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ARTICLES

AGAIN, FROM THE TOP! THE CONTINUING PURSUIT OF A GENERAL PUBLIC PERFORMANCE RIGHT IN SOUND RECORDINGS

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I. INTRODUCTION

"Somehow, for more than half a century, broadcast radio has been allowed to use our music to build a multi-billion dollar industry without a single penny going to the performer or musician."[1]
—John Legend

"[W]ithout music," author Pat Conroy writes, "life is a journey through a desert."[2] Thankfully, for the modern sojourner, the desert is in full bloom—music is everywhere.[3] Whether hiking in the woods or stuck in traffic, one need only press a button to be enveloped by music. Today, consumers have access to a truly staggering amount of recorded music, and unlimited choice as to when, where, and how it can be experienced[4]—factors which have increased the demand for music,[5] and turned it into a multi-billion dollar global industry.[6] But while the industry as a whole

[1] *Performance Rights Act: Hearing on H.R. 848 Before the H. Comm. on the Judiciary*, 111th Cong. 236 (2009) [hereinafter *House Hearing* 2009] (statement of John Legend, Grammy Award-winning recording artist and musician).

[2] PAT CONROY, BEACH MUSIC 627 (1995).

[3] *See* M. WILLIAM KRASILOVSKY ET AL., THIS BUSINESS OF MUSIC: THE DEFINITIVE GUIDE TO THE BUSINESS AND LEGAL ISSUES OF THE MUSIC INDUSTRY 4 (Robert Nirkind & Sylvia Warren eds., 10th ed. 2007) ("The average American listens to about 20.5 hours of radio per week, much of it as background music in restaurants, hotel lobbies, elevators, and factories. . . . Car radios alone reach four out of five adults.").

[4] *See* Stan J. Liebowitz, *Don't Play it Again Sam: Radio Play, Record Sales, and Property Rights* 7–8 (Univ. of Tex. at Dallas CAPRI Working Paper Series, Paper No. 60-02) (Jan. 5, 2007), *available at* http://ssrn.com/abstract=956527 ("The average American spent five times as much time listening to radio per day than listening to traditional sound recordings in 2003, according to the US Statistical abstract. . . . The particular forms of consumption are varied . . . and includes attending live performances, listening to CDs (or other sound recording mediums), or listening to radio and television broadcasts."); *Music, TV Shows, Movies, and More. On the iTunes Store*, APPLE-ITUNES, http://www.apple.com/itunes/whats-on/ (last visited Jan. 4, 2012) (noting the availability of millions of songs within the iTunes store).

[5] *See* KRASILOVSKY ET AL., *supra* note 3, at 7 ("Improvements in the quality and portability of the listening experience made possible by new technologies have enabled much of the industry's growth."); Donald Melanson, *Apple: 16 Billion iTunes Songs Downloaded, 300 Million iPods Sold*, ENGADGET (Oct. 4, 2011, 1:20 PM), http://www.engadget.com/2011/10/04/apple-16-billion-itunes-songs-downloaded-300-million-ipods-sol.

[6] North American music industry revenues were $25.3 billion in 2009. *See North American Music Industry Revenues* (2006–2011), GRABSTATS.COM, http://www.grabstats.com/statmain.asp?StatID=74 (last visited Jan. 4, 2012). Worldwide music industry revenues were $65.0 billion in 2009. *Worldwide Music Industry Revenues* (2006–2011), GRABSTATS.COM, http://www.grabstats.com/statmain.asp?StatID=67 (last visited Jan. 4, 2012).

has benefitted from music's phenomenal growth, recording artists—the individuals who contribute most significantly to this melodic wellspring—have not received an equitable share of the proceeds, especially revenue generated from the public performance of music.[7]

Music industry outsiders likely give little thought to how those who create music are compensated for their time, talent, and financial investment, but it is an important consideration nonetheless, given its potential impact on the creation of new music, and from a perspective of fairness. If asked to speculate, it might be assumed, generalizing from the success of a handful of highly visible superstars, that recording artists are well paid—even overcompensated.[8] But for many recording artists, having a chart-topping hit or a song played on the radio does not always guarantee money in the bank.[9] Although recording artists generally receive royalty payments for the sale of their recordings[10] or a fee when they perform live, the specific terms of

[7] *See infra* notes 20–30 and accompanying text. While broadcast radio derives its income from the performance of music, and songwriters, and music publishers are paid a royalty for the public performance of music, recording artists receive no payment for the public performance of the very same music. *See* Press Release, BIA Advisory Services, Radio Industry Revenues Dipping More Than Originally Expected in 2009; Significant Growth in News Format Indicates Stations Going Where the Money Is (June 4, 2009), *available at* http://www.bia.com/Company/Press-Releases/090604-Radio-Industry-Revenues-Dipping-More-Than-Originally-Expected-in-2009.asp (announcing" . . . 2009 revenues of approximately $14 billion . . . ." for broadcast radio industry). *But see* Press Release, American Society of Composers, Authors and Publishers, ASCAP Delivers 2009 Financial Results, Strengthening Its Position as a Worldwide Performing Rights Leader (May 3, 2010), *available at* http://www.ascap.com/press/2010/0503_Financial_Results.aspx (announcing that "[ASCAP] made royalty payments of more than $863 million" to its members in 2009); BROADCAST MUSIC, INC., BMI 2008–2009 ANNUAL REVIEW 2 (2009), *available at* http://www.bmi.com/pdfs/publications/2009/annual_review_0809.pdf ("BMI realized . . . royalty distributions totaling more than $788 million"); *infra* note 130 and accompanying text.

[8] *See* Zack O'Malley Greenburg, *The World's Highest Paid Musicians*, FORBES.COM (June 15, 2011, 8:39 PM), http://www.forbes.com/sites/zackomalleygreenburg/2011/06/15/the-worlds-highest-paid-musicians/ (illustrating how much money high-profile, high-earning artists potentially made from May 2010 to May 2011).

[9] *See* Sunny Noh, *Better Late Than Never: The Legal Theoretical Reasons Supporting The Performance Rights Act of 2009*, 6 BUFFALO INTELL. PROP. L.J. 83, 83–84 (2009) ("[A] commercial hit does not guarantee financial security.").

[10] *See* KRASILOVSKY ET AL., *supra* note 3, at 19–21 ("A typical recording contract provides that the artist is to be paid a royalty that is calculated either as a percentage of the suggested retail list price of records sold, or as a percentage of the wholesale price of records sold . . . . The increasing importance

their remuneration depend on a number of factors ranging from domestic and international copyright laws to the contracts they sign with their record label—agreements which seldom are in their best interest.[11] Today, scores of performers[12] find themselves buried in debt before they release their first album and spend years repaying advances and production costs.[13] Some recording artists are successful at raising additional revenue through concerts and other such performances; however, since the primary purpose of touring is to promote a new release rather than provide an independent means of income, the monetary benefits have little lasting effect.[14] Thus, for every Elvis Presley, Lady Gaga, or Aerosmith, there are thousands of performers who

of the Internet, including audio streaming and downloads, has thrown traditional methods of calculating royalties into a state of disarray. For income from Internet-related sources, major record companies require artists to take a substantial reduction in the otherwise applicable royalty rate (up to 15%) as well as to permit the record company to deduct a distribution fee of between 15% and 25%.").

[11] *See House Hearing* 2009, *supra* note 1, at 142 (testimony of Steven Newberry, Commonwealth Broadcasting Corporation, on behalf of the National Association of Broadcasters) ("Toni Braxton, for example, received less than 35 cents per album of the $188 million in CDs that she sold."); *Performance Rights Act: Hearing on H.R. 4789 Before the Subcomm. on Courts, the Internet, and Intellectual Prop. of the H. Comm. on the Judiciary*, 110th Cong. 61 (2008) [hereinafter *House Hearing* 2008] (testimony of Charles Warfield, President and COO, ICBC Broadcast Holdings, Inc.) ("[T]he lack of artist compensation is the result of inequitable, one-sided contracts that artists find themselves entangled in for years after they have signed with a label."); *id.* at 71 (prepared statement of Charles Warfield) ("[The increasingly competitive environment] has resulted in a recent seismic industry shift towards so-called '360 deals' between record labels and performers, which are contracts that allow[] . . . record label[s] to receive a percentage of the earnings from all of a band's activities (concert revenue, merchandise sales, endorsement deals, etc.) instead of just record sales . . . ."); *id.* at 57–58 (explaining how domestic and international copyright laws affect earnings).

[12] The term "performer" when used in this article is interchangeable with "recording artist."

[13] *See* KRASILOVSKY, *supra* note 3, at 22 ("An artist generally does not receive any royalties until the record company has recovered all of the recording costs incurred for that artist's records. . . . Recording costs for relatively new artists can range from $80,000 to $150,000 or more for one album."); *id.* at 15 ("The record company agrees to pay all recording costs, including artist's advances, fees to the producers and arrangers, copyists, engineers, and musicians, as well as studio and equipment rental charges and mixing and editing costs. Recording costs so paid by the record company are deemed to be advances against (that is, recoupable out of) royalties payable to the artist.").

[14] *See id.* at 25 ("Touring is an excellent means of promoting an artist's album, as sales consistently increase in areas in which the artist performs. However, for most newer artists, the costs of touring exceed the income derived from the engagements.").

achieve only minimal success by comparison and "must work hard to patch together modest earnings from various sources in order to support their families."[15] Even moderately successful artists often hold down routine jobs to make ends meet.[16] Consequently, for many recording artists—especially those whose albums or tracks are not selling in large numbers or who were "one-hit wonders"—every available source of income is important.

Unfortunately, one potential source of income has been made unavailable by law.[17] Since its debut in the early 1920s, commercial broadcast radio has been exempt under U.S. copyright law from paying a royalty to recording artists and record companies when their songs are played on the air[18]—or in the language of copyright, "performed publicly."[19] This lack of a public performance right[20] deprives recording artists of the ability to collect significant royalties from domestic and foreign airplay and represents the loss of a valuable source of income.[21]

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[15] *House Hearing* 2009, *supra* note 1, at 36 (statement of Paul Almeida, President, Department for Professional Employees, AFL-CIO).

[16] *See id.* ("The most successful . . . are able to build a middle-class career in music. Most performers, even those who appear to the outside world to be successful, have to work day jobs to pay the bills.").

[17] *See* 17 U.S.C.A. § 114(d)(1)(A) (West, Westlaw through P.L. 112-54 (excluding P.L. 112-40) approved 11/12/11) (stating that copyright protection does not extend to "a nonsubscription broadcast transmission").

[18] *See House Hearing* 2009, *supra* note 1, at 18 (statement of the Hon. Lamar Smith, Ranking Member, Comm. on the Judiciary) ("H.R. 848 amends Section 106 and 114 of the copyright act to eliminate the exemption that AM and FM radio stations have enjoyed since the development of broadcast radio."); *Twentieth Century Music Corp. v. Aiken*, 422 U.S. 151, 158 n.9 (1975) ("Station KDKA, established in Pittsburgh in 1920, is said to have been the first commercial radio broadcasting station in the world."), *superseded by statute*, Copyright Act of 1976, Pub. L. No. 94-553, § 101, 90 Stat. 2541, 2543 (1976), *as recognized in Broadcast Music Inc. v. Claire's Boutiques, Inc.*, 949 F.2d 1482, 1487–89 (1991).

[19] *See* 17 U.S.C.A. § 101 (West, Westlaw through P.L. 112-54 (excluding P.L. 112-40) approved 11/12/11) (defining what it means to perform a work "publicly").

[20] 17 U.S.C.A. § 114(a) (West, Westlaw through P.L. 112-54 (excluding P.L. 112-40) approved 11/12/11); *see* 17 U.S.C. § 106(4) (2006) (noting that the copyright holder's exclusive right to authorize public performance is subject to the limitations of §§ 107–122).

[21] *See* John R. Kettle III, *Dancing to the Beat of a Different Drummer: Global Harmonization—And the Need for Congress to Get in Step with a Full Public Performance Right for Sound Recordings*, 12 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 1041, 1075 (2002) ("Since the United States does not provide a full public performance right for sound recordings, American recording artists and record labels are not entitled to receive the millions of dollars in foreign royalties collected that would otherwise be payable.").

