

INTERNATIONAL COPYRIGHT: DOMESTIC BARRIERS TO UNITED STATES PARTICIPATION IN THE ROME CONVENTION ON NEIGHBORING RIGHTS*

I. INTRODUCTION

The majority of the world's non-socialist countries recognize a performer's right to receive royalties from radio and television broadcasts of the performer's sound recordings.¹ This performer's right, also called a "neighboring right" because it involves phonograms, performances, and broadcasts of copyrighted works,² is extended in those countries to protect featured performers, accompanying orchestral musicians, and producers.³ Performers' rights are not recognized in the United States.⁴ Instead, the United States grants royalty rights only to the owner of the copyright,⁵ which precludes a non-owning performer from sharing in broadcast revenues.

The United States position on neighboring rights has prevented its participation in the International Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organi-

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¹ See generally 1-3 UNESCO, COPYRIGHT LAWS AND TREATIES OF THE WORLD (Supp. 1978) (a three volume compilation of all domestic copyright laws of the countries of the world as well as major multilateral conventions). As many as fifty-eight countries now recognize performers' rights in sound recordings. See *Commercial Use of Sound Recordings Amendment: Hearings on H.R. 1805 Before the Subcomm. on Courts, Civil Liberties, and the Administration of Justice of the House Comm. on the Judiciary*, 97th Cong., 1st Sess. 41 (1981) (statement of Stanley M. Gortikov).

² See Ulmer, *The Rome Convention for the Protection of Performances, Producers of Phonograms and Broadcasting Organizations, Part II*, 10 BULL. COPYRIGHT SOC'Y 165, 165 (1963) [hereinafter cited as Ulmer II].

³ See generally Oler, *Performance Rights in Foreign Countries*, reprinted in SUBCOMM. ON COURTS, CIVIL LIBERTIES AND THE ADMIN. OF JUSTICE OF THE HOUSE COMM. ON THE JUDICIARY, 95TH CONG., 2D SESS., PERFORMANCE RIGHTS IN SOUND RECORDINGS 178, 259-329 (Comm. Print 1978) [hereinafter cited as COMMITTEE PRINT].

⁴ See 17 U.S.C. § 114 (1976) (scope of exclusive rights in sound recordings).

⁵ The "copyright owner" is to receive royalties for phonorecords made and distributed after being identified in the registration or other public records of the United States Copyright Office. 17 U.S.C. § 115(c)(1) (Supp. V 1981).

zations (Rome Convention),⁶ under which artists of member countries receive royalties from broadcasts of their works in other member countries.⁷ The absence of United States membership deprives the world's recording artists of a great amount of potential revenue in the United States, as well as domestic artists' potential income from foreign airplay.⁸ The current recession in the music industry⁹ has adversely affected the performers' revenues from record sales worldwide;¹⁰ though broadcasts of those records continue in the United States, the vast majority of performing artists receive nothing from the enjoyment they bring to the American public through this airplay.¹¹

This Note deals with the issue of neighboring rights in the United States and the impact that the resolution of that issue will have on international copyright status in the United States. The Note focuses on section 114(d) of title 17 of the United States Code¹² (hereinafter Copyright Act), which, when revised in 1976, mandated a resolution of the performers' rights issue by 1978.¹³

⁶ International Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organizations, Oct. 26, 1961, 496 U.N.T.S. 43, *reprinted in* 3 UNESCO, COPYRIGHT LAWS AND TREATIES OF THE WORLD (Supp. 1978) [hereinafter cited as Rome Convention]. The Rome Convention, also referred to as the "Neighboring Rights Convention," currently has twenty-three members. They are Austria, Brazil, Chile, Columbia, Congo, Costa Rica, Czechoslovakia, Denmark, Ecuador, El Salvador, Fiji, Federal Republic of Germany, Guatemala, Ireland, Italy, Luxembourg, Mexico, Niger, Norway, Paraguay, Sweden, United Kingdom and Uruguay. See 18 COPYRIGHT: MONTHLY REV. WORLD INTELL. PROP. ORGANIZATION (WIPO) 13 (1982).

⁷ See Rome Convention, *supra* note 6, art. 12.

⁸ It has been estimated that American performers could receive over \$13 million in annual foreign income in addition to an equal amount in revenue from United States airplay. See *Performance Rights Amendment of 1977: Hearings Before the Subcomm. on Courts, Civil Liberties, and the Administration of Justice of the House Comm. on the Judiciary*, 95th Cong., 2d Sess. 180 (1978) [hereinafter cited as 1978 Danielson Amendment Hearings].

⁹ See, e.g., STANDARD AND POOR'S INDUSTRY SURVEYS L-32 (Jan. 1982); *Radio Stations in U.S. down 33.6% in Pre-Tax Profits for 1980*, BILLBOARD, Feb. 13, 1982, at 4. The recession is not limited to the United States. See, e.g., *French Sales Growth in Doubt: Phonogram President Cites Freeze on Prices, Wages*, BILLBOARD, Oct. 9, 1982, at 53; *U.K. LP, Tape Deliveries Dive*, BILLBOARD, Dec. 4, 1982, at 9.

¹⁰ A major cause of the decline in worldwide record sales is home taping and record piracy. See STANDARD AND POOR'S INDUSTRY SURVEYS, *supra* note 9, at L-34; *Aussies Renew Tape Debate*, BILLBOARD, Aug. 7, 1982, at 1, 58. For a discussion of the international ramifications of record piracy, see Note, *Unauthorized Duplication of Sound Recordings: Transnational Problem in Search of a Solution*, 14 VAND. J. TRANSNAT'L L. 399 (1981).

¹¹ See *infra* note 13.

¹² 17 U.S.C. § 114(d) (Supp. V 1981).

¹³ The current United States Copyright Act does not resolve the performers' rights issue. Instead, it defers the resolution of the issue until January 3, 1978. At present, the statute reads:

The prospects of Rome Convention membership for the United States, when the long-overdue resolution is completed, will be examined in light of post-1976 domestic proposals and models from foreign countries. Finally, possible solutions will be proposed which would meet the minimum requirements of the Rome Convention and yet possibly satisfy the factions in the United States which oppose the recognition of neighboring rights.

II. INTERNATIONAL COPYRIGHT: AN HISTORICAL OVERVIEW OF UNITED STATES NON-CONFORMITY

The foundation for all European copyright law was the English Statute of Anne,¹⁴ which, in 1710, gave the author of a literary work the exclusive right to make copies of that work for a twenty-one year period.¹⁵ The statute, which was premised upon formalities of notice and deposit,¹⁶ was the first copyright legislation,¹⁷ and was used as a model for European legislation in Denmark (1741) and France (1793).¹⁸

The United States also used the Statute of Anne as a copyright

On January 3, 1978, the Register of Copyrights, after consulting with representatives of owners of copyrighted materials, representatives of the broadcasting, recording, motion picture, entertainment industries, and arts organizations, representatives of organized labor and performers of copyrighted materials, shall submit to the Congress a report setting forth recommendations as to whether this section should be amended to provide for performers and copyright owners of copyrighted material any performance rights in such material. The report should describe the status of such rights in foreign countries, the views of major interested parties, and specific legislative or other recommendations, if any.

Id. Though the report was submitted, no action has been taken to resolve the performers' rights issue.

¹⁴ Statute of Anne, 8 Anne c. 19 (1710).

¹⁵ *Id.* Works already in existence at the time of the passage of the statute were given protection for 14 years.

¹⁶ Protection was conditioned upon the author affixing a notice to the work indicating that the work was his creation, and the deposit of the work into certain British libraries. See A. LATMAN, *THE COPYRIGHT LAW*, HOWELL'S COPYRIGHT LAW REVISED AND THE 1976 ACT 3 (5th ed. 1979).

¹⁷ E. PLOMAN & L. HAMILTON, *COPYRIGHT* 12 (1980), citing P. RECHT, *LE DROIT D'AUTEUR: UNE NOUVELLE FORME DE PROPRIÉTÉ* 22 (1969). Prior to this time there was limited judicial recognition of international protection of authors' rights in other European countries. Protection was granted in France as early as 1579, but only if the foreigner's work was published within that country. In Germany, A Decree of the Electors of Saxony, dated February 28, 1686, gave foreign publications protection equivalent to national publications. 1 S. LADAS, *THE INTERNATIONAL PROTECTION OF LITERARY AND ARTISTIC PROPERTY* § 6, at 16 (1938).

