1029#ixzz0hSDzB1ZJ](http://www.wired.com/entertainment/music/commentary/listeningpost/2007/10/listeningpost_1029#ixzz0hSDzB1ZJ) (discussing increased sales of vinyl).

<sup>49</sup> Phil Gallo, *Album Sales Continue to Slide in '08: Music Industry Down 14% from Last Year*, VARIETY, Jan. 1, 2009, <http://www.variety.com/VR1117997892.html> (discussing decline in unit sales).

<sup>50</sup> Eliot Van Buskirk, *RIAA to Stop Suing Music Fans, Cut Them Off Instead*, WIRED, Dec. 19, 2008, <http://www.wired.com/epicenter/2008/12/riaa-says-it-pl/>.

<sup>51</sup> Sarah McBride & Ethan Smith, *Music Industry to Abandon Mass Suits*, WALL ST. J., Dec. 19, 2008, at B1.

<sup>52</sup> The MPAA does not appear to have publicly announced its current strategy (as far as the authors of this Article can discern). See generally Jessica Chung, *UCLA Joins Film Industry's Fight Over Illegal File-Sharing*, DAILY BRUIN, Nov. 13, 2003, available at <http://www.highbeam.com/doc/1P1-87535186.html>; TechDirt.com, *Movie Studios Sue Australian ISP for Not Waving Magic Wand and Defeating Piracy*, Nov. 20, 2008, <http://www.techdirt.com/articles/20081120/1214592902.shtml>.

<sup>53</sup> See *supra* note 6.

Richards, who wrote many Rolling Stones songs, receive a royalty payment when the songs they wrote are publicly performed. The other members of the band, however, do not generally receive public performance royalties when the song is played in the United States, as they were only involved in making the sound recording. There are exceptions to this rule for digital public performances, such as satellite and internet radio.<sup>54</sup> The proposed bill would put the owners of sound recordings on a par with the owners of musical compositions, allowing both to receive the full panoply of public performance royalties. The bill would benefit record companies and recording artists, while increasing the cost of doing business for terrestrial broadcasters.

We have now presented the history of the music business up to the current day, and will next provide an overview of the legal framework that is guiding the business with respect to copyright in musical works. Certainly, the business is changing at a more rapid rate than ever. While it used to be difficult to forecast what the business would look like next year, it is now difficult to predict what it will look like next week. The major labels are in increasingly difficult spots—not aided by the global economic contraction. Traditional retail has become basically absent from the picture. The factors described above with respect to co-op and sales pricing have been played out to their logical conclusion. The days when every city had several independent record stores as well as a number of chains (such as Tower Records and Sam Goody) are long gone. Partly victim to the same globalizing trends affecting other regional retailers, and partly due to gross mismanagement, these outlets simply do not exist. In their stead are booksellers, such as Borders and Barnes & Noble, that have tenuous connections to music at best (their core business clearly being books) and so-called “Big Box” outlets like Wal-Mart, Target, and Best Buy. These Big Box retailers typically use music as a loss leader. That is, they will drastically cut the price of the CDs, even to a point

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<sup>54</sup> Section 106 defines the rights of copyright owners, and it states in relevant part: Subject to sections 107 through 122, the owner of copyright under this title has the exclusive rights to do and to authorize any of the following:

...  
(4) in the case of literary, musical, dramatic, and choreographic works, pantomimes, and motion pictures and other audiovisual works, to perform the copyrighted work publicly;

...  
(6) in the case of sound recordings, to perform the copyrighted work publicly by means of a digital audio transmission.

17 U.S.C. § 106 (2010). A digital transmission is defined in section 101 as “a transmission in whole or in part in a digital or other non-analog format.” *Id.* § 101. The rights under section 106(6) were the result of the Digital Performance Right in Sound Recordings Act of 1995. *See* Pub. L. No. 104-39, 109 Stat. 336.

where they are losing money on each sale, as a way of motivating customers to enter the stores and purchase high-margin items such as appliances. For music-specific retailers, there simply was no way to compete against these practices.

What is left is an online world searching for an economic driver. Attempts have been made—by companies such as Ruckus and Spiral Frog—to offer free downloads and compensate the content owners through a percentage of advertising revenue.<sup>55</sup> Unfortunately, these efforts have largely failed as a result of the recent economic downturn and the resulting collapse in advertising revenue. Certainly, a new model exists, however, and the emerging technologies that have historically rescued the business may in fact, once more, be the salvation.

## II. LEGAL ATTEMPTS TO ADDRESS THE SHIFTING LANDSCAPE

Even as songs essentially began self-replicating and nearly automatically appearing on millions of hard drives, additional pressures were being applied to songwriters. In this Part we will address four crucial pieces of legislation that define the landscape in which the music business currently operates. This will allow for some suggestions with respect to moving forward in a more profitable manner in the subsequent sections.

### A. THE SONNY BONO COPYRIGHT TERM EXTENSION ACT AND THE FAIRNESS IN MUSIC LICENSING ACT

The Sonny Bono Copyright Term Extension Act<sup>56</sup> and the Fairness in Music Licensing Act<sup>57</sup> comprise two main pieces of legislation. Title 1 is the Copyright Term Extension (and is familiarly known as The Sonny Bono Copyright Term Extension Act, or SBCTEA, in recognition of its key sponsor who was a member of Congress after his musical career with Sonny & Cher). The amendment increases the term of the copyright for all works currently under copyright protection and for all future works. In the case of newly created works (that is, works created today), the duration of copyright protection is the life of the last surviving author plus seventy years.<sup>58</sup> Additionally, it extends the term for so-

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<sup>55</sup> Catherine Holahan, *Making a Ruckus in the Music Business*, BUS. WK., Jan. 22, 2007, available at [http://www.businessweek.com/technology/content/jan2007/tc20070122\\_774819.htm](http://www.businessweek.com/technology/content/jan2007/tc20070122_774819.htm) (discussing Ruckus' business model).

<sup>56</sup> Pub. L. No. 105-298, 112 Stat. 2827 (1998) (codified in scattered sections of Title 17 of the U.S.C.).

<sup>57</sup> Pub. L. No. 105-298, 112 Stat. 2827 (1998) (codified as amended in scattered sections of Title 17 of the U.S.C.).