The Copyright Act recognizes recorded music as having two distinct property interests—the "musical work"[22] and the "sound recording"[23]—and provides different rights to each.[24] The copyright owner of a musical work (usually the songwriter[25] and/or music publisher) has a public performance right entitling him to a royalty whenever his work is performed publicly, while the copyright owner of the sound recording, usually the artist who sang the song and/or record company, does not possess such a right.[26] To illustrate, when the sound recording of pop-star Britney Spears' 1999 mega hit, " . . . Baby One More Time," was broadcast on terrestrial radio stations across the country, only the song's writer, Max Martin, was entitled—statutorily—to receive a royalty each time it played,[27] while Spears and Jive Records were not.[28]

Congress has attempted numerous times over the past eighty years, without success, to address this inequity and provide for a broader, general public performance right in sound recordings.[29]

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[22] Although not defined in the Copyright Act, 17 U.S.C. § 102(a)(2) specifies "musical works, including any accompanying words" as among the works of authorship it protects. 17 U.S.C. § 102(a)(2) (2006); *see* 1 MELVILLE B. NIMMER & DAVID NIMMER, NIMMER ON COPYRIGHT § 2.05 (2011) [hereinafter NIMMER ON COPYRIGHT] ("It was not thought necessary to define 'musical works' in the Act, in that this term has a 'fairly settled' meaning.").

[23] 17 U.S.C. § 102(a)(7) (2006); 17 U.S.C.A. § 101 (West, Westlaw through P.L. 112-54 (excluding P.L. 112-40) approved 11/12/11) (defining "sound recordings" as "works that result from the fixation of a series of musical, spoken, or other sounds, but not including the sounds accompanying a motion picture or other audiovisual work, regardless of the nature of the material objects, such as disks, tapes, or other phonorecords, in which they are embodied.").

[24] *See* 17 U.S.C. § 106(4)–(6) (2006).

[25] The term "songwriter" when used in this article also refers to a composer of music.

[26] *See* 2 NIMMER ON COPYRIGHT, *supra* note 22, at § 8.14 (differentiating between the rights of the copyright holder for sound recordings and the copyright holder for musical works. Exempt from this evaluation is the digital right because copying a digital file to a computer is not a performance).

[27] *See* 17 U.S.C. § 106(6) (2006); FRED BRONSON, THE BILLBOARD BOOK OF NUMBER 1 HITS 877 (Anne McNamara ed. 2003).

[28] *See* 17 U.S.C. § 106(6) (2006) (stating that only the copyright owner has the right to publicly perform the work via digital audio transmissions); BRONSON, *supra* note 27, at 877; 2 NIMMER ON COPYRIGHT, *supra* note 22, § 8.14. To further illustrate, if Spears had co-written the song with Martin, she would have been entitled to a portion of the songwriter's royalty, but still nothing for her performance.

[29] *See* Matthew S. DelNero, *Long Overdue?: An Exploration of the Status and Merit of a General Public Performance Right in Sound Recordings*, 6 VAND. J. ENT. L. & PRAC. 181, 181 & n.11 (2004) (listing numerous bills dating back to

But, each congressional reconsideration encountered the same arguments made by the same stakeholders, which resulted in an intractable deadlock, wherein each side confidently asserted the rightness of its own position and refused to compromise.[30]

The first time U.S. copyright law recognized any performance right for sound recordings came with the passage of the Digital Performance Rights in Sound Recordings Act of 1995[31] (DPRA), which created a "narrow performance right, applicable only to certain digital transmissions of sound recordings."[32] The DPRA gave sound recording copyright owners an exclusive public performance right for digital broadcasts transmitted by interactive services, also known as "celestial jukeboxes,"[33] that provide music "on demand" through the Internet.[34] Traditional

1926 that were unsuccessful in obtaining a full performance right in sound recordings).

[30] *See* H. SUBCOMM. ON COURTS, CIVIL LIBERTIES, AND THE ADMINISTRATION OF JUSTICE OF THE H. COMM. ON THE JUDICIARY, 95TH CONG., PERFORMANCE RIGHTS IN SOUND RECORDINGS 28 (Comm. Print 1978), *available at* http://www.copyright.gov/reports/performance-rights-sound-recordings.pdf. For example, as early as 1932, the National Association of Broadcasters opposed bills seeking to extend copyright protection to sound recordings and prohibit unauthorized radio performance, arguing that such legislation "would be a burden to small radio broadcasters." *Id.* at 31. In 1947, performers challenged radio's promotional value arguing that "it was the performance on the record itself which determined its popularity, not radio, as the broadcasting industry believed." *Id.* at 35–36. During hearings held "on the economic conditions in the performing arts" in late 1961 and early 1962 "the issue of protection for performers, through remuneration for the repeated commercial use of their recorded performances, emerged throughout the testimony as a common . . . theme." *Id.* at 38. In 1965, the "owners of copyright in musical compositions . . . feared they would receive a 'smaller slice of the pie.'" *Id.* at 42. And in a 1976 report "the Senate subcommittee found that, '(t)he views expressed by the various parties were unchanged from those reflected in the previous subcommittee hearings on this subject.'" *Id.* at 56. For additional discussion, *see infra* Section IV.

[31] Digital Performance Right in Sound Recordings Act of 1995, Pub. L. No. 104-39, §§ 2–3, 109 Stat. 336, 336–344 (1995) (codified as amended at 17 U.S.C.A. §§ 106(6), 114); Rebecca F. Martin, Note, *The Digital Performance Right in the Sound Recordings Act of 1995: Can It Protect U.S. Sound Recording Copyright Owners in A Global Market?*, 14 CARDOZO ARTS & ENT. L.J. 733, 733 (1996).

[32] H.R. REP. NO. 104-274, at 12 (1995), *available at* http://www.gpo.gov/fdsys/pkg/CRPT-104hrpt274/pdf/CRPT-104hrpt274.pdf.

[33] *See* Paul Goldstein, *Copyright in the New Information Age*, 40 CATH. U. L. REV. 829, 829–30, 835–37 (1991) (showing an early use of the term "celestial jukebox" and in a thoughtful discussion of the enduring challenges faced by copyright law in accommodating new technology).

[34] 2 NIMMER ON COPYRIGHT, *supra* note 22, § 8.21[A]–[B]; 17 U.S.C.A. § 114(a) (West, Westlaw through P.L. 112-54 (excluding P.L. 112-40) approved 11/12/11)

over-the-air broadcasts and certain retransmissions, however, continued to enjoy exemption from the performance right.[35] Payment for the transmission of digital performances through non-interactive subscription services was required as well, but the DPRA limited the right by granting such digital broadcasters the right to a compulsory license.[36] Three years later, the Digital Millennium Copyright Act (DMCA) expanded the DPRA's revisions by amending the Copyright Act to include non-interactive non-subscription services[37] (i.e., webcasters[38]), subject to the same statutory license.[39]

The most recent congressional attempt to expand copyright law to provide a general public performance right in sound recordings came by way of the unsuccessful Performance Rights Act of 2009.[40] This article argues that despite decades of unsuccessful legislation, an enlarged performance right in sound recordings is justified under theories of copyright and property law. Following the introduction, section II of this article briefly traces the development of U.S. copyright law over the past 200 years and explores the ever-elusive performance right in sound recordings. Section III outlines the provisions of the unsuccessful Performance Rights Act of 2009 and examines how the proposed legislation attempted to address the concerns of broadcasters, songwriters, and music publishers. Section IV dissects some of the most common arguments mounted by interests on both sides of the issue, evaluates whether a sound recording performance right is fairly characterized as a tax, and then utilizes incentive

(citing the exclusive rights of a sound recording copyright owner found in 17 U.S.C.A. § 106).

[35] *See* 17 U.S.C.A. § 114(d)(1)(A)–(B) (West, Westlaw through P.L. 112-54 (excluding P.L. 112-40) approved 11/12/11).

[36] *See id.* § 114(d)(2) (citing the statutory licensing that certain nonexempt transmissions are subject to under 17 U.S.C.A. § 114(f) (West, Westlaw through P.L. 112-54 (excluding P.L. 112-40) approved 11/12/11)).

[37] Digital Millennium Copyright Act, Pub. L. No. 105-304, §§ 402, 405(a), 112 Stat. 2860, 2888–99 (1998) (codified as amended at 17 U.S.C.A. §§ 112(a), 114(d), (f), (g), (j)).

[38] *See Congress Amends Copyright Act Provisions Concerning Public Performance Licensing for Digital Transmissions of Music Recordings by Webcasters*, 20 ENT. L. REP., no. 6, 1998, *available at* http://elr.carolon.net/BI/v20n06.pdf ("'Webcasting' is the term that is used to describe what is done by websites that play audio music recordings pursuant to playlists created by website employees, like conventional broadcast radio stations do. In fact, 'webcasters' are sometimes referred to as 'Internet radio stations.'").

[39] Digital Millennium Copyright Act § 405(a).

[40] *See* Performance Rights Act, H.R. 848, 111th Cong. §§ 1–2(a) (2009).

and economic theories, moral rights theory, and right of publicity and right of performance theories to evaluate the merits of a performance right in sound recordings. Section V recommends the Performance Rights Act of 2009 serve as a model for future sound recording performance rights legislation, but proposes some improvements to increase the likelihood of passage. The article concludes that a performance right in sound recordings is justified under copyright and property law theories and encourages Congress to introduce and pass comprehensive sound recording performance rights legislation to align United States copyright law with the larger international community and to rightly compensate recording artists and record companies for the performance of sound recordings on terrestrial radio.

II. THE EVER-ELUSIVE PERFORMANCE RIGHT IN SOUND RECORDINGS

American copyright law is rooted in the Constitution, which explicitly empowers Congress "[t]o 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."[41] The first Congress used this power to enact the Copyright Act of 1790, providing copyright protection to "authors and proprietors" of "maps, Charts, And books."[42] Congress revamped the law in 1831 to extend copyright protection to musical compositions,[43] also known as "musical works" under U.S. copyright law,[44] but did not include a public performance right.[45] The recognition of any performance right—

[41] U.S. CONST. art. I, § 8, cl. 8.

[42] Copyright Act of 1790, ch. 15, 1 Stat. 124 (1790); *see also* NEIL WEINSTOCK NETANEL, COPYRIGHT'S PARADOX 229 n.2 (2008) ("The complete title of the first federal copyright statute was: 'An Act for the encouragement of learning, by securing the copies of maps, charts, and books, to the authors and proprietors of such copies, during the times therein mentioned.'").

[43] *See* Act of Feb. 3, 1831, ch. 16, 4 Stat. 436 (listing the categories of intellectual property to be covered under copyright law amendment); *see also White-Smith Music Publ'g Co. v. Apollo Co.*, 209 U.S. 1, 15 (1908) ("Musical compositions have been the subject of copyright protection since the statute of February 3, 1831 . . . and laws have been passed including them since that time.").

[44] *See* 17 U.S.C. § 102 (a)(2) (2006) (denoting that copyright protection exists for "musical works, [and] any accompanying words"); *see also* 6 NIMMER ON COPYRIGHT, *supra* note 22, at § 30.02 (defining compositions to include musical works). For the purposes of this article, the terms "musical composition" and "musical work" are interchangeable.

[45] Act of Feb. 3, 1831, ch. 16, 4 Stat. 436; Kettle, *supra* note 21, at 1056.

musical or otherwise—was incremental, with twenty-five years passing between the 1831 amendment and the first grant of a public performance right, which Congress provided to the copyright owners of dramatic compositions (e.g., theater plays).[46] The right to control the public performance of non-dramatic musical works (e.g., popular music) arrived four decades after that—becoming law in 1897.[47]

The Copyright Act of 1909 marked the third major revision of U.S. copyright law.[48] But, while the legislation constituted a comprehensive overhaul of the law, the protection it afforded to music was disappointing.[49] Rather than extending a full public performance right to the copyright owners of musical compositions—as it continued to do for the copyright owners of dramatic works—the new law, instead, provided the copyright owners of musical compositions only the limited, exclusive right "[t]o perform the copyrighted work publicly for profit."[50] Both record companies and recording artists "strong[ly] critici[zed] . . . Congress [for] not [extending] federal copyright protection to the sound recording, [but] . . . leav[ing] such protection to the states."[51]

As is often the case, significant changes to the law result from unexpected events or advances in technology that push Congress to deal with issues it previously had not considered or had placed on the proverbial "back burner." For sound recording legislation, it was technology that compelled Congress to act.[52] In the decades following the 1909 Act, recorded music became increasingly popular[53] and sound recording piracy grew into an "immediate and urgent [problem]."[54] Realizing it could no longer justify

[46] *See* Act of Aug. 18, 1856, ch. 169, 11 Stat. 138, 138–39; Kettle, *supra* note 21, at 1056.

[47] *See* Act of Jan. 6, 1897, ch. 4, 29 Stat. 481, 481–82 (extending copyright protection to include the public performance of musical compositions).