¹⁸ 1 S. LADAS, *supra* note 17, § 7, at 18-19.

law model.¹⁹ The United States Constitution authorized Congress to "promote the progress of science and the useful arts by securing for limited times to authors and inventors the exclusive right to their respective writings and discoveries."²⁰ Early United States enactments granted protection solely to United States citizens,²¹ and were premised on copyright being a limited economic monopoly granted to authors and composers followed by a free use of the composition by the general public.²²

European nations, which viewed copyright as an author's right or moral right rather than an economic property right,²³ began to grant international protection through bilateral agreements during the early nineteenth century.²⁴ These agreements were premised upon national treatment, under which holders of copyright were to be treated in a member country as if they were nationals of that country.²⁵ The United States was unable to participate in these reciprocity arrangements because the United States copyright laws only protected United States citizens.²⁶

In 1896, nine European nations joined in the first international copyright convention, the Berne Convention,²⁷ which established the Berne Union. The Berne Convention was premised upon the idea of national treatment and abolished the formalities of notice

¹⁹ A. LATMAN, *supra* note 16, at 5. For the full statutes of the former colonies under the Articles of Confederation, see COPYRIGHT OFFICE, COPYRIGHT OFFICE BULL. NO. 3 COPYRIGHT ENACTMENTS: LAWS PASSED IN THE UNITED STATES SINCE 1783 RELATING TO COPYRIGHT 1-21 (1963).

²⁰ U.S. CONST. art. 1, § 8, cl. 8.

²¹ See, e.g., Copyright Act of 1790, ch. 15, 1 Stat. 124; Copyright Act of 1831, ch. 16, 4 Stat. 436.

²² E. PLOMAN & L. HAMILTON, *supra* note 17, at 16.

²³ "It has become traditional to differentiate between the European and American philosophy of copyright by alleging that Europeans think that copyright is an inherent or natural right of the individual author, and that Americans think that copyright is a monopoly granted to stimulate artistic creation." A. BOGSCH, *THE LAW OF COPYRIGHT UNDER THE UNIVERSAL CONVENTION* 3 (1968); see also 1 S. LADAS, *supra* note 17, §§ 1-5, at 1-12.

²⁴ The earliest international agreements in the field of copyright were a series of 32 bilateral agreements between Prussia and other German states enacted between 1827 and 1829. The main premise in these, as well as later bilateral agreements, was that a copyright would be recognized by one of the parties if it originated in the territory of the other party. M. BOGUSLAVSKY, *COPYRIGHT IN INTERNATIONAL RELATIONS: INTERNATIONAL PROTECTION OF LITERARY AND SCIENTIFIC WORKS* 54 (1973).

²⁵ *Id.*

²⁶ See generally 1 S. LADAS, *supra* note 17, § 19, at 49-50 (listing all international bilateral agreements in force in 1886).

²⁷ The Berne Convention For the Protection of Literary and Artistic Works, revised at Brussels, June 26, 1948, 331 U.N.T.S. 218, reprinted in 3 UNESCO, *COPYRIGHT LAWS AND TREATIES OF THE WORLD* (Supp. 1978) [hereinafter cited as Berne Convention].

and deposit, except for formalities required by the author's country of origin.²⁸ By this time the United States had granted protection to non-citizens;²⁹ however, it was precluded from Berne Convention membership because of rigid United States formalities of entry of title, notice, deposit, and United States manufacture.³⁰

In 1908, the Berne Union met at Berlin to revise the earlier text.³¹ The revised text included a provision granting musical composers the right to authorize the mechanical adaptation and public execution of their works.³² Thus, the Berlin revision recognized a composer's right in sound recordings,³³ and foreshadowed the emergence of "mechanical adaptation" as an important element deserving copyright protection.

The United States Copyright Act of 1909³⁴ fell short of meeting the requirements for Berne Convention membership because of continued United States insistence on traditional statutory formalities.³⁵ Despite legislative attempts to conform United States copyright laws to the Berne Convention during the early twentieth century,³⁶ the United States was unable to join the Berne Union.³⁷ United States membership was further precluded by the 1928 Rome Conference, in which the Berne Union granted a "moral

²⁸ 1 S. LADAS, *supra* note 17, § 38, at 83-84.

²⁹ See Copyright Act of 1891, ch. 565, 26 Stat. 1106.

³⁰ A. LATMAN, *supra* note 16, at 7. The manufacturing clause linked United States copyright protection to the "manufacture" of copies in the United States; this prohibited general importation of foreign-manufactured copies. *Id.* at 266.

³¹ 1 S. LADAS, *supra* note 17, § 40, at 92-94.

³² *Id.*

³³ *Id.*

³⁴ Act of Mar. 4, 1909, ch. 320, 35 Stat. 1075 (amended 1976) [hereinafter cited as Copyright Act of 1909].

³⁵ A. LATMAN, *supra* note 16, at 10. The Act of 1909 did advance an important international aspect of United States copyright law by exempting books of foreign origin in foreign languages from the requirement of being reprinted in the United States. See Copyright Act of 1909, *supra* note 34, § 16, 35 Stat. at 1079.

³⁶ Revisions during this period included the easing of the requirements of the deposit of works by foreign authors published abroad (Copyright Act of 1914, ch. 47, 38 Stat. 311), and a partial elimination of the manufacturing clause (Copyright Act of 1926, ch. 743, 44 Stat. 818).

³⁷ Citizens of the United States still were able to take advantage of the Berne Convention's provisions in an indirect way. Under article 6(1) of the Berne Convention, authors who were not nationals could obtain Berne protection if their works were first published in a member country. This led United States publishers to publish works simultaneously in both the United States and Canada (a former Berne Union Member), and thus, obtain the benefits of Berne Convention protection without Berne Convention obligations. A. HANSON, OMNIBUS COPYRIGHT REVISION 11 (1973).

right" to authors³⁸ and gave musical composers the exclusive right to authorize public radio broadcasts of their works.³⁹

After World War II, the United States led a new movement toward a second multilateral international copyright convention based upon a conciliation of the principles of the Berne Convention and United States copyright law.⁴⁰ This approach resulted in the Universal Copyright Convention,⁴¹ which offered less protection to the artist than the Berne Convention.⁴² The United States ratification of the Universal Copyright Convention ended a long history of non-participation in international copyright conventions; however, the United States denial of moral rights to authors and performers was to serve as a barrier to its further international cooperation in the area of neighboring rights.⁴³

³⁸ Berne Convention, *supra* note 27, art. 6. This "moral right," which sharply contrasted with the philosophy in the United States of copyright being an economic monopoly, gave the author the "right to claim authorship of the work and to object to any distortion, mutilation, or other modification of, or other derogatory action in relation to, the said work, which would be prejudicial to his honor or reputation." For a thorough treatment of the "moral right" concept, see Strauss, *The Moral Right of the Author*, 4 AM. J. COMP. L. 506 (1955); Katz, *The Doctrine of Moral Right and American Copyright Law—A Proposal*, 24 SO. CAL. L. REV. 375 (1951); and Roeder, *The Doctrine of Moral Right: A Study in the Law of Artists, Authors, and Creators*, 53 HARV. L. REV. 554 (1940). One writer has suggested that the non-recognition of moral rights by the United States is not necessarily a bar to Berne Convention accession. See Gabay, *The United States Copyright System and the Berne Convention*, 26 BULL. COPYRIGHT SOC'Y 202, 216 (1978).

³⁹ Berne Convention, *supra* note 27, art. 6.

⁴⁰ A. LATMAN, *supra* note 16, at 10.

⁴¹ Universal Copyright Convention, *ratified* Sept. 6, 1952, 6 U.S.T. 2731, T.I.A.S. No. 3324, 216 U.N.T.S. 132, *revised* July 24, 1971, 25 U.S.T. 1341, T.I.A.S. No. 7868. For a summary of the efforts by non-Berne Union countries to draft the Universal Copyright Convention to ensure United States participation, see Wells, *The Universal Copyright Convention and the United States: A Study of Conflict and Compromise*, 8 COPYRIGHT L. SYMP. (ASCAP) 69, 86-88 (1957).

⁴² Compare Universal Copyright Convention, *supra* note 41, art. IV(2)(a), 25 U.S.T. at 1347 (minimum duration of protection is life of author plus 25 years) with Berne Convention, *supra* note 27, art. 7 (minimum duration of protection is life of author plus 50 years); compare Universal Copyright Convention, art. III(1), 25 U.S.T. at 1345-46 (notice is necessary for protection) with Berne Convention, art. 18 (notice and deposit are not necessary for protection); compare Universal Copyright Convention (no provisions on moral rights) with Berne Convention, art. 6 (moral rights expressly recognized). See generally Note, *Abandon Restrictions, All Ye Who Enter Here! The New United States Copyright Law and the Berne Convention*, 9 N.Y.U. J. INT'L L. & POL. 455, 460 (1977); McConnell, *The Effect of the Universal Copyright Convention on other International Conventions and Arrangements*, 9 COPYRIGHT L. SYMP. (ASCAP) 32, 61 (1958).

⁴³ See generally Katz, *Legislative History of Performance Rights in Sound Recordings*, reprinted in COMMITTEE PRINT, *supra* note 3, at 28-58.