<sup>58</sup> Section 302 governs the current copyright term for works by individual authors and joint

called “works made for hire”<sup>59</sup> to 120 years from creation or ninety-five from publication, whichever comes first.<sup>60</sup> All prior works for which the copyright had

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authors:

(a) In General. — Copyright in a work created on or after January 1, 1978, subsists from its creation and, except as provided by the following subsections, endures for a term consisting of the life of the author and 70 years after the author’s death.

(b) Joint Works. — In the case of a joint work prepared by two or more authors who did not work for hire, the copyright endures for a term consisting of the life of the last surviving author and 70 years after such last surviving author’s death.

17 U.S.C. § 302 (2010).

<sup>59</sup> Section 101 defines this copyright term of art:

A “work made for hire” is —

(1) a work prepared by an employee within the scope of his or her employment; or

(2) a work specially ordered or commissioned for use as a contribution to a collective work, as a part of a motion picture or other audiovisual work, as a translation, as a supplementary work, as a compilation, as an instructional text, as a test, as answer material for a test, or as an atlas, if the parties expressly agree in a written instrument signed by them that the work shall be considered a work made for hire. For the purpose of the foregoing sentence, a “supplementary work” is a work prepared for publication as a secondary adjunct to a work by another author for the purpose of introducing, concluding, illustrating, explaining, revising, commenting upon, or assisting in the use of the other work, such as forewords, afterwords, pictorial illustrations, maps, charts, tables, editorial notes, musical arrangements, answer material for tests, bibliographies, appendixes, and indexes, and an “instructional text” is a literary, pictorial, or graphic work prepared for publication and with the purpose of use in systematic instructional activities.

In determining whether any work is eligible to be considered a work made for hire under paragraph (2), neither the amendment contained in section 1011(d) of the Intellectual Property and Communications Omnibus Reform Act of 1999, as enacted by section 1000(a)(9) of Public Law 106-113, nor the deletion of the words added by that amendment —

(A) shall be considered or otherwise given any legal significance, or

(B) shall be interpreted to indicate congressional approval or disapproval of, or acquiescence in, any judicial determination . . . .

17 U.S.C. § 101.

<sup>60</sup> Section 302(c) governs the current copyright term for works made for hire, as well as anonymous works and works published under a pseudonym:

In the case of an anonymous work, a pseudonymous work, or a work made for hire, the copyright endures for a term of 95 years from the year of its first publication, or a term of 120 years from the year of its creation, whichever expires first. If, before the end of such term, the identity of one or more of the authors of an anonymous or pseudonymous work is revealed in the records of a registration made for that work under subsections (a) or (d) of section 408, or in the records provided by this subsection, the copyright in the work endures for

not expired also received twenty years of additional protection, which was the most controversial part of the SBCTEA.

Title 1 seems to clearly benefit the songwriter. He or she will be able to derive income from his or her work for a longer period of time. This income for a songwriter can come from mechanical royalties, performance income (from broadcast of the work over public airwaves, such as radio), and, more and more, from songs being streamed online. Of course, it also represents a victory for the corporations that benefit from copyright, either via works for hire created for them or copyrights they acquired—such as the copyright to the collection of songs that embody the compositions of the writers.

Nonetheless, the impact in terms of increased creative incentives in the music business is limited. The term extension is viewed by some commentators as a windfall to copyright owners of older works, such as Disney Company with its 1920s-era Mickey Mouse film, “Steamboat Willie,” at the expense of the public interest in having older copyrighted works fall into the public domain.<sup>61</sup> Despite these criticisms, which have come primarily from law professors who enjoy tenured teaching jobs that provide them free time for writing and funded research support for their own scholarly creations,<sup>62</sup> the Supreme Court upheld the

the term specified by subsection (a) or (b), based on the life of the author or authors whose identity has been revealed. Any person having an interest in the copyright in an anonymous or pseudonymous work may at any time record, in records to be maintained by the Copyright Office for that purpose, a statement identifying one or more authors of the work; the statement shall also identify the person filing it, the nature of that person’s interest, the source of the information recorded, and the particular work affected, and shall comply in form and content with requirements that the Register of Copyrights shall prescribe by regulation.

17 U.S.C. § 302(c).

<sup>61</sup> Despite the twenty-year term extension, some contend that “Steamboat Willie” may nonetheless be in the public domain, because the copyright owner arguably failed to comply with applicable copyright formalities in place at the time. See, e.g., Joseph Menn, *Whose House Is It Anyway?*, L.A. TIMES, Aug. 23, 2008, at A2, available at <http://articles.latimes.com/2008/aug/22/business/fi-mickey22>.

<sup>62</sup> The string of law review articles attacking the copyright term extension or Justice Ginsburg’s opinion, joined by six other Justices, upholding the action by Congress is so extensive that it could take up several pages. See, e.g., C. Edwin Baker, *First Amendment Limits on Copyright*, 55 VAND. L. REV. 891 (2002); Yochai Benkler, *Free as the Air to Common Use: First Amendment Constraints on Enclosure of the Public Domain*, 74 N.Y.U. L. REV. 354 (1999); Yochai Benkler, *Through the Looking Glass: Alice and the Constitutional Foundations of the Public Domain*, LAW & CONTEMP. PROBS., Winter/Spring 2003, at 173, 175 n.10; Erwin Chemerinsky, *Balancing Copyright Protections and Freedom of Speech: Why the Copyright Extension Act Is Unconstitutional*, 36 LOY. L.A. L. REV. 83 (2002); Alan E. Garfield, *The Case for First Amendment Limits on Copyright Law*, 35 HOFSTRA L. REV. 1169 (2007); Lawrence Lessig, *The Architecture of Innovation* (Mar. 3, 2001), in Meredith and Kip Frey Lecture in Intellectual Property, 51 DUKE L.J. 1783 (2002); Adrian Liu, *Copyright as Quasi-Public Property: Reinterpreting the*

copyright term extension in *Eldred v. Ashcroft*,<sup>63</sup> by a vote of 7–2. The Court found that the term extension was a legitimate exercise of Congress’ power under the Copyright Clause and that the term extension did not violate the First Amendment guarantees of Free Speech and Press.<sup>64</sup>

The impact of the SBCTEA on today’s music business, however, is likely to be limited. First, few songs from the 1920s and 1930s—the time period from which copyrights would be expiring were it not for the twenty-year term extension—generate significant royalties today.<sup>65</sup>

More importantly, the incentive effect of the twenty-year term extension for creating new works is limited by the fact that any increase in the rewards for the creation of a new work today, such as a new musical composition or a sound recording, will only occur in the far distant future. Specifically, taking a work created today, which would previously have been protected for the life of the author plus fifty years, will now have protection for the life of the author plus *seventy* years. For a songwriter or performer in his or her twenties, the additional revenue that might be obtained from this term extension seems a faint reward indeed. Even a record company accountant would view the discounted present value of the royalties derived from this term extension with a jaundiced eye.