[48] *See* Copyright Act of 1909, ch. 320, 35 Stat. 1075 (effective July 1, 1909); *United States Copyright Office: A Brief Introduction and History*, COPYRIGHT.GOV, http://www.copyright.gov/circs/circ1a.html (last visited Dec. 28, 2011).

[49] *See* Kettle, *supra* note 21, at 1058.

[50] Copyright Act of 1909 § 1(d), (e).

[51] Kettle, *supra* note 21, at 1058.

[52] *See id.* at 1059–60 (discussing how live performances were replaced by technology such as jukeboxes, phonorecords, and radio broadcasting).

[53] *See id.*

[54] H.R. REP. NO. 92-487, at 1569 (1971) ("We are persuaded that the problem [of record piracy] is an immediate and urgent one, and that legislation to deal with it is needed now.").

excluding sound recordings from federal copyright protection, Congress acquiesced—amending the law to identify sound recordings as copyrightable subject matter.[55] On February 15, 1972, sound recordings were placed under the protection of federal law (sound recordings published prior to this date, however, still receive protection from state and common law).[56] While a tremendous victory for sound recording copyright owners, the legislation was narrowly focused and did not address the need for a sound recording performance right—a right that by this point had been enjoyed by musical works copyright owners for decades.[57]

Believing copyright law in the United States had grown unwieldy and was in need of a major overhaul, the Copyright Office commissioned more than thirty studies focusing on problem areas of the law and participated in a number of hearings on Capitol Hill.[58] Convinced that U.S. copyright law should be updated, Congress then began work on the Copyright

[55] *See* Kettle, *supra* note 21, at 1060.

[56] *See* Act of Oct. 15, 1971, Pub. L. No. 92-140, § 1, 85 Stat. 391, 391 (codified as amended in scattered sections of 17 U.S.C.). The Act took effect on February 15, 1972. *Id.* § 3; Kettle, *supra* note 21, at 1060.

[57] *See* DelNero, *supra* note 29, at 186 ("[T]he accompanying House Report to the reproduction Amendment was dismissive of calls for a *performance* right in those same sound recordings." (citing H.R. REP. NO. 92-487, at 1568 (1971))). One could infer from the Report that inclusion of a performance right for sound recordings would have derailed the bill (S. 646)—a result the Committee wanted to avoid given that it was "persuaded" legislation was necessary to deal with the "immediate and urgent" problem of record piracy. *See* H.R. REP. NO. 92-487, at 1569. In its report, the Committee matter-of-factly stated that unlike an earlier unsuccessful bill (S. 543) that sought to establish a "limited copyright in sound recordings, [and to] extend[] that protection to encompass a performance right," the current bill included "[n]o such provision." *Id.* at 1568. While arguably dismissive, the exclusion of a performance right in S. 646 was more likely a necessary compromise to ensure passage of the amendment than a statement on what Congress thought of the merits of such a right. The Committee stated that it was "opposed" to "revisi[ng] . . . the statute on a piecemeal basis[,]" *id.* at 1569, and would have preferred "the problem of record piracy [be] dealt with as part of a broad reform of the Federal copyright statute[,]" but believed "[t]he seriousness of the situation with respect to record piracy . . . [was] unique" and therefore justified immediate action. *Id.* Thus, as one commentator observed, "[s]ince record and tape piracy normally involve only unauthorized duplication and distribution of sound recordings, legislation to effectively address [the problem] need not, and did not, include a provision granting a performance right for sound recordings." Jeffery A. Abrahamson, *Tuning Up For A New Musical Age: Sound Recording Copyright Protection In A Digital Environment*, 25 AIPLA Q.J. 181, 191 (1997).

[58] *See* Kettle, *supra* note 21, at 1063.

Act of 1976.[59] As initially constructed, the Act was to provide a full performance right in sound recordings with a royalty framework mirroring the one used for musical works; heavy lobbying from broadcasters, music publishers, and performing rights societies, however, persuaded Congress to instead pass a lesser version of the bill absent a full performance right.[60]

Though expressly excluding performance rights for sound recordings, the 1976 Act did contain a mandate that the Register of Copyrights "study the problem and . . . report on whether Federal copyright legislation providing performance rights for sound recordings should be enacted."[61] The report, released in June of 1978, concluded that vesting sound recordings with a public performance right was fully justified and would not be contrary to the purposes and goals of copyright law.[62] But, no further action was taken toward amending the Act to create a performance right.[63]

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[59] *See id.* at 1063–64.

[60] *See id.* at 1064–65.

[61] Copyright Act of 1976, Pub. L. No. 94-553, § 114, 90 Stat 2541, 2560–61 (1976) (codified as amended in scattered sections of 17 U.S.C.); H. SUBCOMM. ON COURTS, CIVIL LIBERTIES, AND THE ADMINISTRATION OF JUSTICE OF THE H. COMM. ON THE JUDICIARY, 95TH CONG., PERFORMANCE RIGHTS IN SOUND RECORDINGS III (Comm. Print 1978).

[62] 95TH CONG., PERFORMANCE RIGHTS IN SOUND RECORDINGS 177 ("Sound recordings fully warrant a right of public performance. Such rights are entirely consonant with the basic principles of copyright law generally, and with those of the 1976 Copyright Act specifically. Recognition of these rights would eliminate a major gap in this recently enacted general revision legislation by bringing sound recordings into parity with other categories of copyrightable subject matter.").

[63] *See* William H. O'Dowd, Note, *The Need for a Public Performance Right in Sound Recordings*, 31 HARV. J. ON LEGIS. 249, 253–54 (1994). That Congress ignored the findings of the Register of Copyrights—in a report that Congress itself had requested—is unsurprising when one considers both the weighty influence of broadcasters (and their Washington lobby, the National Association of Broadcasters) and the political reality that elected officials instinctively avoid controversies that could be construed (correctly or not) as having a negative impact on their constituents. The broadcast industry is influential, in part, because its members are not concentrated in one geographic location, unlike the recording industry, which is generally associated with New York City, Los Angeles, and Nashville. *See* Richard Florida et al., *That's Entertainment: Scale and Scope Economies in the Location and Clustering of the Entertainment Economy*, MARTIN PROSPERITY INST., 2, 14–18 (April 2009), http://martinprosperity.org/media/pdfs/Thats_Entertainment-Florida-Mellander-Stolarick-April-2009.pdf (noting that the broadcast industry covers more geographic sectors than the recording industry). This geographic diversity serves the broadcast industry well since, as a collective, it is represented by the whole of Congress—that is, every lawmaker represents numerous broadcasters

A. Digital Performance Right in Sound Recordings Act of 1995

Nearly twenty years after the 1976 Act became law, Congress passed the DPRA (Digital Performance Right in Sound Recordings Act of 1995), giving sound recordings a narrowly defined public performance right.[64] The law provided sound recording copyright owners an exclusive public performance right for digital broadcasts of their recordings transmitted by interactive services—those that make music available "on demand" through the Internet (e.g., "celestial jukeboxes").[65] The DPRA does not apply to public performances on terrestrial broadcast radio or to music played from radio in public establishments, such as bars, restaurants, and stores, however.[66] Additionally, radio stations that broadcast via digital transmission, but do not charge a fee for their programming, are also exempt.[67]

While the DRPA was a milestone for sound recording copyright owners, Congress may have been more interested in maintaining the status quo and protecting broadcasters than expanding performance rights for sound recordings.[68] As one commentator observed, Congress's response to "advancing technology, and its threat to traditional ways of doing business," was shaped largely

back home. Such political muscle places the opposition at an immediate disadvantage. As for controversy, the topic of a sound recording performance right was recognized as "explosively controversial" during this period (as it still is), making it politically dangerous territory. *See* 95TH CONG., PERFORMANCE RIGHTS IN SOUND RECORDINGS 42 (quoting H. COMM. ON THE JUDICIARY, 89TH CONG., SUPPLEMENTARY REPORT OF THE REGISTER OF COPYRIGHTS ON THE GENERAL REVISION OF THE U.S. COPYRIGHT LAW 49–50 (Comm. Print 1965)). Thus, from a purely political perspective, lawmakers had very little reason to support the legislation. It not only would anger a powerful constituent, but would involve them in a controversy that might be remembered at the polls.

64 Digital Performance Right in Sound Recordings Act of 1995, Pub. L. No. 104-39, §§ 2–3, 109 Stat. 336, 336–344 (codified as amended at 17 U.S.C.A. §§ 106(6), 114) (illustrating that sound recording owners are granted the exclusive right "to perform the copyrighted work publicly by means of digital audio transmission," but the right only applies to "interactive" and "subscription transmissions" and services).

65 *Id.*; 2 NIMMER ON COPYRIGHT, *supra* note 22, § 8.21[A]–[B].

66 Digital Performance Right in Sound Recordings Act § 3; Kettle, *supra* note 21, at 1070; *see also infra* note 97 and accompanying text.

67 17 U.S.C.A. § 114(d)(1) (West, Westlaw through P.L. 112-54 (excluding P.L. 112-40) approved 11/12/11).

68 *See* Abrahamson, *supra* note 57, at 218–19 (noting that the enacted legislation may not have been the most favorable for sound recording owners, and is considered a "political compromise").

by "the lobbying power of the broadcasters."[69] In fact, when Senator Orrin Hatch introduced the DPRA, he stated that, "in response to the legitimate concerns of interested parties," it was decided to limit the scope of the Bill so as to "not affect the interests of broadcasters."[70] Thus, rather than address the "unfairness inherent in the copyright treatment of sound recordings,"[71] lawmakers arguably "took the route of least resistance,"[72] amending the law as minimally as necessary to deal with the challenges posed by new technology.[73] For Congress, legislative progress was of less importance than the preservation of "longstanding business and contractual relationships . . . that ha[d] served [the music] industr[y] well for decades."[74]

Congress amended the DPRA in 1998 by passage of the DMCA (Digital Millennium Copyright Act).[75] The DMCA, which was passed to implement two copyright treaties negotiated at the 1996 meeting of the World Intellectual Property Organization in Geneva, was regarded as "an important step forward in addressing and protecting copyrights in cyberspace."[76] The DMCA provided "protection against the circumvention of copyright protection systems" and set forth the obligations of Internet service providers in handling copyright infringement on the Internet.[77] It also expanded the DPRA to include, subject to compulsory license, music offered by non-interactive non-subscription services, such as webcasters and satellite radio.[78]

B. International Copyright Treaties

The United States is a signatory to two major international

[69] *Id.* at 218.

[70] 141 CONG. REC. S948 (daily ed. Jan. 13, 1995) (statement of Sen. Hatch).

[71] Abrahamson, *supra* note 57, at 219.

[72] *Id.*

[73] *Id.* (discussing how Congress chose the path of "least resistance" in amending the law by only addressing those technologies that threatened the effectiveness of the compensation scheme that was already in place, so as to not upset the parties supporting or opposing the legislation too greatly).

[74] H.R. REP. NO. 104-274, at 12 (1995), *available at* http://www.gpo.gov/fdsys/pkg/CRPT-104hrpt274/pdf/CRPT-104hrpt274.pdf.

[75] Digital Millennium Copyright Act, Pub. L. No. 105-304, § 405(a), 112 Stat. 2860, 2890–99 (1998) (codified as amended at 17 U.S.C.A. § 114(d), (f), (g), (j)).

[76] Kettle, *supra* note 21, at 1072.

[77] *Id.*

[78] Digital Millennium Copyright Act § 405(a); DelNero, *supra* note 29, at 186.

copyright treaties: the Berne Convention[79] and the Universal Copyright Convention.[80] Initially, the United States refused to join the Berne Convention because it was "unwilling to discard the copyright notice that set it apart among all the world's principal nations,"[81] and instead joined the Universal Copyright Convention, which did not require it "to forfeit [its] copyright notice requirements."[82] However, the United States eventually joined the Berne Convention after mounting "pressure from American authors and publishers for broader international copyright protection . . . ." [83]

One of the major benefits of Berne Convention membership was that it provided reciprocity "whereby nationals of member countries received the same protection afforded citizens of that nation."[84] However, because the United States does not grant performance rights in sound recordings (which was not a requirement of Berne), member countries that *do* grant such a right and follow the "'reciprocal treatment doctrine,'"[85] refuse to recognize the right for American copyright owners, resulting in a "'substantial economic loss.'"[86] As one commentator noted, given that "[t]he number one export of the United States is entertainment . . . it remains questionable as to why Congress

[79] Berne Convention for the Protection of Literary and Artistic Works, Sept. 9, 1886, 828 U.N.T.S. 221 [hereinafter Berne Convention], *available at* http://www.wipo.int/treaties/en/ip/berne/. The Berne Convention has undergone six revisions: Paris, May 4, 1896; Berlin, November 13, 1908; Berne, March 20, 1914; Rome, June 2, 1928; Brussels, June 26, 1948; Paris, July 24, 1971. *Id.*

[80] Universal Copyright Convention, Sept. 6, 1952, 6 U.S.T. 2731, 216 U.N.T.S. 132 (adhered to by the United States on Sept. 16, 1955), as revised July 24, 1971, 25 U.S.T. 1341 (adhered to by the United States on July 10, 1974), *available at* http://portal.unesco.org/culture/en/ev.php-URL_ID=35233&URL_DO=DO_TOPIC&URL_SECTION=201.html.