III. NEIGHBORING RIGHTS IN SOUND RECORDINGS

A. *The Rome Convention of 1961*

In the decade following the Berne Convention's recognition of moral rights for authors, many European countries granted protection to performers by multilateral agreements.⁴⁴ The group initiating a movement towards a multilateral convention was the International Institute for Unification of Private Law, which attempted to draft initial proposals on performers' rights at a meeting in Samaden, Switzerland in 1939.⁴⁵ World War II interrupted the work of the Institute, but a new meeting was called in Brussels in 1948.⁴⁶ The Brussels Conference sparked the proposals of the 1951 Rome Draft, a product of European experts,⁴⁷ which lay dormant from 1951 until 1960.

In 1960, representatives from UNESCO, the Berne Union, and the International Labor Organization produced the Hague Draft, which was to form the basis for the Rome Convention of 1961.⁴⁸ Both the Hague Draft and the Rome Convention adopted a system based on national treatment of performers, producers, and broadcast organizations.⁴⁹ Minimum rights were given to these protected parties, with a single equitable remuneration to be paid to performers.⁵⁰ The Rome Convention was linked to the two major international copyright conventions, the Berne Convention⁵¹ and the Universal Copyright Convention,⁵² with membership in either being a prerequisite to joining the Rome Agreement.⁵³ This was done to promote further cooperation in the field of international copyright and to ensure that countries hoping to benefit from the Rome Convention also would undertake the obligations included in the

⁴⁴ See E. PLOMAN & L. HAMILTON, *supra* note 17, at 20.

⁴⁵ Ulmer, *The Rome Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organizations* (pt. 1), 10 BULL. COPYRIGHT SOC'Y 91, 91 (1963) [hereinafter cited as Ulmer I].

⁴⁶ *Id.*

⁴⁷ *Id.*

⁴⁸ *Id.* at 92-93. During the period 1951-1960 these three factions were divided into opposing camps; the International Labor Organization preferred a clear distinction between copyright and neighboring rights, while the Berne Union and UNESCO wanted neighboring rights to be an extension of copyright. E. PLOMAN & L. HAMILTON, *supra* note 17, at 68.

⁴⁹ See Rome Convention, *supra* note 6, art. 2(1).

⁵⁰ *Id.* art. 12.

⁵¹ Berne Convention, *supra* note 27.

⁵² Universal Copyright Convention, *supra* note 41.

⁵³ Rome Convention, *supra* note 6, art. 24(2).

agreement.⁵⁴

This Convention, sometimes called the "Neighboring Rights" Convention, provides that copyright owners will not be affected by the recognition of performers' rights.⁵⁵ Protected parties include performers,⁵⁶ producers,⁵⁷ and broadcast organizations.⁵⁸ The Convention, while providing a single remuneration, takes no position on whether that remuneration is to be distributed to the performers individually or to a group which will in turn disburse proceeds to performers.⁵⁹ This determination is to be made in accordance with the domestic laws of the member country.⁶⁰

The performer is given minimum rights of performance⁶¹ and is protected against unconsented broadcasts of his performances.⁶² In addition, the performer is protected from unauthorized fixation⁶³ of his performances,⁶⁴ thereby preventing the taping of his works from a live performance and then sold without permission. Domestic law controls areas of broadcasts to which the performer has consented⁶⁵ and governs the use of fixations by broadcasting organizations.⁶⁶ Domestic law also regulates the disbursement of remuneration among performers if several performers participate in the same performance.⁶⁷

The membership of the Rome Convention has grown steadily during the past two decades, but still does not include the United

⁵⁴ Ulmer II, *supra* note 2, at 168.

⁵⁵ Rome Convention, *supra* note 6, art. 1. For a summary of the protection granted under the Rome Convention, see Dittrich, *The Practical Application of the Rome Convention*, 26 BULL. COPYRIGHT SOC'Y 287 (1979).

⁵⁶ Rome Convention, *supra* note 6, art. 7.

⁵⁷ *Id.* art. 10 (producers have the right to authorize reproductions of the work they produce).

⁵⁸ *Id.* art. 13 (broadcast organizations have the right to rebroadcast their broadcasts, the right to fixate those works, and the right to reproduce those works).

⁵⁹ *Id.* art. 12.

⁶⁰ *Id.*

⁶¹ The performer is protected from unconsented broadcasts of his performance, unconsented recordings of his performance, and any unconsented reproduction of the recording of his performance. *Id.* art. 7(1).

⁶² *Id.* art. 7(1)(a).

⁶³ The fixation of a work in a tangible medium of expression occurs "when its embodiment in a copy or phonorecord, by or under the authority of the author, is sufficiently permanent or stable to permit it to be perceived, reproduced, or otherwise communicated for a period of more than transitory duration." 17 U.S.C. § 101 (Supp. V 1981).

⁶⁴ Rome Convention, *supra* note 6, art. 7(1)(c).

⁶⁵ *Id.* art. 7(2)(1).

⁶⁶ *Id.* art. 7(2)(2).

⁶⁷ *Id.* art. 8.

States.⁶⁸ There have been some difficulties in arrangements of remuneration,⁶⁹ but these problems are administrative and do not reflect a major flaw in the Convention's provisions.⁷⁰ The Convention is expected to grow in membership, especially in light of the large number of countries recognizing similar rights for performers.⁷¹

B. *The Battle in the United States Over Neighboring Rights in the 1976 Copyright Enactment*

The position of the United States on neighboring rights has been one of caution and non-conformity, highly reminiscent of its overall international copyright history.⁷² The United States Constitution extends copyright protection only to "authors."⁷³ Narrow interpretations by Congress and the judiciary on the meaning of the term "authors" have excluded musical performers⁷⁴ and have helped prevent United States membership in the Rome Convention.⁷⁵

The non-participation of the United States in the Rome Convention is not the result of a lack of effort by the legislature.⁷⁶ The first efforts to protect performers were various bills introduced in Congress during the 1930's.⁷⁷ These bills, like further legislation proposed during the next two decades,⁷⁸ remained in committee

⁶⁸ See 18 COPYRIGHT: MONTHLY REV. OF THE WORLD INTELL. PROP. ORGANIZATION (WIPO) 13 (1982) (listing Rome Convention membership).

⁶⁹ See Dittrich, *supra* note 55, at 307.

⁷⁰ *Id.*

⁷¹ See E. PLOMAN & L. HAMILTON, *supra* note 16, at 72.

⁷² See *supra* notes 14-43 and accompanying text.

⁷³ U.S. CONST. art. 1, § 8, cl. 8.

⁷⁴ See generally Oler, *Legal Analysis*, reprinted in COMMITTEE PRINT, *supra* note 3, at 9-12.

⁷⁵ Ulmer I, *supra* note 45, at 99-100.

⁷⁶ The House and Senate have had various bills introduced since 1936 which would have recognized a performing artist's rights. See Lang, *Performance and the Right of the Performing Artist*, 21 COPYRIGHT L. SYMP. (ASCAP) 69, 75-80 (1974). See also Katz, *supra* note 3.

⁷⁷ A 1936 proposal by Representative Daly would have treated the composer and performer as equals, with performers granted exclusive rights to public performance and duplication. See H.R. 10632, 74th Cong., 2d Sess. (1936). A second proposal in the same year, made by Representative Sirovich would have made performers' protection contingent upon the written consent of the copyright owner. See H.R. 11420, 74th Cong., 2d Sess. (1936). These proposals, as well as a Senate proposal similar to the Sirovich bill, were not acted upon. A revised Daly bill was submitted in 1939, but met the same fate as his earlier proposal. See Lang, *supra* note 76, at 77. See also S. 2240, 75th Cong., 1st Sess. (1937); H.R. 926, 76th Cong., 1st Sess. (1939) (texts of the 1937 and 1939 proposals, respectively).

⁷⁸ See H.R. 7173, 77th Cong., 2d Sess. (1942); H.R. 1270, 80th Cong., 1st Sess. (1947);

and did not reach the floor for a vote.⁷⁹ The judiciary attempted to deal with performers' rights by applying the common law of unfair competition, but the decisions did not resolve the performers' rights issue.⁸⁰

In the early 1960's the United States Congress began to formulate a copyright revision to replace the Copyright Act of 1909.⁸¹ This revision gave parties interested in performers' rights, those knowledgeable of prior judicial and legislative attempts as well as the experience of the American Delegation at the Rome Convention,⁸² the opportunity to incorporate performers' rights into

H.R. 2464, 82d Cong., 1st Sess. (1951).

⁷⁹ Lang, *supra* note 76, at 77.

⁸⁰ In 1937, the Pennsylvania Supreme Court, deciding *Waring v. WDAS Broadcasting Station, Inc.*, 327 Pa. 433, 441, 194 A. 631, 635 (1937), recognized a performer's interpretation as an artistic creation in which he had a property right:

A musical composition in itself is an incomplete work; the written page evidences only one of the creative arts which are necessary for its enjoyment; it is the performer who must consummate the work by transforming it into sound. If, in so doing, he contributes by his interpretation something of novel intellectual or artistic value, he has undoubtedly participated in the creation of a product in which he is entitled to a right of property, which in no way overlaps or duplicates that of the author in a musical composition

The Court granted the plaintiff injunctive relief to prevent unauthorized broadcasts of music when the label on the records read "Not Licensed for Radio Broadcasts." A federal district court in North Carolina supported that position in *Waring v. Dunlea*, 26 F. Supp. 388 (E.D.N.C. 1939), a case involving the same plaintiff under similar facts. In 1940, however, the Second Circuit rejected the *Waring* decisions in *R.C.A. Mfg. Co. v. Whiteman*, 114 F.2d 86 (2d Cir. 1940), *cert. denied*, 311 U.S. 712 (1940). The court refused to recognize a property right in the performer's creation, reasoning that any protection had been lost with publication. *Id.* at 88-89. The contrasting positions of the *Waring* and *Whiteman* decisions prevented any judicial predictability in this area for the next thirty years. See Lang, *supra* note 76, at 82.