Title 2 of The Sony Bono Copyright Term Extension Act and the Fairness in Music Licensing Act is the Music Licensing Exemption for Food Service or Drinking Establishments (also known as the Fairness in Music Licensing Act of 1998). This legislation exempts bars and restaurants smaller than 3,750 square feet, as well as all non-food service and beverage establishments that are smaller

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*Conflict Between Copyright and the First Amendment*, 18 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 383 (2008); Neil Weinstock Netanel, *Locating Copyright Within the First Amendment Skein*, 54 STAN. L. REV. 1 (2001); Jed Rubenfeld, *The Freedom of Imagination: Copyright’s Constitutionality*, 112 YALE L.J. 1 (2002); Paul M. Schwartz & William Michael Treanor, *Eldred and Lochner: Copyright Term Extension and Intellectual Property as Constitutional Property*, 112 YALE L.J. 2331 (2003).

<sup>63</sup> 537 U.S. 186 (2003).

<sup>64</sup> See generally Paul Goldstein, *Copyright and the First Amendment*, 70 COLUM. L. REV. 983 (1970); Melville B. Nimmer, *Does Copyright Abridge the First Amendment Guarantees of Free Speech and Press?*, 17 UCLA L. REV. 1180 (1970); Neil Weinstock Netanel, *Locating Copyright Within the First Amendment Skein*, 54 STAN. L. REV. 1 (2001); Jed Rubenfeld, *The Freedom of Imagination: Copyright’s Constitutionality*, 112 YALE L.J. 1 (2002); see also Yochai Benkler, *Through the Looking Glass: Alice and the Constitutional Foundations of the Public Domain*, LAW & CONTEMP. PROBS., Winter/Spring 2003, at 173; Steven J. Horowitz, *A Free Speech Theory of Copyright*, 2009 STAN. TECH. L. REV. 2, available at <http://sclr.stanford.edu/pdf/horowitz-free-speech-theory.pdf>.

<sup>65</sup> A review of radio formats from Arbitron shows that no significant number of stations play music from the 1920s and 1930s. Indeed, a discussion of “oldies” stations, which play songs from the 1950s and 1960s, shows that this format is also in decline. See Arbitron, *Radio Today: How America Listens to Radio* 2008 Edition, at 57–71 (2008), <http://www.arbitron.com/downloads/radio-today08.pdf> (last visited Mar. 21, 2010).

than 2,000 square feet, from paying any licensing fees to the PROs (ASCAP, BMI, and SESAC).<sup>66</sup>

Prior to this amendment, section 110(5) contained a very limited exemption for “homestyle” sound systems in small businesses:

Notwithstanding the provisions of section 106, the following are not infringements of copyright:

...

(5)(A) except as provided in subparagraph (B), communication of a transmission embodying a performance or display of a work by the public reception of the transmission on a single receiving apparatus of a kind commonly used in private homes, unless —

- (i) a direct charge is made to see or hear the transmission; or
- (ii) the transmission thus received is further transmitted to the public; . . . .<sup>67</sup>

The Fairness in Music Licensing Act engrafted an entire new exemption, section 110(5)(B), which states:

(B) communication by an establishment of a transmission or retransmission embodying a performance or display of a nondramatic musical work intended to be received by the general public, originated by a radio or television broadcast station licensed

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<sup>66</sup> To understand the application of the section 110(5) exemption, the following definitions are relevant:

An “establishment” is a store, shop, or any similar place of business open to the general public for the primary purpose of selling goods or services in which the majority of the gross square feet of space that is nonresidential is used for that purpose, and in which nondramatic musical works are performed publicly.

A “food service or drinking establishment” is a restaurant, inn, bar, tavern, or any other similar place of business in which the public or patrons assemble for the primary purpose of being served food or drink, in which the majority of the gross square feet of space that is nonresidential is used for that purpose, and in which nondramatic musical works are performed publicly.

The term “financial gain” includes receipt, or expectation of receipt, of anything of value, including the receipt of other copyrighted works. . . .

The “gross square feet of space” of an establishment means the entire interior space of that establishment, and any adjoining outdoor space used to serve patrons, whether on a seasonal basis or otherwise.

17 U.S.C. § 101 (2010).

<sup>67</sup> See 17 U.S.C. § 110(5)(A) (2010).

as such by the Federal Communications Commission, or, if an audiovisual transmission, by a cable system or satellite carrier, if —  
 (i) in the case of an establishment other than a food service or drinking establishment, either the establishment in which the communication occurs has less than 2,000 gross square feet of space (excluding space used for customer parking and for no other purpose), or the establishment in which the communication occurs has 2,000 or more gross square feet of space (excluding space used for customer parking and for no other purpose) and —

(I) if the performance is by audio means only, the performance is communicated by means of a total of not more than 6 loudspeakers, of which not more than 4 loudspeakers are located in any 1 room or adjoining outdoor space; or

(II) if the performance or display is by audiovisual means, any visual portion of the performance or display is communicated by means of a total of not more than 4 audiovisual devices, of which not more than 1 audiovisual device is located in any 1 room, and no such audiovisual device has a diagonal screen size greater than 55 inches, and any audio portion of the performance or display is communicated by means of a total of not more than 6 loudspeakers, of which not more than 4 loudspeakers are located in any 1 room or adjoining outdoor space;

(ii) in the case of a food service or drinking establishment, either the establishment in which the communication occurs has less than 3,750 gross square feet of space (excluding space used for customer parking and for no other purpose), or the establishment in which the communication occurs has 3,750 gross square feet of space or more (excluding space used for customer parking and for no other purpose) and —

(I) if the performance is by audio means only, the performance is communicated by means of a total of not more than 6 loudspeakers, of which not more than 4 loudspeakers are located in any 1 room or adjoining outdoor space; or

(II) if the performance or display is by audiovisual means, any visual portion of the performance or display is communicated by means of a total of not more than 4 audiovisual devices, of which not more than 1 audiovisual device is located in any 1 room, and no such audiovisual device has a diagonal screen size greater than 55 inches, and any audio portion of the performance or display is communicated by means of a total of not more than 6 loudspeakers,



of which not more than 4 loudspeakers are located in any 1 room or adjoining outdoor space;

(iii) no direct charge is made to see or hear the transmission or retransmission;

(iv) the transmission or retransmission is not further transmitted beyond the establishment where it is received; and

(v) the transmission or retransmission is licensed by the copyright owner of the work so publicly performed or displayed . . . .<sup>68</sup>

This section dramatically expands the scope of public performances that are deemed exempt from copyright royalties.