[81] *See* 4 NIMMER ON COPYRIGHT, *supra* note 22, § 17.01(B)(1)(a).

[82] *Id.* § 17.01(B)(2); *see also* Susan Tiefenbrun, *A Hermeneutic Methodology and How Pirates Read and Misread the Berne Convention*, 17 WIS. INT'L L.J. 1, 18 (1999) ("The Universal Copyright Convention was created in the early 1950's for the specific purpose of making it possible for the United States to join the Berne Convention. The Universal Copyright Convention established a low-level international regime requiring no change in U.S. law to bring America into the international copyright legal arena and to stop U.S. piracy of foreign works.").

[83] Kettle, *supra* note 21, at 107–77.

[84] *See id.*

[85] *Id.* at 1077–78 (quoting *The Digital Performance Right in Sound Recordings Act of 1995: Hearings on H.R. 1506 Before the Subcomm. on Intellectual Prop. and Judicial Admin. of the H. Comm. on the Judiciary*, 104th Cong. 768 (1995) (statement of Dennis Breith, President, Recording Musicians' Association of the United States and Canada)).

[86] *Id.*

has not exercised its powers to maximize the economic benefits of the music export."[87]

III. THE PERFORMANCE RIGHTS ACT OF 2009 (H.R. 848)

The most recent legislation seeking a performance right in sound recordings—Performance Rights Act of 2009—was introduced to both the House and the Senate on February 4, 2009,[88] with the stated goal of "provid[ing] parity in radio performance rights" under U.S. copyright laws.[89] This bipartisan bill proposed to amend sections 106 and 114 of the Copyright Act.[90] Most notably, the limited public performance right in sound recordings in section 106(6) would have been expanded to include an exclusive right to perform a sound recording publicly by means of any "audio transmission," rather than only by "digital" audio transmission.[91] Section 114(d)(1), which provides exemptions for the public performance of sound recordings, would have been amended to eliminate the exemption for "nonsubscription broadcast transmissions,"[92] (i.e., terrestrial radio). Had the bill become law, the amendments to sections 106 and 114 would have brought a significant measure of equity to this area of U.S. copyright law by requiring broadcast radio stations to pay copyright owners a royalty payment for the use of their sound recordings when played on the radio, regardless of platform (i.e., broadcast, satellite, or Internet).[93] As committee chairman and bill sponsor, Representative John Conyers, Jr., observed, "every other platform for broadcast music—including satellite radio, cable radio, and Internet webcasters—pay a performance royalty. Terrestrial radio is the only platform that doesn't pay."[94] "This [royalty] exemption . . . no longer makes

[87] *Id.* at 1074.

[88] *See* Performance Rights Act, H.R. 848, 111th Cong. §§ 1–2(a) (2009). The bill was originally introduced in the previous Congress on Dec. 18, 2007, referred to committee, but never voted on. *See* Performance Rights Act, S. 2500, 110th Cong. (2007), http://thomas.loc.gov/cgi-bin/bdquery/z?d110:S2500:.

[89] H.R. 848; *see* Press Release, U.S. House of Representatives Comm. on the Judiciary, Conyers, Issa Introduce Bipartisan Performance Rights Legislation (Feb. 4, 2009) [hereinafter House Press Release], *available at* http://judiciary.house.gov/news/090204.html.

[90] H.R. 848 § 2(a)–(b).

[91] *Id.* § 2(a)–(b)(1).

[92] 17 U.S.C.A. § 114(d)(1)(A) (West, Westlaw through P.L. 112-54 (excluding P.L. 112-40) approved 11/12/11); *id.* § 2(b).

[93] House Press Release, *supra* note 89.

[94] *House Hearing* 2009, *supra* note 1, at 14 (prepared statement of the Hon.

sense and deprives artists of the compensation they deserve for their work."[95]

The Bill also provided a number of protections crafted to address the concerns of songwriters and broadcasters.[96] First, to ensure that a sound recording performance right would not excessively burden broadcasters economically, the Bill offered "special treatment for small, non-commercial, educational, and religious stations," and for the transmission of religious services and incidental uses of music.[97] Additionally, the Bill provided for the availability of a "per program license option for terrestrial broadcast stations that make limited feature uses of sound recordings."[98]

In order to ensure that the owners of musical works would not be negatively impacted, the Bill provided that the "[l]icense fees payable to copyright owners for the public performance of their musical works shall not be reduced or adversely affected in any respect as a result of the rights granted by section 106(6)."[99] This provision guaranteed that songwriters—who already enjoy a performance right—would continue to be paid a royalty when

John Conyers, Jr., Chairman, Comm. on the Judiciary).

[95] *Id.* at 14–15. Terrestrial broadcasters claim a special "symbiotic" relationship with recording artists and record companies, wherein radio play promotes music, leading to artist recognition and record sales, and music promotes radio by attracting listeners and generating advertising revenue. *See infra* note 138 and accompanying text. While there is merit to the underlying premise of this claim, the relationship as it exists today is far from symbiotic. For decades, radio was practically the only way artists and record companies could promote their music to large audiences and listeners could discover new songs. Today, radio is but one of many platforms from which music is available—a shift that has tipped the balance and eroded the claim of a symbiotic relationship. However, the claim completely collapses when one considers that listening to music on the radio has become a substitute for purchasing it. *See infra* notes 197–202 and accompanying text. The benefits of the royalty exemption thus accrue largely to broadcasters—an imbalance that must be corrected lest the relationship become completely parasitic.

[96] *See* House Press Release, *supra* note 89.

[97] *See* H.R. 848, § 3(a)(1), (b); *House Hearing* 2009, *supra* note 1, at 205 (statement of Steve Newberry, President and Chief Executive, Commonwealth Broadcasting Corporation). This favorable treatment is in recognition of the fact that many noncommercial, minority-owned, and religious stations operate on a tight budget and many religious stations are listener-supported. According to Mr. Bainwol, this provision will "ensure that small stations are not economically hurt" and "nonprofit stations can continue their mission while creators of the property they are using are respected and compensated." *House Hearing* 2009, *supra* note 1, at 197 (statement of Mitch Bainwol, Chairman & CEO, Recording Industry Association of America).

[98] *See* H.R. 848, § 4.

[99] *Id.* § (a)(1).

their musical works are broadcast on the radio. Songwriters and music publishers have long feared a full performance right in sound recordings, believing it could reduce their share of the performance royalties pie—especially if, as they theorize, "the total royalties from performance rights . . . remain[ed] the same"—resulting in the loss of a substantial income.[100] They also expressed concern that a performance right in sound recordings could diminish their rights by giving sound recording copyright owners the power to deny broadcasters a license to play the recorded song, thereby blocking the use of the underlying musical work.[101] The Bill addressed this concern specifically by requiring "that all public performances of a sound recording first require a license granted by the owner of the underlying musical composition."[102] Therefore, a song could not be performed publicly unless the copyright owner of the musical work first granted a license for such use.

Finally, the Bill sought to "protect[] nonfeatured musicians and featured artists by ensuring they always receive 50% of the performance royalty, regardless of whether the license [was] awarded under the statute or privately negotiated."[103] By requiring that "[h]alf of the payments . . . go directly to the performers" without going through any third party, the legislation guarded against performance royalties being swallowed completely by record companies.[104]

The legislation would have had no effect, however, on the performance exemptions found in § 110(5)(A) and (B), which allow public establishments such as bars, restaurants, and small businesses to play music originating from licensed radio or television broadcasts on their premises, without paying performance royalties.[105] To qualify under this narrow exemption,

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[100] Kettle, *supra* note 21, at 1053 (quoting Paul Goldstein, *Commentary on "An Economic Analysis of Copyright Collectives,"* 78 VA. L. REV. 413, 414 (1992)) (internal quotations omitted).

[101] *See id.*

[102] *House Hearing* 2009, *supra* note 1, at 16 (prepared statement of the Hon. John Conyers, Jr., Chairman, Comm. on the Judiciary). This lack of control on the part of recording artists over the public performance of their music has moral rights implications. *See infra* section IV.C.

[103] *Id.*

[104] H.R. 848, § 6; *House Hearing* 2009, *supra* note 1, at 198 (statement of Mitch Bainwol, Chairman & CEO, Recording Industry Association of America).

[105] 17 U.S.C. § 110(5)(A)–(B) (2006); *House Hearing* 2009, *supra* note 1 at 197–98 (statement of Mitch Bainwol, Chairman & CEO, Recording Industry Association of America).

businesses are allowed only to perform music or display programs embodying music received from a licensed radio or television station, or from a cable system or satellite carrier, and may not charge a fee to hear or see the transmission, or re-transmit it beyond the premises.[106] The exemption also details the maximum area a particular type of business is allowed to occupy and restricts the size and placement of sound and audiovisual equipment, such as speakers or televisions.[107]

Broadcasters questioned why this exemption was not addressed in the Performance Rights Act of 2009, especially since it appeared to be at odds with the goal of a full sound recording performance right.[108] Lawmakers who supported the exemption made a reasonable distinction, countering that it was justified because broadcasters, unlike restaurants and retail shops, are in the business of "selling . . . music, and [the] advertising [that] go[es] with it."[109]

From a practical standpoint, even if the Performance Rights Act of 2009 had addressed this apparent gap and eliminated the exemption, it is difficult to imagine how it would have been enforced effectively. It would be a mammoth undertaking for government or industry to police every restaurant, coffee shop, bar, and small business for violations of performing music from radios or televisions. And, even if enforcement were possible, the actual collection and administration of royalties received from hundreds of thousands of businesses would be mind-boggling.[110]

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106 17 U.S.C. § 110(5)(A)–(B)(i).

107 17 U.S.C. § 110(5)(A)–(B)(i)–(ii).

108 *The Performance Rights Act and Parity Among Music Delivery Platforms: Hearing Before the S. Comm. on the Judiciary*, 111th Cong. 24 (2009) [hereinafter *Senate Hearing* 2009] (statement of Steve Newberry, President and Chief Executive, Commonwealth Broadcasting Corporation) ("[I]n restaurants, in ballparks, we have [royalty-exempt] performances that occur every day, but yet this bill does not want to address that. It just wants to address radio stations. . . . [I]t is difficult for us to understand why if it is about the principle of this argument, why is [the legislation] not . . . comprehensive[?]").

109 *Id.* (statement of Sen. Richard J. Durbin, Member, S. Comm. on the Judiciary) (responding to Steve Newberry's question regarding justification). During the exchange, Senator Durbin conceded that addressing the exemptions found in § 110(5)(A)–(B) was "a separate fight . . . [w]e may be forced to visit . . . ." *Id.* But he stated that he "struggle[s] with this notion that radio stations can pick anybody's performance and use it to their benefit and not compensate them." *Id.*

110 *See Subcommittee on Regulations and Healthcare Hearing on Impact of Food Recalls on Small Businesses*: *Hearing Before the H. Comm. on Small Bus.*, 111th Cong., 24–25 (2009) (statement of Ken Conrad, Chairman of the Board, Libby Hill Restaurants, Incorporated) (explaining that the restaurant industry

The significance and effect of this exemption, however, may be overblown. While it was estimated that 70 percent of restaurants and bars would have qualified for the exemption at the time it went into effect in 1999,[111] the actual number of restaurants and small businesses that perform music under the exemption is likely far fewer. Though the exact number is unknowable, what is certain is that many businesses today, including retail stores and food service and drinking establishments, choose to forego the exemption altogether and subscribe to commercial music services, such as Muzak,[112] which secure the necessary rights[113] and pay royalties to artists, labels, and publishers for the music played.[114]

IV. IS A PERFORMANCE RIGHT IN SOUND RECORDINGS JUSTIFIED?

For nearly a century, the merits of granting "performance rights for sound recordings ha[ve] been debated by parties, courts, national legislatures, and intergovernmental bodies in various State, Federal, foreign, and international forums."[115] While times have changed, many of the arguments remain the same. Whether claiming that "small broadcasters would suffer harm" if a performance right were granted,[116]or showcasing the plight of performers who have encountered financial difficulty,[117]

is very large and composed of several small businesses and that any regulation imposed on the industry would be hard to enforce because of its expansiveness and because it is composed of mostly small, privately owned businesses). Because the restaurant industry is comprised of 945,000 food service locations it would be a logistical nightmare to enforce 17 U.S.C. § 110(5)(B).