Perhaps the most thorough treatment by the judiciary of the performers' rights issue was Judge Learned Hand's dissent in *Capitol Records v. Mercury Records Corp.*, 221 F.2d 657, 664 (2d Cir. 1955). Although he recognized that a performer's rendition could be copyrighted as an original arrangement or adaptation of a musical score, he feared that judicial recognition of a performer's right based on common law principles of unfair competition might extend those rights beyond the limited protection of the United States Constitution. The majority in the *Capitol Records* case ruled that, under New York law, the sale of records did not forfeit the performer's right in his recorded performance; however, the majority opinion did not address the fears of Judge Hand concerning perpetual monopoly. The courts in the United States have not addressed the performers' rights issue since the *Capitol Records* decision.

⁸¹ A. LATMAN, *supra* note 16, at 11-12.

⁸² The United States had been involved as a non-signatory party during the Rome Convention of 1961; thus, the performers' rights issue was familiar to many copyright authorities in the United States. The United States delegation at Rome "greatly promoted the work of the Conference by its sagacious and temperate attitude." Ulmer I, *supra* note 45, at 99. For example, article 2 of the Rome Convention, defining "national treatment," was a

United States copyright law. A 1965 proposal for a comprehensive revision⁸³ was strongly opposed by the American Federation of Musicians (AFM), the largest musicians' union, on the sole ground that the proposal did not include provisions recognizing performers' rights.⁸⁴ The AFM noted that recognition of a performers' right in sound recordings would allow performers to economically benefit from the performances they had made popular,⁸⁵ and that composers, who receive royalties from airplay, were dependent upon performers' renditions of their songs.⁸⁶ The relationship between composers and performers was seen as a musical partnership, with each group making a distinct and equal contribution toward the final product.⁸⁷ The 1965 proposal did not come to the floor for a vote; however, the House Judiciary Committee went on record as supporting constitutional recognition of performers' sound recordings as "writings of an author."⁸⁸

Debate continued on the performers' rights issue when comprehensive revision bills were proposed in 1967,⁸⁹ 1969,⁹⁰ 1971,⁹¹ and 1973.⁹² The performers' rights movement was strongly opposed by

United States proposal. Ulmer II, *supra* note 2, at 169.

⁸³ H.R. 4347, 89th Cong., 1st Sess. (1965).

⁸⁴ See *Copyright Law Revision: Hearings Before Subcomm. No. 3 of the House Comm. on the Judiciary*, 89th Cong., 1st Sess. 1388-1405 (1965).

⁸⁵ *Id.* The AFM's position seemed to incorporate a concept developed in the American law of unfair competition; that one should not "reap where one has not sown." See generally *Int'l News Serv. v. Associated Press*, 248 U.S. 215 (1918). In the case of recorded music, a composer or copyright owner in the United States reaps all broadcast royalty benefits; however, the recording is the result of a collaborative effort between the composer and the performer. Since the United States copyright laws granted royalties only to the composer, that partner was essentially reaping from the efforts of the performers. For a recent treatment of this idea of unjust enrichment, see D'Onofrio, *In Support of Performance Rights in Sound Recordings*, 29 U.C.L.A. L. REV. 168, 175-76 (1981).

⁸⁶ See *Copyright Law Revision: Hearings Before Subcomm. No. 3 of the House Comm. on the Judiciary*, 89th Cong., 1st Sess. 1388-1405 (1965).

⁸⁷ *Id.*

⁸⁸ H.R. REP. NO. 83, 90th Cong., 1st Sess. 16-19 (1967).

⁸⁹ H.R. 2512, 90th Cong., 1st Sess. (1967).

⁹⁰ S. 543, 91st Cong., 1st Sess. (1969).

⁹¹ S. 644, 92d Cong., 1st Sess. (1971).

⁹² S. 1361, 93d Cong., 1st Sess. (1973); see also H.R. 8186, 93d Cong., 1st Sess. (1974). Prior to the introduction of this proposed legislation, the Sound Recording Amendment of 1971, Pub. L. No. 92-140, 85 Stat. 391 (Oct. 15, 1971), was enacted. This amendment extended federal statutory protection to sound recordings fixed between February 15, 1972 and January 1, 1975, and for the first time, a sound recording was officially recognized as a "writing" under the Constitution. The recognition of a copyright in a sound recording did not, however, include a recognition of performers' rights in those recordings. The constitutionality of the Sound Recording Amendment was upheld in *Shaab v. Kleindienst*, 345 F. Supp. 589 (D.C. Cir. 1972).

Senator Sam Ervin, who introduced an amendment to the 1973 revision bill which would have eliminated any performers' rights.⁹³ That amendment was passed in an effort to prevent the performers' rights issue from endangering the entire copyright revision,⁹⁴ and Congress refused to act upon the revision measure.⁹⁵

A 1975 revision measure,⁹⁶ passed in 1976,⁹⁷ did not recognize performers' rights, despite strong support for performers' rights by the Register of Copyrights.⁹⁸ In Section 114(d) of the Copyright Act, a compromise between broadcasters and performers,⁹⁹ the Register of Copyrights was directed to submit a report to Congress on January 3, 1978.¹⁰⁰ That report and its accompanying proposed legislation,¹⁰¹ along with the so-called "Danielson Amendment,"¹⁰² have yet to be acted upon by Congress.

C. *The Pending Proposals and the Renewed Interest in the Rome Convention*

Pursuant to section 114(d) of the Copyright Act of 1976,¹⁰³ the Register of Copyrights submitted her report to Congress in January 1978. The report concluded that a performers' sound recordings were "writings" under the Constitution and, therefore, were protectable authorship.¹⁰⁴ The Register advocated the enactment of a federal copyright provision, noting that the language of the 1976 general revision preempted any state protection under com-

⁹³ S. 1361, 93d Cong., 2d Sess. Amend. No. 1846 (1974).

⁹⁴ See 120 CONG. REC. 30401 (1974).

⁹⁵ See S. REP. NO. 94-1058, 94th Cong., 2d Sess. (1976). The performers' strongest opposition came from broadcasting stations, which felt that payments of royalties to both performers and composers would cause them tremendous economic hardship. A. HANSON, *supra* note 35, at 73. In contrast, performers and authors were the two major opposing factions in the Rome Convention negotiations. Ulmer I, *supra* note 45, at 95.

⁹⁶ S. 22, 94th Cong., 1st Sess. (1975).

⁹⁷ Act of Oct. 19, 1976, Pub. L. No. 94-553, 90 Stat. 2541 (codified as amended in 17 U.S.C.) [hereinafter cited as Copyright Act of 1976].

⁹⁸ See *Copyright Law Revision Hearings on H.R. 2223 Before the Subcomm. on Courts, Civil Liberties, and the Administration of Justice of the House Judiciary Comm.*, 94th Cong., 1st Sess. 1907-09 (1975); see also U.S. COPYRIGHT OFFICE, SECOND SUPPLEMENTARY REPORT OF THE REGISTER OF COPYRIGHTS ON THE GENERAL REVISION OF THE U.S. COPYRIGHT LAW: THE 1975 REVISION BILL, chap. VIII (Oct.-Dec. 1975).

⁹⁹ H.R. REP. NO. 94-1476, 94th Cong., 2d Sess. (1976).

¹⁰⁰ See *supra* note 13.

¹⁰¹ 43 Fed. Reg. 12,763 (1978).

¹⁰² H.R. 6063, 95th Cong., 1st Sess. (1977).

¹⁰³ See *supra* note 13.

¹⁰⁴ Ringer, *Summary of the Report*, reprinted in COMMITTEE PRINT, *supra* note 3, at 3.

mon law.¹⁰⁵ Protected parties would include both performers and producers, with royalty rates to be set by the Copyright Royalty Tribunal.¹⁰⁶ Section 114(c)(14) of the Register's proposal would give performers and producers at least fifty percent of all royalties from broadcasts of sound recordings, with composers to receive the remainder.¹⁰⁷ Performers would in turn divide their share on a per capita basis, regardless of the extent of the individual's involvement in the recording session.¹⁰⁸ This proposal troubled one of the major composer's cooperatives, which did not wish to sacrifice any of its members' current revenues,¹⁰⁹ and also one of the major performers' unions, which did not give decisive support to per capita distribution.¹¹⁰ Broadcasters continued to strongly oppose a per-

¹⁰⁵ The United States Supreme Court, in *Goldstein v. California*, 412 U.S. 546 (1973), held that congressional silence on this issue did not totally preempt state protection. Congress had addressed this issue in the 1976 revision, which theoretically would preclude state protection; however, not all writers accept that position. See Brown, *Unification: A Cheerful Requiem for Common Law Copyright*, 24 U.C.L.A. L. Rev. 1070, 1089-1106 (1977).