As one can imagine, the PROs were sorely disappointed with this decision. As explained above, these PROs act as royalty clearinghouses, and collect fees in order to facilitate the copyright payment to their affiliated writers.<sup>69</sup> Given the reduction in royalties paid to the PROs for blanket licenses as a result of exempting thousands of retail establishments, songwriters and music publishers have inevitably seen a significant reduction in the royalty payments made to them.<sup>70</sup>

There simply is no way of viewing this piece of legislation as beneficial to the songwriters. As we will discuss below, these performance royalties are crucial to the sustainability of all artists—those signed to major labels as well as those releasing their own music. With advances in technology, it is easier than ever before for accurate measurement and reporting of the copyright use by these establishments. To exempt them from compensating the writers is unnecessary and detrimental. Furthermore, as discussed below, this expanded exemption violates tenets of international law.<sup>71</sup>

## B. THE DIGITAL MILLENNIUM COPYRIGHT ACT OF 1998

The third significant piece of legislation currently shaping the music landscape is the Digital Millennium Copyright Act (DMCA). The DMCA was signed into law on October 28, 1998. In addition to implementing the treaties signed at the

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<sup>68</sup> § 110(5)(B). The Fairness in Music Licensing Act of 1998 amended section 110(5) by adding subparagraph (B) and by making conforming amendments to subparagraph (A); by adding the phrase “or of the audiovisual or other devices utilized in such performance” to paragraph 7; and by adding the last paragraph to section 110 that begins “The exemptions provided under paragraph (5).” Pub. L. No. 105-298, tit. II, 112 Stat. 2827, 2830.

<sup>69</sup> See *supra* Part I.A.

<sup>70</sup> See *infra* notes 82–85 and accompanying text.

<sup>71</sup> See *infra* notes 82–87 and accompanying text.

World Intellectual Property Organization in 1996 “that deal with copyright protection for works in a digital form and that require countries to give protection to foreign works no less favorable than the protections afforded to domestic works,”<sup>72</sup> it adds a number of additional provisions that define how the music business currently operates with respect to copyright.

First, the DMCA sets forth remedies for the circumvention of copy-prevention systems, so-called Digital Rights Management (DRM) software, which are used by copyright holders to identify their copyrighted material and to deter unauthorized duplication.<sup>73</sup> Second, it provides a safe harbor for service providers (such as YouTube) that limits infringement liability due to the posting of infringing material to these sites from a third party.<sup>74</sup> Nonetheless, these service providers must remove the infringing material in a timely fashion once notice is given.<sup>75</sup>

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<sup>72</sup> JEFFREY BRABEC & TODD BRABEC, MUSIC MONEY AND SUCCESS: THE INSIDER’S GUIDE TO MAKING MONEY IN THE MUSIC INDUSTRY 365 (3d ed. 2002). See 17 U.S.C. § 106 (2010) (“Subject to sections 107 through 122, the owner of copyright under this title has the exclusive rights to do and to authorize any of the following: . . . (6) in the case of sound recordings, to perform the copyrighted work publicly by means of a digital audio transmission.”).

<sup>73</sup> See §§ 1201–1205.

<sup>74</sup> See § 512.

<sup>75</sup> This complex provision states:

. . . (c) Information residing on systems or networks at direction of users.—

(1) In general. — A service provider shall not be liable for monetary relief, or, except as provided in subsection (j), for injunctive or other equitable relief, for infringement of copyright by reason of the storage at the direction of a user of material that resides on a system or network controlled or operated by or for the service provider, if the service provider —

(A) (i) does not have actual knowledge that the material or an activity using the material on the system or network is infringing;

(ii) in the absence of such actual knowledge, is not aware of facts or circumstances from which infringing activity is apparent; or

(iii) upon obtaining such knowledge or awareness, acts expeditiously to remove, or disable access to, the material;

(B) does not receive a financial benefit directly attributable to the infringing activity, in a case in which the service provider has the right and ability to control such activity; and

(C) upon notification of claimed infringement as described in paragraph (3), responds expeditiously to remove, or disable access to, the material that is claimed to be infringing or to be the subject of infringing activity.

(2) Designated agent. — The limitations on liability established in this subsection apply to a service provider only if the service provider has designated an agent to receive notifications of claimed infringement described in paragraph (3), by making available through its service, including on its website in a location accessible to the public, and by providing to the Copyright Office, substantially the following information:

(A) the name, address, phone number, and electronic mail address of the

This rather complex notice-and-take-down rule provides copyright owners, including those in the music industry, with at least a modicum of protection from the unauthorized placement of copyrighted music online.

agent.

(B) other contact information which the Register of Copyrights may deem appropriate.

The Register of Copyrights shall maintain a current directory of agents available to the public for inspection, including through the Internet, in both electronic and hard copy formats, and may require payment of a fee by service providers to cover the costs of maintaining the directory.

(3) Elements of notification. —

(A) To be effective under this subsection, a notification of claimed infringement must be a written communication provided to the designated agent of a service provider that includes substantially the following:

(i) A physical or electronic signature of a person authorized to act on behalf of the owner of an exclusive right that is allegedly infringed.

(ii) Identification of the copyrighted work claimed to have been infringed, or, if multiple copyrighted works at a single online site are covered by a single notification, a representative list of such works at that site.

(iii) Identification of the material that is claimed to be infringing or to be the subject of infringing activity and that is to be removed or access to which is to be disabled, and information reasonably sufficient to permit the service provider to locate the material.

(iv) Information reasonably sufficient to permit the service provider to contact the complaining party, such as an address, telephone number, and, if available, an electronic mail address at which the complaining party may be contacted.

(v) A statement that the complaining party has a good faith belief that use of the material in the manner complained of is not authorized by the copyright owner, its agent, or the law.

(vi) A statement that the information in the notification is accurate, and under penalty of perjury, that the complaining party is authorized to act on behalf of the owner of an exclusive right that is allegedly infringed.