111 *Music Licensing in Restaurants and Retail and Other Establishments: Hearing Before Subcomm. on Courts and Intellectual Prop*, 105th Cong. 129 (1997) (statement of Mac Davis, Songwriter, on behalf of Broadcast Music).

112 *See* David Owen, *The Soundtrack of Your Life: Muzak in the Realm of Retail Theatre*, NEW YORKER, Apr. 10, 2006, at 66 (providing an interesting history of Muzak and the use and "design" of music in retail settings).

113 *See* NAT'L RESTAURANT ASS'N, *Playing Music in Your Restaurant, in* LEGAL PROBLEM SOLVER FOR RESTAURANT OPERATORS 1, 2 (2010), *available at* http://www.restaurant.org/pdfs/legal/lps/guests_music.pdf (stating that music providers such as Muzak pay the performing rights societies so that restaurant owners do not have to pay them directly).

114 *See id.* (explaining that music providers such as Muzak pay performing rights societies and restaurant owners do not have to pay them directly and instead pay the music provider only).

115 H. SUBCOMM. ON COURTS, CIVIL LIBERTIES, AND THE ADMINISTRATION OF JUSTICE OF THE H. COMM. ON THE JUDICIARY, 95TH CONG., PERFORMANCE RIGHTS IN SOUND RECORDINGS 42 (Comm. Print 1978).

116 *Id.* at 31.

117 *See id.* at 38–39 (quoting *Economic Conditions in the Performing Arts:*

each side has fought zealously for its position.

Today, the debate has again crystallized around economics and ideas of fairness. One of the most common arguments focuses on the unfairness of allowing an industry or business to profit from the use of another's property without requiring it to obtain the owner's permission or pay compensation for the use.[118] Performance rights advocates contend that U.S. copyright law has sanctioned a highly inequitable and unusual business model, wherein broadcasters are permitted to obtain their "primary input" (i.e., sound recordings) without having to pay the sound recording owners, who in turn are prohibited from "tell[ing] broadcasters not to use [their] property."[119] Supporters of sound recording performance rights have likened such uncompensated, unilateral use of property to "a taking."[120] Broadcasters discount this characterization, arguing that recording artists and record companies receive a greater benefit than they admit from the performance of their music on the radio and are compensated through the resultant increase in record sales.[121]

Hearing Before the Select Subcomm. on Educ. of the H. Comm. on Educ. and Labor, 87th Cong. 17 (1961–62) (statement of Herman Kenin, President, Am. Fed'n of Musicians) ("[I]t is a shocking crime that [artists] are denied the right to receive additional fees, when money is made with [their] product[s]. All you have to do is put a radio set into this room today and you can listen for hours and hours to canned music here, [played from] records received free by the broadcaster . . . while the men who made them are sitting home trying to figure out how to pay for their children's education.").

[118] *See House Hearing* 2009, *supra* note 1, at 192–93 (statement of Mitch Bainwol, Chairman & CEO, Recording Industry Association of America) ("What business would not love to avoid paying for their key input? Imagine Morton's not paying for beef . . . .").

[119] *Id.* at 192, 195.

[120] *Id.*

[121] *See id.* at 147 (prepared statement of Steven Newberry, Commonwealth Broadcasting Corporation) ("The data shows that the [sic] when music airs on the radio, record sales go up."). Broadcasters argue that recording artists are not without "payment" for the use of their music—the benefit being in the form of song promotion. This argument, however, overlooks the fact that the promotion value of radio airplay significantly declines as songs age. Radio play for a song that debuted this year is far more valuable than airplay for a song that was popular three years ago. As a result, broadcasters, songwriters, and music publishers get an extremely good deal—their benefit continues for the life of the song, while the recording artist has a very small window of opportunity to capitalize on their song's popularity and hope the "promotion" will turn into record sales. A radio station playing "oldies"—or even not-so-old songs (i.e., songs from the 1990s or 2000s)—will have a viable business since many listeners enjoy songs from the past and advertisers like to target such audiences; however, for the recording artist or sound recording copyright owner, there is practically no economic benefit derived from the station's performance

The argument that radio's promotion of music is adequate payment for its use is, however, not as persuasive today given that radio airplay is no longer a guarantee of sales, but in fact has the opposite effect.[122] In a 2007 study, researchers found that "[r]adio play [was] largely a displacement for the sales of sound recordings, a result that seems at odds with most conventional thinking."[123] The repeated performance of a song on the radio (certainly a sign of popularity) is of little value to the sound recording copyright owner if listeners do not purchase the music. Promotion is only valuable to the extent that it generates sales.[124] Furthermore, as one commentator correctly noted, if the promotion-as-compensation argument is valid, then why do broadcasters "have to pay a royalty to the owner of the underlying musical work . . . since [that] owner also benefits (through phonorecord sales) from air play of the song[?]"[125]

When their own property is jeopardized, however, broadcasters have no difficulty arguing for the right to negotiate and receive compensation for the use—a turn that significantly diminishes the credibility of their position with respect to performance rights.[126] More than twenty years ago, television broadcasters demanded successfully that Congress require cable companies and satellite operators to pay for the use of broadcasters' content whenever a broadcaster's terrestrial signal is retransmitted back into that station's local market by cable and satellite companies, notwithstanding the fact that the providers are increasing the broadcaster's viewership and advertising revenue.[127]

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of their songs. In this situation, the prospect of song or album sales is virtually non-existent—the listener either already owns the recording (perhaps as a result of the song's airplay years before) or does not own the recording, but has no intention of purchasing it. So once the period of genuine promotion passes, the sound recording copyright owner receives nothing from repeated radio play—neither royalty nor promotion. The same cannot be said of the broadcaster, songwriter, or publisher. *See Fiction vs. Fact*, MUSICFIRST COALITION, http://www.musicfirstcoalition.org/media/fictionvsfact (last visited Feb. 13, 2012).

122 Liebowitz, *supra* note 4, at 15–17.

123 *Id.* at 32.

124 *See House Hearing* 2009, *supra* note 1, at 192 (statement of Mitch Bainwol, Chairman & CEO, Recording Industry Association of America) (describing the "hollow" promotion of playing oldies on the radio, as it does not generate any record sales from air play).

125 Abrahamson, *supra* note 57, at 217.

126 *See House Hearing* 2009, *supra* note 1, at 195 (prepared statement of Mitch Bainwol, Chairman & CEO, Recording Industry Association of America).

127 *Id.* (referring to the Satellite Home Viewer Act of 1988 and its subsequent

Broadcasters also justify the current state of affairs by characterizing radio's relationship with music as symbiotic, arguing that a performance right would upset a mutually beneficial relationship—that is, radio and music work hand-in-hand to promote each other.[128] As observed, radio's contribution to this "relationship"—its promotion value—is not commensurate with the benefit it receives from sound recording copyright owners. Performance rights advocates argue that radio is not in business to promote music (as it often claims), but to use music as a means "to attract listeners, which in turn allows them to earn billions from advertising."[129]

Another recurrent argument focuses on the financial impact a sound recording performance right would have on broadcasters, especially small, independent stations.[130] Broadcasters contend that paying additional royalties would impose a financial hardship for many radio stations across the country already feeling squeezed by the economic turmoil of recent years.[131] Though terrestrial radio remains hugely popular, with "the greatest number of overall listeners," broadcasters have not been immune to economic woes, and many have entered bankruptcy or gone off the air.[132]

Economic hardship, though, is not a valid justification for radio's continued uncompensated use of music. While the

revisions and renewals as codified in 17 U.S.C.A. §§ 119, 122). For a concise background on sections 119 and 122 of the Copyright Act, *see* REGISTER OF COPYRIGHTS, SATELLITE HOME VIEWER EXTENSION AND REAUTHORIZATION ACT § 110 REPORT 3–13 (2006), *available at* http://www.copyright.gov/reports/satellite-report.pdf.

[128] *See House Hearing* 2009, *supra* note 1, at 142, 145 (statement of Steve Newberry, President and Chief Executive, Commonwealth Broadcasting Corporation) ("Herbie Hancock summed it up nicely—'Just as radio promotes music, music promotes radio,' . . .").

[129] *Id.* at 195–96 (prepared statement of Mitch Bainwol, Chairman & CEO, Recording Industry Association of America).

[130] *Id.* at 153–54 (prepared statement of Steve Newberry, President and Chief Executive, Commonwealth Broadcasting Corporation).

[131] *See id.* at 142 (prepared statement of Steve Newberry, President and Chief Executive, Commonwealth Broadcasting Corporation) ("Under H.R. 848, your local radio stations will be forced to cut services or employees. They may be forced to move from a music format to a talk format or may be facing bankruptcy . . .").

[132] Pew Project for Excellence in Journalism, *Audio– Summary Essay*, THE STATE OF THE NEWS MEDIA 2010, http://stateofthemedia.org/2010/audio-summary-essay/ (last visited Feb. 14, 2012) [hereinafter *Audio–Summary Essay*] ("Many stations have left the air and some owners of multiple stations have entered bankruptcy.").

economy has proved challenging for broadcasters, they are hardly alone—many other businesses and industries have encountered similar financial difficulties in recent years, including record companies.[133] However, one would be hard-pressed to find another industry whose business model insists its suppliers provide goods free-of-charge so that it can continue to operate and make a profit.[134]

Additionally, performance rights proponents note that radio has made the claim of financial hardship for decades[135] and contend broadcasters' "oppos[ition] [to] correcting the law" [136] is rooted more in self-interest (i.e., maintaining profits) than economic constraints. Terrestrial radio benefits immeasurably from free use of the broadcast spectrum as well as its exemption from paying performance royalties for using the sound recordings that comprise its playlists.[137] Such benefits give it a "significant economic advantage over every other radio platform,"[138] and allow it to dominate all other forms of radio—despite some decline in revenues.[139] As one advocate noted, "[i]t's no mystery why broadcasters are fighting so hard to maintain their special interest exemption."[140] Thus, the fact remains that terrestrial radio is "the most economically secure platform that broadcasts music, . . . [but] the only platform in the United States that does

[133] *See* Patrick Fogarty, *Major Record Labels and the RIAA: Dinosaurs in a Digital Age?*, 9 HOUS. BUS. & TAX J. 141, 144–47 (2008) (describing how the record companies' sales have dropped due to internet sharing of music).

[134] *See House Hearing* 2009, *supra* note 1, at 194–95 (prepared statement of Mitch Bainwol, Chairman & CEO, Recording Industry Association of America) (describing how broadcasters are able to use songs recorded by artists to build their business and sell advertising without having to pay the recording artists for use of their records).

[135] *See Fiction vs. Fact*, *supra* note 121 ("Broadcasters [have] actively fought Performance Right legislation in the '50s, '60s, '70s, and '90s as well. It will never be 'the right time' for them.").

[136] *House Hearing* 2009, *supra* note 1, at 198 (prepared statement of Mitch Bainwol, Chairman & CEO, Recording Industry Association of America).

[137] *See id.* at 195 ("If anything, this has been a government subsidy to the broadcasters, allowing them to use property for free in an anticompetitive manner.").

[138] *Id.* at 198.

[139] *See* Kenny Olmstead et al., *Audio: Medium on the Brink of Major Change*, THE STATE OF THE NEWS MEDIA 2011, http://stateofthemedia.org/2011/audio-essay/ (last visited Feb. 14, 2012) (reporting data that shows traditional radio's continued success against all other forms of media other than television).

[140] *House Hearing* 2009, *supra* note 1, at 198 (prepared statement of Mitch Bainwol, Chairman & CEO, Recording Industry Association of America).

not pay."[141]

Performance rights advocates claim that despite their willingness to explore responsible compromises with broadcasters, such as "build[ing] phase-in ramps [to deal with] the economic downturn[,]"[142] broadcasters have refused to talk.[143] Broadcasters' resistance to discussion and compromise is revealing, exposing their economic hardship argument to be little more than a ploy intended to derail reform and maintain their favored position. Radio's ability to use sound recordings without permission or payment is integral to its "profit-making business model" and it has no reason to participate or encourage changes in the law.[144] Thus, change in this area of law is unlikely to ever

[141] *Id.* at 192.