¹⁰⁶ 43 Fed. Reg. 12,766 (1978). The Copyright Royalty Tribunal is composed of five commissioners appointed by the President, with the advice and consent of the Senate, for seven-year terms. 17 U.S.C. § 802 (Supp. III 1979). Their role is to make determinations of reasonable copyright royalty rates. 17 U.S.C. § 801(b)(1) (Supp. III 1979).

¹⁰⁷ Register's draft bill, 17 U.S.C. § 114(c)(14), *reprinted in* 43 Fed. Reg. 12,763, 12,767 (1978).

¹⁰⁸ *Id.*

¹⁰⁹ BMI [Broadcast Music, Inc.] believes that performers should be fairly rewarded for their efforts. Our concern, however, is that there be no erosion of funds already set aside for distribution to those whom we represent. Thus, while prepared to support legislation that will properly compensate the performer, we can do so only if we are assured that the position of BMI writers and publishers will not be adversely affected

COMMITTEE PRINT, *supra* note 3, at 452 (statement of Edward M. Cramer, Broadcast Music, Inc.). BMI is a performing rights society which serves as a clearinghouse for performance. It obtains from composers exclusive performing rights in a sound recording and collects royalties from radio airplay. The royalty pool is then distributed to the composers who transfer licenses to the performing rights society. J. TAUBMAN, *IN TUNE WITH THE MUSIC BUSINESS* 232-33 (1980). The other major performing rights societies, the American Society of Composers, Authors, and Publishers, (ASCAP), and the Society of European Stage Authors and Composers, Inc., (SESAC), did not comment publicly on the performers' rights issue.

¹¹⁰ See COMMITTEE PRINT, *supra* note 3, at 819 (statement of Sanford Wolff, American Federation of Television and Radio Artists):

Let's say there were fifteen musicians (in addition to seven singers). That would make twenty-two.

The fifteen musicians would get 15/22's, and the seven singers would get 7/22 in contributions. *As to how it would be divided, that remains to be seen. And I don't think that should be an obstacle in the way of adopting the legislation . . .* (emphasis added).

But see COMMITTEE PRINT, *supra* note 3, at 505 (statement of Hal Davis, American Federation of Musicians) ("Each musician and/or singer on each record should receive an equal share of the royalties allocated to performers" (emphasis added)).

formers' rights amendment on economic hardship grounds¹¹¹ and also because the broadcasters felt they already generated benefits to performers and producers through radio airplay.¹¹² At least one major record company advocated that it, too, should share in any royalties given to performers and producers because of the company's involvement in "record conception, production, design, manufacturing, distribution, marketing and promotion."¹¹³ As a result of these differences, the Register's draft bill has not been formally submitted to Congress.¹¹⁴

The only other attempts to amend section 114(d) have been made by Representative George Danielson, who introduced a "Performers' Rights Amendment" in 1977,¹¹⁵ 1979,¹¹⁶ and 1981.¹¹⁷ The Danielson proposal differs from the Register's draft bill in that the Danielson Amendment provides for a mandatory 50-50 division between composers and performers,¹¹⁸ while under the Register's draft bill the performer was entitled to at least fifty percent.¹¹⁹

The 1978 hearings on the Danielson Amendment¹²⁰ gave a great deal of attention to possible United States participation in the Rome Convention. During the period between 1976 and 1979, the number of signatories to that Convention had increased from six-

¹¹¹ See generally COMMITTEE PRINT, *supra* note 3, at 496-588.

¹¹² See Hayes, *Performance Rights in Sound Recordings: How Far to the Horizon?*, 9 PERF. ARTS REV. 121, 147-52 (1979).

¹¹³ COMMITTEE PRINT, *supra* note 3, at 570 (statement of Jerry Moss, Chairman of A. & M. Records). Mr. Moss was also Chairman of the Board of the Recording Industry Association of America, which came out in favor of such an arrangement. *Id.* at 459-69.

¹¹⁴ The attitudes of these two groups reflect a long-standing disagreement over performers' rights. The 1930's and 1940's marked the beginning of a dispute over the performers' rights issue as a tangential matter to the greater concern of mechanized music replacing live musicians. For a history of the early disputes between performing rights societies (representing composers), musicians' unions, and broadcasters, see Countryman, *The Organized Musicians: II*, 16 U. CHI. L. REV. 239 (1948).

¹¹⁵ H.R. 6063, 95th Cong., 1st Sess. (1977).

¹¹⁶ H.R. 997, 96th Cong., 1st Sess. (1979); see also S. 1552, 96th Cong., 1st Sess. (1979) (identical bill introduced in the Senate).

¹¹⁷ H.R. 1805, 97th Cong., 1st Sess. (1981) [hereinafter cited as Danielson Amendment]. The sponsor changed the name of the bill from the "Performers' Rights Amendment" used in the 1977 and 1979 proposals, to "Commercial Use of Sound Recordings Amendment" in the 1981 proposal. The text of the 1981 draft is identical to the earlier bills.

¹¹⁸ *Id.* at 14-15 (proposed text of 17 U.S.C. § 114(c)(14)).

¹¹⁹ Register's draft bill, reprinted in 43 Fed. Reg. 12,763, 12,767 (1978) (proposed text of 17 U.S.C. § 114(c)(14)). Representative Danielson testified that he was not "bound" by a 50-50 split; this would allow the possibility of composers receiving a greater share than performers. See 1978 Danielson Amendment Hearings, *supra* note 8, at 143.

¹²⁰ 1978 Danielson Amendment Hearings, *supra* note 8, at 1-196.

teen to twenty-three¹²¹ and the number of countries recognizing performers' rights by legislation had increased to fifty-four.¹²² These countries had collected broadcast royalties for United States performers, but, because of the United States lack of reciprocity, those funds were never distributed to those performers.¹²³ Had there been reciprocity arrangements, performers in the United States would have received over \$13 million in 1976 alone,¹²⁴ and foreign artists would have received revenues from the lucrative United States market.¹²⁵ On the other hand, composers in the United States, because of the United States acceptance of composers' rights, are given reciprocal treatment in foreign countries and receive royalties from foreign airplay.¹²⁶

Despite the 1979 proposal's failure to receive congressional approval, Representative Danielson reintroduced his amendment in 1981.¹²⁷ Strong opposition from broadcasters¹²⁸ persuaded members of the House subcommittee to question whether statutory protection was necessary.¹²⁹ The Danielson Amendment remained in committee and was not voted upon in the Ninety-seventh Congress.

IV. THE ECONOMICS OF COMPROMISE: INTERNATIONAL COOPERATION THROUGH INTERNAL RESOLUTION

The resolution of the performers' rights issue in the United States can take two basic courses. First, the system can remain as it is, and section 114(d) could be drafted to prevent performers from receiving broadcast royalties unless they are composers of the recorded work. This would essentially grant performers the status they had under the 1909 act and preclude United States participation in the Rome Convention. The second alternative would be to

¹²¹ 1-3 UNESCO, *supra* note 1.

¹²² *Id.*

¹²³ 1978 Danielson Amendment Hearings, *supra* note 8, at 183 (statement of Louise Wiener, Special Assistant to the Secretary of Commerce for Cultural Resources).

¹²⁴ *Id.* at 180.

¹²⁵ *Id.* No amount was given for United States broadcasters' potential payments to foreign artists.

¹²⁶ See Note, *Performers' Rights Under the General Revision of the Copyright Law*, 28 CASE W. RES. L. R. 766, 769 (1978).

¹²⁷ See *supra* note 117.

¹²⁸ *Radio Broadcasters and Jukebox Operators are "Unalterably Opposed" to Performance Rights*, PAT., TRADEMARKS, & COPYRIGHT J. (B.N.A.) No. 534, at A-13, A-14 (June 18, 1981).

¹²⁹ *Id.*

draft the statute in a way which gives performers an economic interest in their work. A performer's right could take three forms: 1) the amendment could allow performers to negotiate their broadcast royalties in the same way they negotiate for royalties from record sales;¹³⁰ 2) the amendment could follow the Register of Copyright's philosophy and give performers a "baseline" royalty percentage above which the performer could negotiate;¹³¹ and 3) the Danielson Amendment position could be taken so that the performer is given only a fixed percentage.¹³²

Each of these alternatives should satisfy United States composers, performers, and broadcasters, and, at the same time, open the door for United States participation in the Rome Convention. The issue in the United States is one of economics; however, economic interests have influenced other countries in their resolution of neighboring rights.¹³³ By analyzing the concerns of domestic interests, and comparing domestic proposals to current foreign systems, certain models emerge which, if followed, could allow the United States to join the Rome Convention.