(B) (i) Subject to clause (ii), a notification from a copyright owner or from a person authorized to act on behalf of the copyright owner that fails to comply substantially with the provisions of subparagraph (A) shall not be considered under paragraph (1)(A) in determining whether a service provider has actual knowledge or is aware of facts or circumstances from which infringing activity is apparent.

(ii) In a case in which the notification that is provided to the service provider's designated agent fails to comply substantially with all the provisions of subparagraph (A) but substantially complies with clauses (ii), (iii), and (iv) of subparagraph (A), clause (i) of this subparagraph applies only if the service provider promptly attempts to contact the person making the notification or takes other reasonable steps to assist in the receipt of notification that substantially complies with all the provisions of subparagraph (A).

*Id.*

### C. THE DIGITAL PERFORMANCE RIGHT IN SOUND RECORDINGS ACT OF 1995

The final and most important piece of legislation with respect to our forthcoming suggestions for additional revenue models for artists is the Digital Performance Right in Sound Recordings Act (DPRSRA). This act created a public performance right for artists and record companies in certain sound recordings when they are performed by digital audio transmission.<sup>76</sup> As discussed above, the songwriters and publishers have long been the sole beneficiary of any performance royalties. The DPRSRA sets forth limited rights for the performer and label that issued the recording when the recording is streamed over the internet or broadcasted over digital satellite.

This amendment represents a significant potential (and now actual) new revenue stream for artists in general, but for performers and labels specifically. This change is very important as the authors of this Article believe that the future of the music business will largely be defined by those artists who bypass labels and release their music themselves, with a small team that can leverage the technology in order to create sustainable careers. The DPRSRA, for such an artist, represents a significant revenue growth potential. Such artists will not only receive traditional performance income if they are the writer, but also receive DPRSRA income as the performer and label.

The royalties are collected by a non-profit organization known as SoundExchange.<sup>77</sup> Since 1994, when it first started collecting royalties, SoundExchange has brought in \$147.5 million in royalties for owners of sound

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<sup>76</sup> BRABEC & BRABEC, *supra* note 72, at 364.

<sup>77</sup> See SoundExchange, General Questions, <http://www.soundexchange.com/Category/Faq/> (last visited Mar. 21, 2010). SoundExchange, like other PROs, performs a variety of services for copyright owners:

- collects performance royalties from the statutory licensees;
- collects performance royalties from reciprocal agreements with foreign collecting societies for featured artists and labels;
- collects and processes all data associated with the performance of the sound recordings;
- allocates royalties for the performance of the sound recording based on all of the data collected and processed;
- makes distribution of the featured artist's share directly to the artist;
- makes distribution of the SRCO's [Sound Recording Copyright Owner] share directly to the copyright owner;
- makes distribution of the non-featured artist's share to AFTRA [American Federation of Television and Radio Artists] and AFM's [American Federation of Musicians] Intellectual Property Rights Distribution Fund; and
- provides detailed reports summarizing the titles, featured artists and royalty amounts for each of the sound recordings performed by the statutory licensees.

*Id.*

recordings through the third quarter of 2009.<sup>78</sup> It is likely that royalties have risen since that time and will continue to do so, and thus the digital performance royalty is providing a significant source of revenue to the 3,600 copyright owners who are members of the organization.<sup>79</sup> As significant as these royalties are, it should be considered that the royalty payments for traditional forms of public performances of sound recordings, particularly via terrestrial radio, would form a much larger revenue stream.

Additionally, the DPRSRA represents a potential rationale for normalizing United States performance income to be consistent with the rest of the world, and pay not only the writer and publisher for terrestrial broadcast, but also the performer and label. This would represent yet another increased revenue stream for the new-model musician who acts as his or her own writer, performer, and label. Given the recent reduction in performance income due to the Fairness in Music Licensing Act, it seems all the more imperative to attempt to broaden the DPRSRA to encompass terrestrial performance as well.

### III. RECONFIGURING THE PUBLIC PERFORMANCE RIGHT

In this Part of the Article, we will examine new business models and copyright frameworks, which together with the emerging technologies and other possibilities, might provide a viable foundation for the future of the music business. This Article suggests that the public performance right should be reconfigured and given the full extent of copyright protection accorded to other types of works. Two fundamental changes are needed. First, the Fairness in Music Licensing Act's exemption for small establishments should be abolished. Second, sound recordings should be given the full panoply of public performance rights currently given to musical compositions. This can be accomplished by enactment of one of the versions of the Performance Rights Act.

#### A. REPEAL OF THE FAIRNESS IN MUSIC LICENSING ACT

There are five reasons for repealing the Fairness in Music Licensing Act's exemption of many retail establishments from any obligation to pay public performance royalties. First, this ill-considered and relatively new exemption substantially guts the economic value of the public performance right in these

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<sup>78</sup> See SoundExchange.com, The Latest, <http://soundexchange.com/category/thelatest/> (last visited Mar. 21, 2010).

<sup>79</sup> All figures are from <http://www.soundexchange.com/> (SoundExchange by the Numbers) (last visited Apr. 8, 2010).

retail settings.<sup>80</sup> This point is significant when the music business as a whole is suffering from a long-term trend of lower revenues from the traditional sales of music, which have not been offset by sales in the market for digital downloads. For the music business to have a viable business model, every reasonable revenue stream should be considered.

Second, the Fairness in Music Licensing Act's exemption has been found to undercut the protections given to performance rights under the Berne Convention and TRIPS.<sup>81</sup> The United States adhered to the Berne Convention in 1989. Article 9.1 of the TRIPS Agreement requires WTO member nations, including the United States, to comply with most articles of the Berne Convention. Two articles of the Berne Convention, as incorporated in TRIPS through Article 9.1, are pertinent to the question at hand—Article 11*bis*(1)(iii) and Article 11(1)(ii). First, Article 11*bis*(1) states:

Authors of literary and artistic works shall enjoy the exclusive right of authorizing:

- (i) the broadcasting of their works or the communication thereof to the public by any other means of wireless diffusion of signs, sounds or images;
- (ii) any communication to the public by wire or by rebroadcasting of the broadcast of the work, when this communication is made by an organization other than the original one;
- (iii) the public communication by loudspeaker or any other analogous instrument transmitting, by signs, sounds or images, the broadcast of the work.

In addition, Article 11(1) states:

Authors of dramatic, dramatico-musical and musical works shall enjoy the exclusive right of authorizing:

- (i) the public performance of their works, including such public performance by any means or process;
- (ii) any communication to the public of the performance of their works.