[142] *Id.* at 193. *See also Fiction vs. Fact*, *supra* note 121 ("[T]he current version of the performance Rights Act recognizes the current economic downturn: No royalties will be required for three years after enactment of the legislation (one year for stations that make more than $5 million in revenues annually).").

[143] *See House Hearing* 2009, *supra* note 1, at 193 (statement of Mitch Bainwol, Chairman & CEO, Recording Industry Association of America) ("Despite the call last year from Members from this Committee for us to sit down and negotiate, Mr. Rehr, who runs the NAB, said he would rather slit his throat than talk. I have got to tell you that it makes it hard to negotiate with that kind of player."). In October 2010, near the close of the 111th Congress—when passage of the Performance Rights Act of 2009 was unlikely—the NAB provided musicFIRST with "a legislative 'Term Sheet' designed to resolve the longstanding performance fee issue." Press Release, National Association of Broadcasters, *NAB Radio Board Endorses Conditions Necessary for Performance Resolution* (Oct. 26, 2010), *available at* http://www.nab.org/documents/newsRoom/pressRelease.asp?id=2390. The term sheet, according to the NAB, represented "a good faith effort to resolve [the performance rights] issue in the best interest of both radio and the music industry." *Id.* While "NAB remain[ed] 100 percent opposed to performance fee legislation[,]" the NAB deemed the term sheet provisions "essential to the future of free and local radio[.]" *Id.* (internal quotations omitted). The provisions included a bare-bones revenue-based royalty structure for terrestrial broadcasts, a reduction in current digital royalty rates, and a requirement that resultant legislation "include a provision mandating the inclusion and activation of radio chips on . . . mobile devices." *See Term Sheet for Performance Rights Agreement*, NAT'L ASS'N OF BROADCASTERS (Oct. 25, 2010), http://www.nab.org/documents/newsroom/pdfs/102510_NABTermSheet.pdf. The term sheet also contained the requirement that musicFIRST acknowledge and recognize the unparalleled promotional value of terrestrial radio airplay. *See id.* The unilaterally created proposal stipulated "that if any term of this framework [was] not enacted, the agreement of the parties [would be] null and void." *Id.* MusicFIRST rejected the proposal stating the "term sheet [gave] the idea of a sweetheart deal a bad name. It might even be worse for the music community than the status quo." Tom Matzzie, *NAB Rewrites July Agreement and Undermines Economics of Compromise*, MUSICFIRST COALITION (Oct. 26, 2010), http://www.musicfirstcoalition.org/node/813.

[144] *House Hearing* 2009, *supra* note 1, at 195 (prepared statement of Mitch

occur if perfect economic conditions are required for broadcaster cooperation.

Finally, performance rights supporters continue to press for legislative change to end the ongoing loss of "hundreds of millions of dollars" in foreign royalties.[145] American music enjoys great popularity throughout the world, "get[ting] more [foreign] airplay . . . than any other country," however, U.S. "laws prevent payment for [foreign] radio performances."[146] While numerous nations provide for sound recording performance rights, the absence of such a right in the United States frustrates the reciprocity provisions of international copyright treaties.[147] This prevents U.S. sound recording copyright owners from being compensated when their music is broadcast abroad, "even though [those same foreign countries] compensate their own and other countries' artists."[148] This is an incredible economic loss.[149] That recording artists and record companies, as well as the larger economy, would lose "approximately $100 million in royalties"[150] annually without Congress taking action is puzzling.

A. Performance Tax or Performance Right?

As happens all too often with complicated yet important matters, the debate surrounding the Performance Rights Act of 2009 was reduced to self-serving "buzzwords" that politically charged the issue. Rather than addressing the larger question of whether a performance right in sound recordings is justified on the merits, the issue was trivialized to whether a performance

Bainwol, Chairman & CEO, Recording Industry Association of America).

145 *Id.* at 194.

146 *Id.*

147 *See supra* notes 79–87 and accompanying text (highlighting the inconsistent history of United States international IP law controls). *See also Fairness in Radio: A Performance Right for Sound Recordings*, AFL-CIO (Mar. 4, 2008), http://www.aflcio.org/aboutus/thisistheaflcio/ecouncil/ec03042008g.cfm (listing Austria, Australia, Belgium, Canada, Czech Republic, Denmark, Finland, France, Germany, Greece, Hungary, Iceland, Ireland, Italy, Japan, Luxembourg, Mexico, Netherlands, New Zealand, Norway, Poland, Portugal, Slovakia, South Korea, Spain, Sweden, Switzerland, Turkey, and the United Kingdom as countries that provide a performance right as of 2008).

148 *House Hearing* 2009, *supra* note 1, at 194 (statement of Mitch Bainwol, Chairman & CEO, Recording Industry Association of America).

149 Broadcasters show little interest in this area of the debate, presumably because they have no financial stake in whether foreign broadcasters pay royalties to U.S. sound recording copyright owners for the performance of their music.

150 *Fiction vs. Fact*, *supra* note 121.

right in sound recordings is a "right" or a "tax."[151]

Though the characterization of a performance right in sound recordings as a "tax" was far from new,[152] the term was especially resonant in the tense political environment of the day—a time when the nation's leaders were grappling with a crumbling economy and the public was souring on an ineffectual yet expanding government.[153] The Oxford English Dictionary, however, defines the word "tax" as "a compulsory contribution to state revenue, levied by the government on workers' income and business profits or added to the cost of some goods, services, and transactions."[154] Therefore, unless the royalties are collected by the government to be paid into the Treasury, a performance right is not a tax. Congressman Conyers addressed this point directly, stating, "Let me also be clear that this legislation is not a tax—not a penny of the performance royalties are going to the government. All royalties generated will go to the copyright owners and creative artists who deserve compensation for their talent."[155]

Furthermore, royalties are an accepted part of commerce and regularly paid to thousands of people as compensation for their work—some of whom are the owners of musical works, who have been paid by broadcasters for decades.[156] Claiming that a sound recording performance right would constitute a "tax" on broadcasters is thus little more than "hyperbolic diversionary

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[151] *See* JANE MAGO ET AL., NAT'L ASS'N OF BROADCASTERS, SHOULD THE U.S. LEAD OR FOLLOW? WHY OTHER COUNTRIES' IMPOSITION OF A TAX ON THE PERFORMANCE OF SOUND RECORDINGS DOES NOT JUSTIFY SUCH A U.S. TAX 3–5 (2009), *available at* http:// www.nab.org/documents/advocacy/performanceTax/032009_Should_the_US_Lead_or_Follow.pdf.

[152] H. SUBCOMM. ON COURTS, CIVIL LIBERTIES, AND THE ADMINISTRATION OF JUSTICE OF THE H. COMM. ON THE JUDICIARY, 95TH CONG., PERFORMANCE RIGHTS IN SOUND RECORDINGS 1063 (Comm. Print 1978) ("Users today look upon any requirement that they pay royalties as an unfair imposition in the nature of a 'tax.'").

[153] *See A Year Out, Widespread Anti-Incumbent Sentiment*, PEW RES. CENTER (Nov. 11, 2009), http://pewresearch.org/pubs/1405/widespread-anti-incumbent-sentiment-obama-approval-afghanistan-troop-levels ("Ratings of the state of the nation's economy remain dismal– fully 91% of Americans rate the nation's economy as in 'only fair' or 'poor' shape.").

[154] *Tax*, OXFORD ENG. DICTIONARY, http://oxforddictionaries.com/definition/tax (last visited Feb. 16, 2012).

[155] *House Hearing* 2009, *supra* note 1, at 15 (prepared statement of the Hon. John Conyers, Jr., Chairman, Comm. on the Judiciary).

[156] *See Fiction vs. Fact*, *supra* note 121 (discussing the accepted nature of royalties).

rhetoric."[157] At its core, granting a performance right in sound recordings is "about [the] right of a creator to be able to negotiate and get paid for what [he] create[s]."[158] Most people would "call it a paycheck."[159]

B. Support for Performance Rights Under Theories of Property and Copyright Law

While it is evident that a performance right in sound recordings is not a tax on broadcasters, the question of whether such a right is merited must still be addressed. Arguments on both sides of the debate are essentially ones of fairness and economics. The subsequent analysis evaluates these arguments and finds support for a performance right in sound recordings under incentive and economic theories, moral rights theory, and right of publicity and performance theories.

1. Incentive and Economic Theories

The core objective of American copyright law, as set forth in the copyright clause of the Constitution, is to further "the Progress of Science and useful Arts."[160] In order to accomplish this objective, copyright law endeavors to incentivize authors to create new works by granting them a limited monopoly over the reproduction of their work.[161] The Founders believed the creative activities of authors, benefit the public and that "the copyright monopoly is a necessary condition to the full realization of such creative activities."[162] Incentive and economic theories firmly undergird the rationale for U.S. copyright law and have been recognized by both Congress[163] and the courts.[164]

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[157] *House Hearing* 2009, *supra* note 1, at 194 (prepared statement of Mitch Bainwol, Chairman & CEO, Recording Industry Association of America).

[158] *Id.* at 20 (statement of the Hon. Howard L. Berman, Member, Comm. on the Judiciary).

[159] *Id.* at 33 (statement of Randy Weingarten, President, American Federation of Teachers, Larry Cohen, President, Communications Workers of America, Gerald McEntee, President, American Federation of State, County and Municipal Employees, Harold Schaitberger, President, International Association of Fire Fighters, Leo Gerard, President, United Steelworkers, Anna Burger, Secretary-Treasurer, Service Employees International Union).

[160] U.S. CONST. art. I, § 8, cl. 8.

[161] Daryl Lim, *Copyright Under Siege: An Economic Analysis of the Essential Facilities Doctrine and the Compulsory Licensing of Copyrighted Works*, 17 ALB. L.J. SCI. & TECH. 481, 485–86 (2007).

[162] 1 NIMMER ON COPYRIGHT, *supra* note 22, § 1.03[A].

[163] *See* H.R. REP. NO. 105-452, at 4 (1998) ("Extending copyright protection

Incentive theory encourages the development of copyright laws that promote the production of new creative works "for the general public good."[165] While there is debate as to whether a

will be an incentive for U.S. authors to continue using their creativity to produce works, and provide copyright owners generally with the incentive to restore older works and further disseminate them to the public."); DelNero, *supra* note 29, at 195 ("Congress has explicitly accepted the incentive rationale for granting expanded copyright protection.").

[164] *See e.g.*, *Eldred v. Ashcroft*, 537 U.S. 186, 212 n.18 (2003) (citing *Am. Geophysical Union v. Texaco Inc.*, 802 F. Supp. 1, 27 (S.D.N.Y. 1992), *aff'd*, 60 F.3d 913 (2d Cir. 1994)) ("[The][c]opyright law *celebrates* the profit motive, recognizing that the incentive to profit from the exploitation of copyrights will redound to the public benefit by resulting in the proliferation of knowledge . . . . The profit motive is the engine that ensures the progress of science."); *Twentieth Century Music Corp. v. Aiken*, 422 U.S. 151, 156 (1975) ("The immediate effect of our copyright law is to secure a fair return for an 'author's' creative labor. But the ultimate aim is, by this incentive, to stimulate artistic creativity for the general public good."), *superseded by statute*, 17 U.S.C. § 110(5)(A) (2006); *Mazer v. Stein*, 347 U.S. 201, 219 (1954) ("The economic philosophy behind the clause empowering Congress to grant patents and copyrights is the conviction that encouragement of individual effort by personal gain is the best way to advance public welfare through the talents of authors and inventors. . . ."), *superseded by statute*, 17 U.S.C.A. §101 (West, Westlaw through P.L. 112-89 (excluding P.L. 112-55, 112-74, 112-78, 112-81) approved 1/3/12).