A. *Maintaining the Current System*

Under the current copyright system in the United States, the composer is compensated for radio broadcasts, but record companies and performers are not paid.¹³⁴ To maintain the current system, section 114(d) would be drafted either to explicitly reject a performers' right in a sound recording or retain its present form.¹³⁵ If either of these alternatives is adopted, the status of performers will remain as it was under the Copyright Act of 1909¹³⁶ and composers will continue to receive all broadcast royalties.¹³⁷

Composers' royalties are generally distributed through performing rights societies such as the American Society of Composers,

¹³⁰ See generally J. TAUBMAN, *supra* note 109, at 54-65.

¹³¹ Register's draft bill, *supra* note 107, at 12,767 (proposed text of 17 U.S.C. § 114(c)(14)).

¹³² See *supra* note 117.

¹³³ "The obscure language frequently used [in this field] must not let us lose sight of the real facts: economic interests are at stake." Chakroun, *What Attitude Should the Developing Countries Adopt Following the Paris Copyright Conference, February 1969?*, 115B EUR. BROADCASTING UNION REV. 50, 54 (1969), reprinted in E. PLOMAN & L. HAMILTON, *supra* note 17, at 74.

¹³⁴ See *supra* notes 4-5 and accompanying text.

¹³⁵ See *supra* note 13.

¹³⁶ See *supra* notes 74, 76-81.

¹³⁷ See *supra* note 4 and accompanying text; see also Note, *supra* note 126, at 768-69.

Authors, and Publishers (ASCAP), Broadcast Music, Inc. (BMI), and SESAC (formerly the Society of European Stage Authors and Composers, Inc.), which act as clearinghouses for composers and lyricists.¹³⁸ The societies obtain rights in the work from the songwriters and collect royalties from broadcasting stations, which are monitored by the society to ensure proper payment.¹³⁹

Performing artists usually do not receive royalty payments from sales of their recorded performances.¹⁴⁰ Even those who can negotiate for sales royalties are faced with industry insistence on terms which defer royalties until all production costs of the sound recording are recouped by the record company; such an arrangement is usually a prerequisite to a sales royalty agreement.¹⁴¹ Though the recording artist does not share in the risk of loss with the record company, the artist does bear the risk of receiving no royalty income until the company has recouped the costs of all of the artist's commercial failures within a single accounting period.¹⁴² For those performers who receive royalties after recoupment, their income is very small. Most earn less than one percent of their gross income in this manner.¹⁴³

The Register of Copyright's 1978 report¹⁴⁴ enumerated two reasons for the lack of performer income from the sales of recordings. First, most performers do not have the bargaining power to command a percentage of sales.¹⁴⁵ Instead, their contributions are compensated in the form of union-scale wages, which constitute the only payment they receive for their recorded works. Second, the contractual arrangements between producers and performers are such that the recoupment cost is high,¹⁴⁶ which forces those performers who possess bargaining power to subsidize some costly productions.

¹³⁸ J. TAUBMAN, *supra* note 109, at 232.

¹³⁹ *Id.* at 234.

¹⁴⁰ See Note, *supra* note 126, at 780. Only 23% of performers participating in sound recordings receive royalties from sales, and three-fourths of that 23% depends on those royalties for less than five percent of their yearly income. Werner, *An Economic Impact Analysis of a Proposed Change in the Copyright Law*, reprinted in COMMITTEE PRINT, *supra* note 3, at 59.

¹⁴¹ Werner, *supra* note 140, at 59.

¹⁴² Note, *supra* note 126, at 780. For example, if an artist releases three non-profitting records and then releases a fourth which is a hit, no royalties will be paid for the fourth until the losses from the first three are recouped.

¹⁴³ Werner, *supra* note 140, at 62.

¹⁴⁴ See COMMITTEE PRINT, *supra* note 3, at 1-424.

¹⁴⁵ Werner, *supra* note 140, at 117.

¹⁴⁶ *Id.*

As a result of the current United States system, record companies profit from their marketed product,¹⁴⁷ composers receive broadcast royalties for airplay through federal copyright laws and sales royalties through contracts,¹⁴⁸ broadcasters make profits from advertising revenues based on listener audience, which is in turn linked to the popularity of the station's format in playing a particular style of sound recordings,¹⁴⁹ and over one-half of the musicians in the United States earn less than \$13,000 per year.¹⁵⁰ The bargaining power of musicians' unions is not sufficient to protect performers since the Lea Act¹⁵¹ makes it unlawful to "coerce, compel, or constrain . . . a licensee . . . to accede to or impose any restriction upon . . . production, preparation, manufacture, sale, purchase, rental, operation, use, or maintenance . . . of a program or programs for broadcasting."¹⁵² This prevents the musicians' unions from striking, eliminating their ability to use the threat of a work stoppage to negotiate for better terms.¹⁵³

Maintaining the current system is beneficial to record companies, composers, and broadcasters, but it does little for unknown performers. Popular performers, realizing that no profits are to be made from airplay, have taken advantage of the current system to increase their contractual demands when signing a recording contract.¹⁵⁴ These expenditures have been passed on from the record companies to the consumer, causing record prices to increase dramatically;¹⁵⁵ therefore, the current system is not beneficial for record buyers in the United States.

The current copyright law also precludes the United States from joining the Rome Convention. Under the Convention, a participating country must grant a minimum amount of protection to per-

¹⁴⁷ See STANDARD AND POOR'S INDUSTRY SURVEYS, *supra* note 9, at L-32.

¹⁴⁸ For standard royalty provisions in the songwriter's agreement, see J. TAUBMAN, *supra* note 109, at 34-35.

¹⁴⁹ Werner, *supra* note 140, at 99.

¹⁵⁰ *Id.* at 117.

¹⁵¹ Act of Apr. 16, 1946, ch. 138, 60 Stat. 89, (codified at 47 U.S.C. § 506 (1976)) [hereinafter cited as Lea Act].

¹⁵² *Id.* § 506(b)(2), 60 Stat. at 90.

¹⁵³ See generally Note, *Federal Legislation: The Lea Act: An Enactment to Proscribe Certain Practices Affecting Broadcasting*, 35 GEO. L.J. 79 (1946). The constitutionality of the Lea Act was upheld in *United States v. Petrillo*, 332 U.S. 1 (1947).

¹⁵⁴ An example would be Paul McCartney, who in 1979 signed with Columbia Records for a guaranteed \$20 million. *The Blues in Vinyl*, NEWSWEEK, Aug. 13, 1979, at 67.

¹⁵⁵ Present retail list price for a phonorecord is \$8.98. In 1977, the retail list price was \$6.98. See BILLBOARD, Aug. 1, 1981, at 71.

formers.¹⁵⁶ Absent such a recognition of these rights in the United States, the Rome Convention would be denied the much desired participation of the United States.¹⁵⁷

B. *The Economics of Compromise*

1. *Performers' Rights by Contractual Negotiation*

One possible resolution of the performers' rights issue would be to draft section 114(d) so that performers could negotiate broadcast royalties in the same manner as they presently negotiate for sales royalties. The new section would expressly recognize a performers' right in sound recordings, but would leave the determination of the scope of the performers' protection and the amount of remuneration to the bargaining process. It would be expected that performers would make individual agreements for broadcast royalties with composers in exchange for the performers' renditions of the composers' work. This would cause no economic hardship to broadcasters nor to record companies, and would give recording artists some benefits from the performance of their works.

The drawbacks to this arrangement are two-fold. First, it does not give all performers a guaranteed percentage for their work. Under article 3(a) of the Rome Convention, the term "performers" includes anyone who participates in the literary or artistic work.¹⁵⁸ The article does not contemplate a distinction between performers in the amount of protection they receive. Article 26 mandates that participating countries are to adopt the measures necessary to ensure the application of the Rome Convention;¹⁵⁹ without statutory protection for all performers, the United States could not satisfy this requirement. Also, a system of contractual negotiation would probably be unsatisfactory to domestic factions because many of the same difficulties in the current system would recur; for instance, popular performers would be able to bargain for economic gain, leaving little for the other participants. A second drawback to a system of contractual negotiation is that there would seem to be

¹⁵⁶ Rome Convention, *supra* note 6, art. 7.

¹⁵⁷ In preparing her 1978 report, the Register of Copyrights consulted with experts from various countries on the issue of neighboring rights. Representatives from Denmark, Austria, and West Germany all enthusiastically approved of the United States participation in the Rome Convention. Oler, *Performance Rights in Foreign Countries*, reprinted in COMMITTEE PRINT, *supra* note 3, at 178, 185, 188, 199.

¹⁵⁸ Rome Convention, *supra* note 6, art. 3(a).

¹⁵⁹ *Id.* art. 26.

no incentive for composers to relinquish the four cents per play they now enjoy¹⁶⁰ to little-known performers who are a greater risk in the marketplace. Therefore, the only performers who would benefit from this arrangement are those who really do not need broadcast royalties.