Thus, Articles 11 and 11*bis* of the Berne Convention require signatory nations to provide authors the exclusive rights to have their works broadcast or publicly

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<sup>80</sup> See *infra* notes 105–07 and accompanying text.

<sup>81</sup> See *infra* notes 82–85 and accompanying text.

performed. The question is thus whether the section 110(5) exemptions so undermine the scope of public performance rights in musical works as to contravene the Berne Convention and TRIPS. The amendment essentially exempted approximately two-thirds of all bars/restaurants and nearly one-half of all other retail establishments from an obligation to pay public performance royalties if they complied with the terms of the exemption.<sup>82</sup> In the view of the Register of Copyrights, Marybeth Peters:

An exception this broad appears to be outside the scope of permissible 'small exceptions' to the Berne rights of public performance and communication. Allowing virtually every business to play music to its customers through loudspeakers or audiovisual devices would invite a difficult case against the United States for violating our TRIPS obligations.<sup>83</sup>

In 1999, at the behest of the Irish Music Rights Organisation (IMRO) and the *Groupment Européen des Sociétés d'Auteurs et Compositeurs* (GESAC), European Union nations initiated discussion and eventually requested establishment of a WTO dispute resolution panel to address the treaty compliance issue. The intricacies of that dispute, which focused on whether the United States law could be deemed to fit within a narrow exemption within TRIPS, are beyond the scope of this Article.<sup>84</sup>

In June 2000, a panel of the Dispute Settlement Body of the WTO determined that the TRIPS exemption was not satisfied and that the expanded loopholes of section 110(5) did not comply with the Berne and TRIPS obligations for protection of public performance rights.<sup>85</sup> The United States continues to be in violation of these provisions as this article goes to press.

Third, the preexisting exemption for "homestyle" sound systems receiving broadcasts provided narrowly tailored but adequate protection for small retail businesses. The original form of the statutory exemption is what is now

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<sup>82</sup> See Michael Landau, *Fitting United States Copyright Law into the International Scheme: Foreign and Domestic Challenges to Recent Legislation*, 23 GA. ST. U. L. REV. 847 (2007).

<sup>83</sup> *Id.* at 879–80 (also noting that this view was shared by other government officials familiar with intellectual property law).

<sup>84</sup> See generally *id.* at 884–87; Mary LaFrance, *Congress Trips over International Law: WTO Finds Unfairness in Music Licensing Act*, 11 DEPAUL-LCA J. ART & ENT. L. 397 (2001) (commenting on the WTO dispute); Kenneth D. Crews, *Looking Ahead and Shaping the Future: Provoking Change in Copyright Law*, 49 J. COPYRIGHT SOC'Y U.S.A. 549 (2001); Graeme B. Dinwoodie & Rochelle C. Dreyfuss, *TRIPS and the Dynamics of Intellectual Property Lawmaking*, 36 CASE W. RES. J. INT'L L. 95 (2004) (discussing compliance with international copyright norms).

<sup>85</sup> See Landau, *supra* note 82, at 887–89.

section 110(5)(a). This homestyle exemption can be traced to a Supreme Court decision under the Copyright Act of 1909, *Twentieth Century Music Corp. v. Aiken*,<sup>86</sup> which recognized that the receipt of music broadcast by radio stations into small commercial establishments that have the same types of radio receivers found in typical homes should not give rise to a cause of action for an unauthorized public performance. The original version of section 110(5) thus carried forward this reasonable accommodation of the rights of copyright owners and the listening public into the statutory scheme of the Copyright Act of 1976.

Fourth, the presence of music in retail establishments provides more value than ever to retailers, as the music helps establish the mood and enhances the overall customer experience.<sup>87</sup> Music has always played this role, but common sense suggests that music provides a more important feature in the modern media and cultural environment. Thus, the shopping experience at a store such as Gap or Abercrombie, or the dining experiences at Red Lobster or the local Irish bar, are all enhanced by the music being played in each setting.

Finally, repealing the exemption would help alleviate the decline in revenues suffered by the music industry, particularly when combined with the addition of full public performance rights for sound recordings. The synergistic effect of combining these two changes is likely to provide a more significant foundation for the future of the music business.

#### B. PUBLIC PERFORMANCE RIGHTS FOR SOUND RECORDINGS

Giving the full panoply of protection to sound recordings can perhaps be seen as a more radical departure from past copyright practice, given that sound recordings have not historically been given any “public performance” rights, let alone a robust one. Congress took the first step to provide that protection in the context of digital transmissions.<sup>88</sup>

In today’s media environment, there is no reason the traditional forms of media such as terrestrial radio should receive more generous treatment than the relative newcomers—satellite and other subscription radio and internet streaming of music. Nancy Sinatra, speaking on behalf of musicFIRST, has stated in testimony: “In no other business is the promise of promotion justification for the

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<sup>86</sup> 422 U.S. 151 (1975).

<sup>87</sup> See, e.g., Eric Pfanner, *Music Industry Sees Nightclubs as a New Source of Revenue*, N.Y. TIMES, May 31, 2009, <http://www.nytimes.com/2009/06/01/business/media/01iht-music01.html?src=sch> (“With music available in many more ways, and in many more places, fewer people feel the need to buy CDs. Yet music is increasingly valuable to businesses, . . . encouraging customers, for example, to linger in a store or restaurant, where they buy more items or order extra drinks.”).

<sup>88</sup> See *supra* notes 76–79 and accompanying text.



taking of someone's product."<sup>89</sup> The Department of Commerce has issued a letter in support of the Performance Rights Act. The letter states in part: "Granting copyright owners of sound recordings a full performance right coupled with extending an existing statutory license is an appropriate and workable approach to providing compensation to recording artists and record labels for the transmission of their works by over-the-air broadcast stations."<sup>90</sup> Moreover, providing full protection to sound recordings would bring United States policy in harmony with those of the international community, including the practices of European nations and the rest of the industrialized world.

Perhaps the most frequently asserted reason to bar payment of public performance royalties is that radio airplay can help stimulate sales. In the early life of a sound recording, such as the first few months after its release, there is some validity to this point, but once a song is recognized by the listening public, it is unlikely that airplay alone will significantly increase sales. More fundamentally, the promotional argument has never been given credence in other copyright contexts. For instance, in the early litigation over unauthorized file sharing, the defendant Napster argued that unauthorized downloading of music on the Napster system could actually promote record sales.<sup>91</sup>

Substantial policy reasons warrant giving sound recordings full protection. The distinction between fully protected musical compositions and the limited protection given to sound recordings—though long standing—is unjustified. Both types of creative works fit squarely in the purposes the Framers had in mind in drafting the Copyright Clause: promoting the progress of knowledge and rewarding artistic creativity. Both types of work also deserve protection given the Congressional policy of protecting all works of authors under the Copyright Act.