[165] *Twentieth Century Music Corp.*, 422 U.S. at 156. While the goal of copyright law, according to the Constitution, is to promote creative expression, should copyright law ever concern itself with issues of morality? For example, should copyright law only apply to—and thus encourage—works of music and sound recordings that society finds acceptable (i.e., good for the public), or should it be equally applicable to music that might be considered by some as immoral or not for "the general public good?" While there are indeed limits to what society deems acceptable with regard to creative works (e.g., obscenity, child pornography), withholding copyright protection will in no way prevent their creation. If society seeks to limit or prevent the creation and distribution of such works it must look to some other area of law, such as the criminal code—or even outside of the law altogether. In the early 1980s, two prominent political women and several citizen action groups organized various "campaign[s] against 'porn rock' [that] received national publicity." George P. Smith, II, *Nudity, Obscenity and Pornography: The Streetcars Named Lust and Desire*, 4 J. CONTEMP. HEALTH L. & POL'Y 155, 178 (1988). The campaigns targeted "the 'unwholesome' recording companies, radio stations and producers of rock videos who market music porn. . . ." *Id.* This eventually led to the creation of the "Parental Advisory Label" program administered by the Recording Industry Association of America. *See Parental Advisory Label Program*, RECORDING INDUSTRY ASS'N AM., http://www.riaa.com/toolsforparents.php?content_selector=parental_advisory (last visited Feb. 17, 2012). As a result of these efforts, some retailers, including Wal-Mart, have refused to sell recordings with the Parental Advisory Label. *See Music Content Policy, Parental Advisory Labels*, WALMART, http://www.walmart.com/cp/Music-Content-Policy/547092 (last visited Feb. 17, 2012). Although the "offending" sound recordings received copyright protection just like any other, industry self-regulation and market forces served to restrain their distribution. As Smith

performance right in sound recordings would motivate artists to produce new music and thus contribute to the fulfillment of copyright's primary objective, it is not unreasonable to believe that a performance right would be a strong incentive for the majority of artists, most of whom are not fabulously wealthy,[166] but "are working people, trying to put bread on the table."[167] Even the most successful performer would likely welcome additional revenue to help dispatch the correspondingly huge debts owed to their record companies—debts that might be an obstacle to making a new recording.[168] Moreover, because the sound recordings of many songs continue to play on the radio for years—and sometimes decades—after the peak sales period has passed, a performance right providing "even a modest . . . royalty could spur the ability and desire" of many popular and talented artists to return to the studio to create new works.[169]

Additionally, a performance right in sound recordings could provide record companies an incentive to invest in lesser-known or traditionally unprofitable artists.[170] Record companies have focused primarily on artists who have broad appeal and are most able to sell a large volume of records and produce a profit.[171] The promise of a performance right royalty to supplement the lower-quantity record sales of new or unproven artists could encourage record companies to make an otherwise unjustified or risky investment, ultimately leading to "a larger and more

observed, "this form of self-censorship . . . must surely be applauded, for it obviates the need for strong enforcement or censorship policies by the state and federal governments." Smith, *supra*, at 179. Thus, as far as copyright law is concerned, as long as new creative works are produced, the general public good is served.

166 *See* DelNero, *supra* note 29, at 195 (discussing the incentive rationale of copyright law and explaining that while there are some outliers, for many artists adequate performance royalties can mean the difference between being able to afford staying in the music industry and being forced to leave and find more lucrative work). Of course, there are always outliers. As one observer stated, "An extra few million dollars would do little for an artist such as pop-megastar Madonna, who already has all the economic incentive she might ever need to produce new works." *Id.*

167 *House Hearing* 2009, *supra* note 1, at 200 (testimony of Paul Almeida, President of the Department of Professional Employees, AFL-CIO).

168 *See* Courtney Love, *Courtney Love Does the Math*, SALON (June 14, 2000), http://sodacity.net/system/files/Courtney-Love_Courtney-Love-does-the-math.pdf (discussing the debt owed to record companies by the musicians who work for them).

169 DelNero, *supra* note 29, at 195.

170 *Id.*

171 *Id.*

heterogeneous body of widely available music."[172]

An opposing theory argues that *denying* a performance right in sound recordings incentivizes the creation of better and more diverse music. According to this theory, incentivizing recording artists to write their own songs benefits society because, in doing so, they establish "a deeper connection to their music, and . . . are more likely to compose passionate, socially conscious music"[173] — music which is more "diverse than the music written by professional songwriters."[174] But, denying a sound recording performance right will do nothing to incentivize performers who are unable to write music or lyrics or both—a significant weakness in the theory.[175]

Opponents also commonly argue that a performance right for sound recordings is unnecessary since record sales resulting from airplay are sufficient to incentivize performers to create new works.[176] While this may have been true in decades past, "listeners [no longer] turn on the radio, hear a song and run down to Tower Records to buy that song. . . . [C]onsumers get their music through the performance of it—[be it] through standard radio, . . . niche programming or on demand access."[177] Research indicates that "contrary to received wisdom, increases in time spent listening to music radio do not increase the purchase of sound recordings but instead appear to decrease the[ir] sale . . . by an economically large amount."[178] Although radio play undoubtedly has promotional effect, it appears "that listening to music radio is a substitute for . . . music listening that might otherwise have [come from purchased] sound

[172] *Id.*

[173] Emily F. Evitt, *Money, That's What I Want: The Long and Winding Road to a Public Performance Right in Sound Recordings*, 21 INTELL. PROP. & TECH. L.J. 10, 13 (2009).

[174] Shourin Sen, *The Denial of a General Performance Right in Sound Recordings: A Policy that Facilitates our Democratic Civil Society?*, 21 HARV. J.L. & TECH., 233, 235–36 (2007).

[175] Evitt, *supra* note 173, at 13.

[176] *See supra* note 131 and accompanying text (explaining the argument of radio airplay being incentive enough for artists to create new works).

[177] *House Hearing* 2009, *supra* note 1, at 192 (prepared statement of Mitch Bainwol, Chairman & CEO, Recording Industry Association of America) ("We are not saying there is no promotional value. There is, but it has diminished. Sales have fallen from almost $15 billion to $9 billion since 1999, including digital, and hits are not what they once were. In 2000, the Top 10 song albums in the country sold 60 million units. Last year, the Top 10 song albums sold about 19 million units.").

[178] Liebowitz, *supra* note 4, at 19.

recordings."[179] Furthermore, when consideration is given to the fact that "more than half" of the songs played on the radio are oldies —in which the prospect of record sales is very slim[180] —the promotion argument falters seriously.[181]

Economic theories also support the creation of a performance right in sound recordings. For example, under free market principles, "[t]rade, or exchange, is engaged . . . because both parties [expect a] benefit."[182] Applied to the present discussion, broadcasters contend that the exchange of airplay for the royalty-free use of sound recordings is an equitable trade; however, the benefit to broadcasters far exceeds the benefit accruing to performers and record companies.[183] Though airplay is not devoid of promotional value for sound recordings, such value diminishes the more often a song is played—as the listener has little reason to purchase what he can get on a regular basis for free.[184] But the result is different for broadcasters: the more often a station plays a song that is popular with its audience, the more likely it will maintain or increase its audience, and the more advertising revenue it will generate.[185] As has been observed, "[t]he primary economic motivation for traditional radio broadcasters in playing music is income, not the beneficent promotion of records."[186] Though broadcasters consistently invoke the promotional value of radio play—as though they are doing sound recording copyright owners a favor—the "performances must have value to the stations or they wouldn't be playing them."[187] Furthermore,

179 *House Hearing* 2009, *supra* note 1, at 192 (statement of Mitch Bainwol, Chairman & CEO, Recording Industry Association of America); *id.*

180 *See House Hearing* 2009, *supra* note 1, at 192 (statement by Mitch Bainwol, Chairman & CEO, Recording Industry Association of America); *see also supra* note 118 and accompanying text.

181 *See* Liebowitz, *supra* note 4, at 29 (demonstrating the decrease in sales of song recordings since the introduction of music radio).

182 Murray N. Rothbard, *Free Market*, LIBRARY ECONOMICS & LIBERTY, http://www.econlib.org/library/Enc/FreeMarket.html (last visited Dec. 30, 2011).

183 *See House Hearing* 2009, *supra* note 1, at 142 (testimony of Steven Newberry, Commonwealth Broadcasting Corporation, on behalf of the National Association of Broadcasters); Liebowitz, *supra* note 4, at 29 (demonstrating the decrease in sales of song recordings since the emergence of the radio).

184 *See House Hearing* 2009, *supra* note 1, at 226 (testimony of Stan Liebowitz, Ashbel Smith Professor of Managerial Economics, University of Texas at Dallas) (stating that listening to the radio supplants listening to purchased recorded music).

185 *See* DelNero, *supra* note 29, at 197.

186 *Id.*

187 *House Hearing* 2009, *supra* note 1, at 29 (testimony of Billy Corgan, vocalist and lead guitarist, The Smashing Pumpkins).

the absence of a performance right for sound recordings strips recording artists and record companies of the ability to prohibit or withdraw from the exchange—a situation contrary to free market principles.[188] "In an economy predicated on property rights, it's property owners, not those using the property, who should decide whether or not to give away their product in the name of promotion."[189] A sound recording performance right would ensure the benefit received by sound recording copyright owners is truly commensurate with their contribution to the broadcast enterprise.[190]

While incentive and economic theories provide ample support for the recognition of a sound recording performance right, two other significant theories—moral rights theory and right of publicity and performance theories—also lend credence to the argument.[191]

2. Moral Rights Theory

Support for a performance right in sound recordings also is found under the theory of moral rights, or *le droit moral*.[192] Developed in nineteenth century France,[193] moral rights theory is rooted in the idea that an artist's work is not only an expression of his personality and unique attributes, but that the work and the artist are intertwined and cannot be separated.[194] In the language of copyright law, the theory encompasses the right of authors and artists "to control the public disclosure of their works, to withdraw their works from public circulation, to receive appropriate credit for their creations, . . . to protect their works against mutilation or destruction[,]"[195] and to receive resale

[188] *See* Rothbard, *supra* note 182.

[189] *House Hearing* 2009, *supra* note 1, at 196 (statement of Mitch Bainwol, Chairman & CEO, Recording Industry Association of America).

[190] *See* Evitt, *supra* note 173, at 11–12.

[191] *See infra* Parts IV.C & D (discussing the theories of moral rights and right of publicity and performance respectively).

[192] 3 NIMMER ON COPYRIGHT, *supra* note 22, § 8D.01[A].

[193] *See* Susan P. Liemer, *Understanding Artists' Moral Rights: A Primer*, 7 B.U. PUB. INT. L.J. 41, 41–42 (1998).

[194] *See* Aurele Danoff, Note & Comment, *The Moral Rights Act of 2007: Finding the Melody in the Music*, 1 J. BUS. ENTREPRENEURSHIP & L. 181, 183 & n.10 (2007) (quoting Rajan Desai, *Music Licensing, Performance Right Societies, and Moral Rights for Music: A Need in the Current U.S. Music Licensing Scheme and a Way to Provide Moral Rights*, 10 U. BALT. INTELL. PROP. L.J. 1, 11 (2001)).

[195] William Fisher, *Theories of Intellectual Property*, *in* NEW ESSAYS IN THE

royalties.[196] Such rights are justified, according to the theory, because "work[s] of art embod[y] and help[] to realize [the] creator's personality or will."[197]

In the United States, federal law has been hesitant to "embrace general moral rights,"[198] and the protection provided under state law is uneven and equally minimal.[199] At the national level, moral rights were recognized for the first time with the passage of the Visual Rights Act of 1990,[200] which amended federal copyright law to provide moral rights solely "in the realm of certain visual arts,"[201] specifically covering "painting, drawing, print, or sculpture."[202] Apart from this narrow area, moral rights receive no protection under federal copyright law.[203] As for the states, a handful of legislatures have enacted moral rights statutes, including California,[204] Connecticut,[205] Massachusetts,[206] and New York,[207] but they too are fixated on visual arts[208] and

LEGAL AND POLITICAL THEORY OF PROPERTY 168, 174 (Stephen R. Munzer ed., 2001).

196 *See* Liemer, *supra* note 193, at 46 & n.35 (quoting CAL. CIV. CODE § 986(a) (West, Westlaw though ch. 745 of 2011 Reg. Sess. and all 2011–2012 1st Ex. Sess. laws 2011)) ("Whenever a work of fine art is sold and the seller resides in California or the sale takes place in California, the seller or the seller's agent shall pay to the artist of such work of fine art or to such artist's agent 5 percent of the amount of such sale.").

197 Fisher, *supra* note 195, at 174.

198 3 NIMMER ON COPYRIGHT, *supra* note 22, § 8D.06.

199 *See id.* § 8D.02; Crimi v. Rutgers Presbyterian Church, 89 N.Y.S.2d 813, 818–19 (Sup. Ct. 1949) (holding that moral rights are not recognized in N.Y.). *But see* Carter v. Helmsley-Spear, Inc., 71 F.3d 77, 81–82 (2d Cir. 1995) (explaining that while American courts have traditionally rejected moral rights theories, they have begun "cloaking the concept in the guise of other legal theories, such as copyright").