The rights of composers in the United States are protected by federal statute rather than the free marketplace.¹⁶¹ This is done to give composers control over copies of their work and to prevent others from reaping the fruits of the composer's labors. Given the great amount of broadcast facilities worldwide, a composer could not possibly monitor the radio airwaves to prevent unauthorized versions of his composition from being played.¹⁶² This has led to the emergence of performing rights societies such as ASCAP and BMI, which provide those services to the composer.¹⁶³ Only by such a cooperative effort can broadcasting, a "public good,"¹⁶⁴ be monitored.

The Lea Act and the absence of bargaining power through the threat of strike¹⁶⁵ makes the performer's situation much like that of the composer. Performers in the United States do not have the strength, either individually or collectively through labor unions, to bargain for objectives to protect their economic status.¹⁶⁶ Composers, being in the noncompetitive market of musical performance rights, need public regulation to establish a satisfactory price for those rights.¹⁶⁷ Since the performer is a vital part of the creative process which produces a sound recording, there is no reason why the performer should, unlike the composer, be subject to the free

¹⁶⁰ See *Oversight Hearings Before the Subcomm. on Courts, Civil Liberties, and the Administration of Justice of the House Comm. on the Judiciary*, 97th Cong., 1st Sess. 121 (1981) (Report of the Copyright Royalty Tribunal).

¹⁶¹ See H. HENN, *COPYRIGHT PRIMER* 204-06 (1979).

¹⁶² J. TAUBMAN, *supra* note 109, at 232.

¹⁶³ The broadcast licensing mechanisms of ASCAP and BMI were upheld in a recent anti-trust suit. *Broadcast Music, Inc. v. Columbia Broadcasting Sys., Inc.*, 441 U.S. 1 (1979).

¹⁶⁴ A "public good" is a class of goods "[w]herein the amount of use of the good or service by one person does not reduce the amount available to others if the good has been produced. Classic examples are melodies, poems, ideas, and theories. Anyone can use them without in any way reducing someone else's supply." A. ALCHIAN & W. ALLEN, *EXCHANGE AND PRODUCTION THEORY IN USE* 251 (1969), reprinted in E. KITCH & H. PERLMAN, *LEGAL REGULATION OF THE COMPETITIVE PROCESS* 48 (1979).

¹⁶⁵ See *supra* notes 151-53 and accompanying text.

¹⁶⁶ See Gorman, *The Recording Musician and Union Power: A Case Study of the American Federation of Musicians*, reprinted in *COMMITTEE PRINT*, *supra* note 3, at 1085.

¹⁶⁷ *Cirace, C.B.S. v. ASCAP: An Economic Analysis of a Political Problem*, 47 *FORDHAM L. REV.* 277, 277 (1978).

market.

2. A "Minimum Rights" Statute

Section 114(d) could be drafted to assure the performer of a minimum broadcast royalty percentage over which he could negotiate for additional compensation. This "minimum rights" statute would be similar to the Register's proposal, which guaranteed performers at least 50% of broadcast royalties,¹⁶⁸ but would not necessarily have to adopt that percentage as a minimum remuneration. Though this arrangement might persuade popular performers to reduce their demands on sales royalties and, consequently, reduce costs to consumers, there would be substantial administrative costs in maintaining files on all performers and composers of all sound recordings who individually have negotiated different percentages for different songs.¹⁶⁹

A collective mechanism is as necessary for performers as it is for composers. If radio stations were to contract with individual composers there would be enormous transaction costs.¹⁷⁰ Similar problems would develop with performers under a minimum rights statute regarding the number of transactions and the varying terms of those individual contracts. Administrative costs would be significant for a performers' rights society because of the large number of royalty recipients and the costs of monitoring a large number of broadcast facilities;¹⁷¹ an increased amount of administrative time devoted to individual calculations and disbursements would drive those costs past the point of maximum efficiency.¹⁷²

¹⁶⁸ See *supra* note 107 and accompanying text.

¹⁶⁹ There has been concern that the increased amount of calculations brought about by performers' rights will cause increased transaction costs for both composers and performers. See *Hearings Before the Subcomm. on Patents, Trademarks and Copyrights of the Senate Comm. on the Judiciary*, 90th Cong., 2d Sess. 506 (1967) (statement of Sidney A. Diamond).

¹⁷⁰ Cirace, *supra* note 167, at 293.

¹⁷¹ See *supra* note 169.

¹⁷² The economic section of the 1978 Report of the Register of Copyrights put forth three administrative systems to handle disbursements to performers. Under the "parallel system" the performers' and record companies' disbursement group would duplicate the functions of composers' groups such as ASCAP and BMI. Considering that the 1976 combined expenditures of ASCAP and BMI totalled over \$24 million, and the total amount that would have been generated for performers in that year was \$15.4 million, this system is not cost-justified. The report pointed out that ASCAP and BMI negotiated with artists for the societies' fees, while the performers' rights society would have a fixed fee; therefore, the new society would not have negotiation costs. However, under a minimum rights proposal, there would be enough added costs in maintaining records and disbursements to possibly nullify the advantage of a fixed fee.

A minimum rights statute, however, would satisfy the requirements of the Rome Convention. Performers would have the protection required by article 7¹⁷³ and, more importantly, any arrangements for negotiation beyond the minimum amount would seem to be permissible under article 8.¹⁷⁴ Nevertheless, no country which recognizes neighboring rights seems to have such a system.¹⁷⁵

Though Rome Convention participation might be facilitated with the passage of a minimum rights statute, the administrative costs of such a system make it doubtful that American composers, performers, and broadcasters would agree to such an arrangement. For example, the high costs of maintaining information on a large orchestra would possibly deplete the royalties set aside for that group. Though negotiation for royalties above a fixed amount would allow featured performers to get a larger share in recognition of their contribution to the work, it is doubtful that many others would receive more than the set royalty rate. Under this system, the rich probably would get richer, but those who are not in a position to bargain for large revenues would have at least a statutory guarantee of some royalty payments. The system would work in theory; but as a practical matter, the high administrative costs would tend to diminish any return to performers.

The "augmented system" would reduce administrative costs by a cooperative effort between one or both of the composers' societies and the new performers' organization. The incentive for ASCAP and BMI to cooperate is to share the burdens of monitoring in order to reduce their own expenses. As a practical matter, obtaining cooperation could be difficult since BMI feels that its members are competitors with performers for royalty payments. In addition, this system would require structural changes in ASCAP and BMI concerning their monitoring and data collection, and there is no indication that these groups are willing to change their long-established practices.

The "substitute system" would have the new performers' society take over ASCAP's and BMI's role on information collection, and have broadcasters put on a self-reporting basis. The society would then charge ASCAP and BMI for information concerning broadcaster use. This system is probably the least practical of the three: in addition to the dubious possibility of ASCAP and BMI stepping aside to allow the new group to become the central clearinghouse, the "substitute system" relies on advances in technology to be able to monitor tapes submitted by broadcasters. These tapes would be similar to the present "spot-check" arrangements, currently performed by BMI, which requires broadcasters to submit a log for all music played during a chosen week of the year. The combination of this new reporting system, the new technology necessary to implement it, and the unrealistic prospect of ASCAP and BMI merging into a performers' society, makes the "substitute system" unworkable at the present time. See Werner, *supra* note 140, at 107-10.

¹⁷³ See *supra* note 61.

¹⁷⁴ Domestic law may specify the manner in which performers are represented in connection with the exercise of their rights. Rome Convention, *supra* note 6, art. 8.

¹⁷⁵ See generally Oler, *supra* note 3, at 331-67.

3. A "Fixed Rights" Statute

Section 114(d) could be drafted to give composers and performers a set royalty percentage, with the performers' share to be divided on a per capita basis. Such a "fixed rights" statute has been proposed in the Danielson Amendment.¹⁷⁶ Under that proposal, the administrative costs of the "minimum rights" statute would be avoided, and superstars would not be able to use their bargaining power in broadcast royalties as they have in sales royalties. A parallel system, under which an independent performing rights society would be created to represent performers only, could be economically feasible in the absence of negotiation costs and the administrative costs of recordkeeping. Both costs would be eliminated under a fixed right/parallel system arrangement since the percentage rate would be fixed.

The per capita division proposal in the Danielson Amendment is not necessary for United States participation in the Rome Convention. One of the Convention's participants, Denmark, calculates royalties on the basis of "points" which are accumulated according to the amount of participation of each performer.¹⁷⁷ A soloist, for example, receives ten points for his contribution in a sound recording, while lesser points are given to the soloist when there is an accompanist. The Danish model includes point variations for orchestras, ensembles and choirs in various combinations. A performer's total payment is then calculated by multiplying his points by a uniform point value.¹⁷⁸ Royalties are collected from broadcasting organizations by GRAMEX, the Danish performing rights' society, and distributed to the individual performers. GRAMEX operates in conjunction with KODA, the Danish counterpart of ASCAP and BMI, to collect data on broadcasts. This cooperation has eliminated high costs of administration; the costs of administering the GRAMEX fund in 1975 did not exceed nine percent of the total fees collected.¹⁷⁹

In Austria, similar calculations of performers' royalties are made by the Wahrnehmung von Leistungsschutzrechten Gesellschaft,

¹⁷⁶ See Danielson Amendment, *supra* note 117, § 114(c)(14), at 14-15.