Some might question whether the two changes proposed here would truly expand incentives for creativity. Part of the objection is that the increased revenues for sound recordings are split between artists and record companies. Of course, in the case of musical compositions, there is also a division of public performance royalties between songwriters and music publishing companies. These splits are the result of contracts and license agreements freely entered into by the parties. Moreover, the central concept in this Article is that the economic pie should be increased, whereas the allocation of that pie among artists, songwriters, music publishers, and record companies is material for another day. Typically, the division of revenues between a record company and an artist will be approximately 85% to the label and 15% to the artist, although there are other

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<sup>89</sup> *Performance Rights Act: Hearing on H.R. 4789 Before the Subcomm. on Courts, the Internet, and Intellectual Property of the H. Comm. on the Judiciary*, 110th Cong. 141 (2008) (statement of Nancy Sinatra).

<sup>90</sup> Letter from Lilly Fu Claffe, Gen. Counsel, Dep't of Commerce (June 10, 2008).

<sup>91</sup> See *A&M Records, Inc. v. Napster, Inc.*, 239 F.3d 1004 (9th Cir. 2001).

splits typically provided for in most record contracts.<sup>92</sup> Indeed, the very issue of how to divide digital download revenues was recently litigated in *The Youngbloods v. BMG Music*.<sup>93</sup> In that case, the record company contended that digital download revenues are the equivalent of CD sales, while the artist contended it was licensing revenue for the master recording, which would be subject to the more favorable 50% allocation for this type of licensing under the parties' record contract. The court ultimately held that the download revenues are tantamount to CD and record sales, and do not entail licensing of the master recording. In the case of public performance royalties, however, it is fairly clear that the record company share would be smaller under the licensing revenue split. Thus, artists would receive a substantial portion of any additional revenue generated by the proposed overhaul suggested here.

More fundamentally, some might question whether the increased royalties that would result from a reinvigorated public performance right are sufficiently significant in magnitude to offset lost revenues from music sales. Strictly speaking, the public performance royalties might not and indeed probably would not reach this order of magnitude. But the public performance royalties would clearly bolster overall revenues in the music business. Indeed, the powerful radio industry's vehement opposition to such measures is recognition that the royalties would be economically significant. The radio industry—which is now largely made up of large chains of broadcasters—has a website<sup>94</sup> and a heavily orchestrated radio campaign on the issue. Conveniently, the radio stations can use their own airtime on public airwaves to lobby against public performance rights, while artists and record companies do not have access to a similarly powerful soapbox.

One indicator of the importance of public performance rights is the recognition of its greater role given the shrinkage in record sales.<sup>95</sup> In his article, Pfanner suggests that public performance royalties are growing in importance:

As the music industry searches for a way to make up for plunging sales of compact discs, it is pushing to generate new revenue, not

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<sup>92</sup> The range of royalties received by artists varies considerably. Some new artists receive as little as 10% of CD sales, while superstars can receive 18%–20% or more. See generally DONALD S. PASSMAN, *ALL YOU NEED TO KNOW ABOUT THE MUSIC BUSINESS* 86 (6th ed. 2006).

<sup>93</sup> No. 07 CV 2934 (GBD), 2008 WL 919617 (S.D.N.Y. Mar. 28, 2008); see also *Allman v. Sony BMG Music Entm't*, No. 06 CV 3252 (GBD), 2008 WL 2477465 (S.D.N.Y. June 18, 2008) (addressing a similar contention by the Allman Brothers and also concluding that the traditional CD royalty split should be applied).

<sup>94</sup> See Save Free Radio, <http://www.saveyourradio.org> (last visited Apr. 8, 2010).

<sup>95</sup> See Pfanner, *supra* note 87.

just from Australian clubs but also from Italian restaurants, Chinese karaoke bars and U.S. radio stations, as well as fitness centers, retail stores and myriad other businesses that play music, around the world.

“This has always been seen in the past as a secondary source of revenue,” said John Kennedy, chief executive of the International Federation of the Phonographic Industry, a London-based trade group for the major record labels. “But with the declines in revenue from physical sales in recent years, it has become more and more important.”

Royalty payments to the record industry from so-called performance rights rose 16 percent last year, according to the federation, even as overall music sales fell by 8 percent. The federation is coordinating a global campaign to double the amount raised from performance rights over the next decade.<sup>96</sup>

With regard to the amount of public performance royalties that might be received if the proposals made here are put into place, there is some information to suggest that the royalties would be substantial.<sup>97</sup> Once again, the synergistic effect of eliminating most retail exemptions with expanded protection to sound recordings should increase the impact of the reassessment of current law. Mechanisms are already in place for the collection, monitoring, and disbursement of public performance royalties through the PROs already in existence—ASCAP, BMI, SESAC, and SoundExchange.<sup>98</sup> At the same time, there are also frameworks in place for the determination of reasonable royalty rates, such as the Copyright Royalty Board.<sup>99</sup>

Some commentators have suggested that the industry should seek revenue from other sources, such as live performances. Concert revenues have indeed increased by 7.8% from 2007 to \$4.2 billion, though this increase is primarily a result of higher ticket prices.<sup>100</sup> The average ticket price (based on the 100 top-grossing shows) was \$66.90, an 8% increase from 2007, while the number of

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<sup>96</sup> *Id.*

<sup>97</sup> Consider that SoundExchange has collected and distributed a net amount of \$147.5 million in royalties in 2009 from digital public performance licensing alone. *See supra* note 78 and accompanying text.

<sup>98</sup> *See supra* notes 9–19 and accompanying text (discussing PROs).

<sup>99</sup> *See* Copyright Royalty Board, <http://www.loc.gov/crb> (last visited Apr. 8, 2010).

<sup>100</sup> Gallo, *supra* note 49.

tickets sold fell slightly.<sup>101</sup> The top-selling concert tours of the year were Madonna (grossing \$105.3 million), Celine Dion (\$94 million), the Eagles (\$73.4 million), Kenny Chesney (\$72.2 million), and Bon Jovi (\$70.4 million).<sup>102</sup>

But live performances are not the panacea. Highly successful bands earn the lion's share of concert revenue, and the cost and demands of touring prevent all but the most hardy bands from touring indefinitely. To place these sorts of constant demands on performers as a condition for earning a decent living seems unreasonable. Perhaps it would be analogous to slashing the salaries of all law professors by 50%, and then pointing out that the professors have enough free time to make up the difference by consulting or practicing law. Moreover, a recent analysis suggests that the live performance business model cannot sustain a diverse and thriving music business.<sup>103</sup>

Some might suggest that reconfiguring public performance rights would cause undue hardship to the radio industry. It is questionable, however, whether the radio industry as a whole is struggling, particularly the large chain radio stations that largely play the same lists of songs and have very few production costs associated with their many individual stations. Smaller stations can and would certainly pay far smaller amounts of royalties (if any, depending on the scope of the legislation), just as is true today in the case of performance royalties for musical compositions. Clear Channel, the largest radio chain, owns 894 stations (including 272 stations in the top fifty radio markets), as of December 31, 2008.<sup>104</sup> Other broadcasting chains control large numbers of the large commercial radio stations that would pay the lion's share of (if not all, depending on the final language of the amendment) public performance royalties for sound recordings.

Finally, some might question whether the proposals suggested here are politically feasible. Clearly, enactment of these reforms would require congressional action and presidential approval. In the current congressional session, Representative John Conyers has proposed a bill, H.R. 848 (also known as the Performance Rights Act) addressing public performance rights in sound recordings, and the bill has forty-nine co-sponsors as of February 13, 2010.<sup>105</sup> Rep. Conyers and others contend that providing greater protection for sound recordings is a civil rights issue, and indeed a strong case can be made that the bill

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<sup>101</sup> *Id.*

<sup>102</sup> *Id.*

<sup>103</sup> See Schultz, *supra* note 37, at 759–61 (questioning the extent to which live performance revenue can sustain a diverse and robust music business).

<sup>104</sup> CC Media Holdings, Inc., Annual Report (Form 10-K), at 4 (Feb. 27, 2009), available at <http://www.clearchannel.com/Investors/Documents/320.pdf>.

<sup>105</sup> Open Congress, H.R. 848: Performance Rights Act, <http://www.opencongress.org/bill/111-h848/show> (last visited Apr. 8, 2010).

would provide protections for musical artists—who are often struggling financially and a significant percentage of whom are minorities—and obtain compensation from the huge corporate conglomerates that own most of the large radio stations in the United States.

In July 2009, the NAACP passed a resolution at their centennial convention endorsing performance royalties for musicians under the Performance Rights Act. The resolution reportedly states:

“H.R. 848 ends a decade’s old, outdated exemption from the copyright laws that allows radio stations to exploit African-American and other musicians by not paying them for their music when it airs on radio,” reads the resolution. “Every modern country requires radio stations to compensate musicians, and copyright law requires that artists be compensated in every other circumstance – when their music is played on satellite radio, downloaded from iTunes or even played at a local bar. H.R. 848 is about ending the exploitation of African-American musicians and paying them a fair wage for their work.”

The resolution concludes, “H.R. 848 is the only source of income for many older performers. They didn’t write the songs – but they brought them to life. Without the performers, these songs would be nothing but words on a page. And for many of them, radio performances are their only source of potential income. Therefore be it resolved that the NAACP endorses and supports H.R. 848, The Civil Rights for Musicians Act of 2009 and call on the NAACP units and members throughout the country to contact its Congressional members and Senators and the President of the United States to pass this measure into law so America’s performers can receive the respect they so long deserve.”<sup>106</sup>

In its present form, H.R. 848 exempts small radio stations, and thus would only have an impact on large, commercially successful stations and chains. According to Sean Glover of the musicFIRST Coalition, a musician advocacy organization,

The NAACP recognizes that many black musicians are penniless in old age because Radio One and Clear Channel don’t pay royalties.

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<sup>106</sup> *NAACP Passes Resolution for Radio Royalties*, FMQB, July 15, 2009, <http://www.fmqb.com/article.asp?id=1414031>.

Performance rights is a civil rights issue, it is a workers' rights issue. . . . This civil rights for musicians legislation guarantees fair pay for musicians. This is a rebuke of Radio One and Clear Channel for exploiting musicians and smearing members of the Congressional Black Caucus.<sup>107</sup>

#### IV. CONCLUSION

Musicians and songwriters are the creative sources for the enjoyment of music, and many people view live and recorded music as an integral part of their lives and experiences. Record companies and music publishers, though viewed perhaps less sympathetically by the general public, provide a still-important role in the marketing and distribution of music. Moreover, as many artists are now considering the option of providing their own record label, they stand to benefit directly from any reconfiguration of the scope of public performance rights. All of these important segments of the music business have been struggling in the last decade. There is no panacea for all the problems faced by this important field of creative endeavor, but today's legal and business environment seems to provide the proper occasion for a reexamination of the American concept of the public performance right.

Unlike other industrialized nations, the United States does not offer comprehensive protections for public performance rights. In particular, sound recordings receive no protection except in the narrow context of digital transmission of music. Moreover, because of the so-called Fairness in Music Licensing Act, both sound recordings and musical compositions receive very limited public performance royalties from many business establishments, including large chain stores and restaurants, that benefit from performances of music in their venues. This broad exemption practically guts the public performance right in these retail settings, particularly with regard to bars and restaurants, and has already been found to violate international law. For the United States to continue delaying any restoration of the law to its proper and lawful state not only flouts binding international law, but also calls into question the American commitment to protection of intellectual property rights by other nations. Perhaps the new Administration and current Congress will consider this international law problem, together with the reasonable argument that the civil rights of musicians would be protected if the law were amended in the manner suggested here.

It is thus time to reconfigure the public performance right by placing sound recordings on a level playing field with musical compositions, thereby giving

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<sup>107</sup> *Id.*

musicians and record companies the same protections long given to composers and music publishers. This action, perhaps through H.R. 848 or another similar bill, will provide struggling musicians and troubled record companies an important new source of revenue. Further, by repealing the Fairness in Music Licensing Act, Congress can bring the United States back into compliance with the Berne Convention and restore public performance rights to the sort of robust protection that other industrialized nations clearly recognize as valuable for supporting a vibrant music business. Making these two changes would fundamentally reconfigure copyright law as it applies to music. There is probably no better time to do so.