¹⁷⁷ Law No. 158 of 1961 on Copyright in Literary and Artistic Works, § 47 (Den.) (amended 1977) (Danish Ministry of Educ. transl. 1977), reprinted in 1 UNESCO, COPYRIGHT LAWS AND TREATIES OF THE WORLD (Supp. 1978), is the source of performers' rights in Danish law. The point valuation for performers is not statutory, but is found in GRAMEX regulations. See Oler, *supra* note 3, at 178, 183.

¹⁷⁸ Oler, *supra* note 3, at 178, 183.

¹⁷⁹ *Id.* at 183.

m.b.H. (LSG), which bases its payments to performers on air time.¹⁸⁰ Like most Rome Convention countries,¹⁸¹ Austrian producers and performers share equally in royalty payments.¹⁸² LSG, like the Danish system, has very low administrative costs.¹⁸³

The Federal Republic of Germany does not calculate royalties on a point system, but instead on the basis of each individual's recording-related earnings from the previous year.¹⁸⁴ Gesellschaft zur Verwertung von Leistungsschutzrechten m.g.H. (GVL), the German performing rights society, administers a fund into which performers pay a percentage of their earnings. Unlike other Western countries, the performers are granted sixty-four percent of the net distributable revenue, while producers are given a subsidiary right to thirty-six percent.¹⁸⁵

Perhaps the most interesting system of Rome Convention countries is Brazil's, which has undergone a dramatic change in its system's administration during the last decade.¹⁸⁶ Prior to 1973, the Sociedade Brasileira de Interpretes e Produtores Fonographicas (SOCINPRO) acted as a performing rights society and distributed funds to performers and producers. Two-thirds of the performers' share was to go to the featured performer, and the remaining one-third was to be divided per capita among the remaining performers.¹⁸⁷ Administrative costs as high as fifty to sixty percent caused

¹⁸⁰ *Id.* at 187.

¹⁸¹ *See id.* at 331-67.

¹⁸² Federal Act on Copyright in Works of Literature and Art and on Related Rights (Copyright Act), § 76, 1936 Bundesgesetzblatt [BGBl] 131 (Aus.) (amended 1949, 1953, 1972, and 1980) (Permanent Delegation of Aus. for UNESCO transl. 1980), *reprinted in* 1 UNESCO, *supra* note 177.

¹⁸³ LSG collects a lump sum payment from Oesterreichische Rundfunk Gesellschaft m.b.H. (ORF), which is Austria's only broadcasting corporation. Administrative costs from this collection are around 10% of collected fees. Oler, *supra* note 3, at 178, 186-87.

¹⁸⁴ An Act dealing with Copyright and Related Rights, art. 7, 1965 Bundesgesetzblatt [BGBl] I 1273 (W. Ger.) (amended 1969, 1970, 1972, 1973 and 1974) [hereinafter cited as West German Copyright Statute], *reprinted in* 2 UNESCO, COPYRIGHT LAWS AND TREATIES OF THE WORLD (Supp. 1978); *see also* Oler, *supra* note 3, at 178, 197 (scale of fees set by the German Orchestra Association). The collecting society is to determine fees in regard to "religious, cultural, and social interest of the persons liable to pay remuneration, including youth welfare interests." West German Copyright Statute, *supra*, art. 13, *reprinted in* 2 UNESCO, *supra*. The West German Copyright Law is said to have "tackle[d] the modern realities brought about by technological advancement." E. PLOMAN & L. HAMILTON, *supra* note 17, at 113.

¹⁸⁵ *See* Oler, *supra* note 3, at 178, 197.

¹⁸⁶ *Id.* at 222-25.

¹⁸⁷ *Id.* at 223, *citing* Leduc, *National Applications of the Rome Convention on Neighboring Rights*, 8 COPYRIGHT 232 (1972).

the Brazilian National Copyright Council to suspend SOCINPRO's collection activities and to replace it with the Escritorio Central de Arrecadacao e Distribuicao (ECAD), a government agency which cannot, under Brazilian law, deduct more than twenty percent of the total fund for administrative costs.¹⁸⁸

The Danish, Austrian, West German, and Brazilian systems give the United States four models upon which to structure an alternative to the pure per capita distribution scheme proposed in the Danielson Amendment. The administrative costs of these systems have been reduced in great part by a cooperative effort between those countries' collecting societies. To enjoy the same success, ASCAP and BMI must work closely with a performing rights society in the United States.

Once it is established that this system is cost-justified for performers, the next step of analysis must be the impact that such an arrangement will have on United States broadcasters. The Register's report in 1978 concluded that the economic fears of radio broadcasters were unjustified since those broadcasters would be able to pass on the costs of their operations to advertising sponsors.¹⁸⁹ The report noted that the broadcast industry in the United States does not function like a "competitive, profit-maximizing, cost-minimizing market";¹⁹⁰ instead, the income of owners is generated in ways other than dividends from profits.¹⁹¹ Those stations which suffer "losses" have high expenses, including salaries to owners and managers,¹⁹² which help divert station profits into personal profits.¹⁹³ Many stations which reported losses over long periods of time remained in the industry,¹⁹⁴ which does not coincide with the usual fate of businesses operating at a deficit.

An increase in royalty rates as a result of a performers' right would be passed on primarily by stations to advertisers without a significant loss of advertising revenues.¹⁹⁵ The Register's report

¹⁸⁸ See Oler, *supra* note 3, at 178, 224, citing Chaves, *News from Brazil*, 93 REVUE INTERNATIONALE DU DROIT D'AUTEUR 58, 66 (1977). Escritorio Central de Arrecadacao e Distribuicao (ECAD), was promulgated by a major revision in the Brazilian copyright laws in 1973 which dealt with the administration of the country's copyright system. See DIARIO OFICIAL [D.O.] art. 117(vi) (Braz. 1973), reprinted in 1 UNESCO, *supra* note 177.

¹⁸⁹ Werner, *supra* note 140, at 98.

¹⁹⁰ *Id.* at 97.

¹⁹¹ *Id.*

¹⁹² *Id.* at 91.

¹⁹³ *Id.*

¹⁹⁴ *Id.* at 88.

¹⁹⁵ *Id.* at 100.

concluded that the demand for radio advertising is relatively insensitive to price fluctuations,¹⁹⁶ and, therefore, the broadcasters would not suffer economically. The broadcasting industry seems to be composed of members who are able to withstand losses without going off the air; certainly the expenses of performers' royalties could be absorbed without dire consequences.

The effect of a fixed royalty statute for performers may be beneficial to record buyers. The Consumer Federation of America favors the grant of a performers' right in sound recordings because the price of a record includes costs for the creation and production of sound recordings, and these costs should be absorbed by broadcasters.¹⁹⁷ In light of the large contracts which major artists now command,¹⁹⁸ record prices may decline. Record companies would no longer be the sole royalty supporter of the artist, and broadcasters would merely pass on their increased costs to advertisers. The fixed rights statute therefore would do the most good with the least possible damage to any of the interested parties. Most importantly, it would facilitate participation of the United States in the Rome Convention.

V. CONCLUSION

The United States history in the field of international copyright has been one of non-cooperation and non-participation with foreign countries. After rejecting the Berne Convention for over half a century, the United States finally entered into a major multilateral copyright convention, the Universal Copyright Convention, in the 1950's.

This international cooperation by the United States has not extended to the area of neighboring rights in sound recordings. During the 1960's, a major international convention dealing with neighboring rights entered into force. This agreement, the Rome Convention, includes twenty-four countries; the United States, however, is not a member. This is largely due to the United States treatment of copyright as the sole property of the initial creator and not the property of the performer,¹⁹⁹ resulting in a dichotomy between the United States position and the positions of the major-

¹⁹⁶ *Id.*

¹⁹⁷ COMMITTEE PRINT, *supra* note 3, at 599 (comment letter of Kathleen F. O'Reilly, Executive Director, Consumer Federation of America).

¹⁹⁸ See *supra* note 154.

¹⁹⁹ See *supra* note 23.

ity of the world's non-socialist countries. The history of the United States prior to its accession to the Universal Copyright Convention might be repeated as it continues to reject a major multilateral international copyright convention.

To join the Rome Convention, the United States must seek a compromise between domestic broadcasters, composers, and performers, whose actions threaten continued non-participation. The compromise must recognize performers' rights in sound recordings, a prerequisite to Rome Convention membership, and yet satisfy these domestic factions. The resolution of this issue continues to be beyond the reach of the United States Congress; therefore, significant financial benefits remain beyond the reach of deserving foreign and domestic performers.

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