200 Judicial Improvements Act of 1990, Pub. L. No. 101-650, tit. vi,§§ 601–610, 104 Stat. 5089, 5128–34 (codified as amended at 17 U.S.C.A.§§ 101, 106A, 107, 113, 301, 411, 412, 501, 506).

201 3 NIMMER ON COPYRIGHT, *supra* note 22, § 8D.06.

202 *Id.* at n.69.

203 *See id.*

204 *See* CAL. CIV. CODE § 987(a) (West, Westlaw though Ch. 745 of 2011 Reg. Sess. and all 2011–2012 1st Ex. Sess. laws).

205 *See* CONN. GEN. STAT. ANN. § 42-116t (West, Westlaw through 2011 Jan. Reg. Sess. And June Sp. Sess.).

206 *See* MASS. GEN. LAWS ANN. Ch. 231, § 85S (West, Westlaw through ch. 133 of the 2011 1st Annual Sess.).

207 *See* N.Y. ARTS & CULT. AFF. LAW § 14.03 (McKinney, Westlaw through L. 2011, ch. 1–54, 58, 63–96 & 98–108).

208 *See* 3 NIMMER ON COPYRIGHT, *supra* note 22, § 8D.02[A] ("[N]ine states have enacted laws protecting, in some measure, the rights of integrity and attribution for visual artists. Nonetheless, although these statutes represent the furthest explicit recognition of moral rights to be found in U.S.

are, furthermore, "rarely litigated."[209]

While moral rights are controversial in the United States,[210] they are very prominent in European copyright law and extend beyond visual arts.[211] France, Germany, and Italy each have statutes providing "protection of the rights of disclosure, attribution, integrity, and withdrawal."[212] French case law, for example, has "recognized a moral right in a voice and . . . acknowledged its economic and professional value,"[213] giving actors "a personality right in the sound of [their] voice and a moral right to control its commercial use."[214]

3. Origins in Personhood and Personality

The concept of moral rights is an outgrowth of the theories of personhood and personality.[215]

> The crucial link between the American right of personality and the concept of moral rights is that works of art are expressions of the creative personality of the author, and insofar as these works continue to embody the author's personality, acts done to them that impair their ability accurately to reflect the author's

jurisprudence, both the federal and state laws relate solely to protection for works of visual art, and have no application to other copyrightable subject matter."). As to the question of federal pre-emption of these state statutes, Nimmer states, "[w]ith respect to moral rights in works of visual art, Congress in the Visual Artists Rights Act of 1990 has enacted specific provisions pre-empting some, but not all, state entitlements in the same field. With respect to moral right[sic] in all other types of works, general pre-emption considerations apply. . . . [F]ederal pre-emption is generally inapplicable to state laws of unfair competition of the passing off variety, defamation, invasion of privacy, and contracts." *Id.* § 8D.02[B].

209 *See* Cyrill P. Rigamonti, *Deconstructing Moral Rights*, 47 HARV. INT'L L.J. 353, 404–05 (2006). Some examples of the rare cases that have litigated the issue of moral rights are: *Pavia v. 1120 Avenue. of the Americas. Associates*, 901 F. Supp. 620 (S.D.N.Y. 1995); *Schatt v. Curtis Management Group, Inc.*, 764 F. Supp. 902 (S.D.N.Y. 1991); *Wojnarowicz v. American Family Ass'n*, 745 F. Supp. 130 (S.D.N.Y. 1990); *Lubner v. City of L.A.*, 53 Cal. Rptr. 2d 24 (Cal. Ct. App. 1996); *Phillips v. Pembroke Real Estate, Inc.*, 819 N.E.2d 579 (Mass. 2004); *Moakley v. Eastwick*, 666 N.E.2d 505 (Mass. 1996). *Id.*at 404 n.305.

210 *See* Bonnie Teller, Note, *Toward Better Protection of Performers in the United States: A Comparative Look at Performers' Rights in the United States, Under the Rome Convention and in France*, 28 COLUM. J. TRANSNAT'L L. 775, 800 (1990).

211 *See* Fisher, *supra* note 195, at 174.

212 Rigamonti, *supra* note 209, at 359.

213 Teller, *supra* note 210, at 799.

214 *Id.* at 795.

215 *Carter v. Helmsley-Spear, Inc.*, 71 F.3d 77, 81 (2d Cir. 1995).

personality should be actionable.[216]

Renowned legal theorist Margaret Jane Radin has argued "that to achieve proper self-development—to be a person—an individual needs some control over resources in the external environment. The necessary assurances of control take the form of property rights."[217] According to Radin, property is divided into two categories—fungible property (which has no intrinsic meaning to the owner and is "held purely instrumentally"[218]) and personal property (which has deep meaning and "is bound up with the holder"[219])—with the latter deserving "special[] recogni[tion]"[220] and greater rights.[221] Thus, "the more a piece of property creates a sense of personal existence, that is, the more personal a piece of property, the broader the control an individual should be afforded with respect to that piece of property."[222] In affirming this perspective, one commentator has argued that "the fruits of highly expressive intellectual activities, such as the writing of novels,"[223] should be accorded legal protection more readily than the "fruits of less expressive

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[216] Edward J. Damich, *The Right of Personality: A Common-Law Basis for the Protection of the Moral Rights of Authors*, 23 GA. L. REV. 1, 4 (1988).

[217] Margaret Jane Radin, *Property and Personhood*, 34 STAN. L. REV. 957, 957 (1982).

[218] *Id.* at 959–60 ("[Fungible property is] an object that is perfectly replaceable with other goods of equal market value.[It is retained]for purely instrumental reasons. The archetype of such a good [being] money, which is almost always held only to buy other things.").

[219] *Id.* To illustrate her conception of personal property, Radin famously wrote: "Most people possess certain objects they feel are almost part of themselves. These objects are closely bound up with personhood because they are part of the way we constitute ourselves as continuing personal entities in the world. They may be as different as people are different, but some common examples might be a wedding ring, a portrait, an heirloom, or a house." *Id.* She continued: "One may gauge the strength or significance of someone's relationship with an object by the kind of pain that would be occasioned by its loss. On this view, an object is closely related to one's personhood if its loss causes pain that cannot be relieved by the object's replacement. If so, that particular object is bound up with the holder. For instance, if a wedding ring is stolen from a jeweler, insurance proceeds can reimburse the jeweler, but if a wedding ring is stolen from a loving wearer, the price of a replacement will not restore the status quo—perhaps no amount of money can do so." *Id.*

[220] *Id.* at 1008.

[221] *See id.* at 1013 (stating the need for a recognized right to personal property).

[222] Zachary Garsek, *Napster Through the Scope of Property and Personhood: Leaving Artists Incomplete People*, 19 CARDOZO ARTS & ENT. L.J. 205, 207–08 (2001).

[223] *See* Fisher, *supra* note 195, at 171.

activities, such as genetic research,"[224] because the former are deeply personal and reflective of the artist as a person in a way that the latter are not.[225]

Few pieces of property could be considered more personal and expressive, and thus clearly "receptacles for personality,"[226] than a sound recording of a performer breathing life into a musical work.[227] The unique vocal performance captured in the sound recording is "an embodiment or reflection"[228] of the performer's personality.[229] Additionally, artists frequently develop a strong emotional connection with their music,[230] and can "become personally invested"[231] in the recording. Some even come to be identified with the performance.[232] For example, the song "My Heart Will Go On" from the 1997 movie *Titanic* is referred to as Celine Dion's "signature song."[233] Her vocal style and quality, her interpretation of the lyrics, even her mannerisms and persona, all combined to produce a singularly unique expression of the song that captured audiences worldwide.[234] And while the song has been covered by a number of artists since it was originally

[224] *Id.*

[225] *See* Justin Hughes, *The Philosophy of Intellectual Property*, 77 GEO. L.J. 287, 342–43 (1988).

[226] *Id.* at 340.

[227] *See* Noh, *supra* note 9, at 101–03.

[228] *See* Justin Hughes, *The Personality Interest of Artists and Inventors in Intellectual Property*, 16 CARDOZO ARTS & ENT. L.J. 81, 87 (1998); Noh, *supra* note 9, at 101–03.

[229] *See* Hughes *supra* note 228, at 87 ("When we first encounter a res of intellectual property, instead of noting that an individual's personality has moved into an existing object, we may note that an individual's personality caused the object to come into existence."); Noh, *supra* note 9, at 101–03 (discussing sound recordings and personality).

[230] *See Josh Groban Announces Exclusive Live-Streaming Concert Event for Fans Who Purchase Physical Copy of New Album "Illuminations"*, WARNER MUSIC GROUP (Nov. 15, 2010), http://www.wmg.com/newsdetails/id/8a0af8122c353d41012c518060090e56 ("[Groban] was free to express himself at his fullest by tapping into a new range of expression and emotional connection with lyrics drawn straight from the heart.").

[231] *See* Karla M. O'Regan, *Downloading Personhood: A Hegelian Theory of Copyright Law*, 7 CAN. J. L. & TECH. 1, 19, (2009) (quoting Lawrence C. Becker, *Deserving to Own Intellectual Property*, 68 CHI.-KENT L. REV. 609, 626 n.44 (1993)).

[232] *See* Noh, *supra* note 9, at 102 (explaining that vocalist Etta James will always be identified for her performance of the song "At Last").

[233] Jon Caramanica, *Emotions With Exclamation Points*, N.Y. TIMES, Sept. 17, 2008, at E1, *available at* http://www.nytimes.com/2008/09/17/arts/music/17celi.html?_r=1&ref=arts.

[234] *See id.*; Noh, *supra* note 9, at 101–02 (explaining how artists impose their personality upon a song).

recorded for the film,[235] Dion's association with the song has not been supplanted.[236]

Moral rights theory thus recognizes that recording artists have a property right (i.e., moral right) in their performances that is separate from any ownership right to the sound recording—a right derived from the notion that recorded performances are an embodiment of an artist's personality, and as such, "should be afforded the heightened level of control reserved for personal property[,]"[237] strengthening the performer's "sense of individuality."[238] A sound recording performance right would protect this moral right by ensuring artists have a measure of control over the public performance of their sound recordings and are fully compensated when "others exploit [the] work commercially or otherwise benefit from it financially."[239]

Unlike painters, photographers, and other visual artists who have control over the public display of their works by virtue of the right of display,[240] recording artists have no control over the public performance of their sound recording beyond the limited provisions already discussed.[241] By stripping performers of the ability to control public performances on terrestrial radio or to withdraw the sound recording from broadcast altogether, they are denied "the necessary protection and control over [their] personal property required to experience personhood."[242] The absence of a sound recording performance right thus "deprives

[235] *See* RAY CONNIFF, *My Heart Will Go On*, *on* I LOVE MOVIES (Ivy Music 1998); NEIL DIAMOND, *My Heart Will Go On*, *on* The MOVIE ALBUM: AS TIME GOES BY (Columbia 1998); PAM HALL, *My Heart Will Go On*, *on* BET YOU DON'T KNOW (VP Music Group, Inc. 1998); NEW FOUND GLORY, *My Heart Will Go On*, *on* FROM THE SCREEN TO YOUR STEREO (Drive-Thru Records 2000); KELLY CARSON, *My Heart Will Go On*, *on* POP HITS (Essential Media Group 2007).

[236] *See* Caramanica, *supra* note 233 (identifying "My Heart Will Go On" as Dion's signature song).

[237] Garsek, *supra* note 222, at 209–10.

[238] Hughes, *supra* note 228, at 88 (quoting Lynn Sharp Paine, *Trade Secrets and the Justification of Intellectual Property: A Comment on Hettinger*, 20 PHIL. & PUB. AFF. 247, 252 (1991)).

[239] Liemer, *supra* note 193, at 44, 55.

[240] 17 U.S.C. § 106(5) (2006); *see* 17 U.S.C.A. § 101 (West, Westlaw through P.L. 112-54 (excluding P.L. 112-40) approved 11/12/11) ("To 'display' a work means to show a copy of it, either directly or by means of a film, slide, television image, or any other device or process or, in the case of a motion picture or other audiovisual work, to show individual images nonsequentially.").

[241] *See* 17 U.S.C.A. § 114(a) (West, Westlaw through P.L. 112-54 (excluding P.L. 112-40) approved 11/12/11).

[242] *See* 17 U.S.C.A. § 114(d) (West, Westlaw through P.L. 112-54 (excluding P.L. 112-40); Garsek, *supra* note 222, at 213.

artists . . . the ability to fully . . . experience . . . personhood."[243] This is amplified in situations where "an artist may wish that his song not be played on certain types of radio stations[] [or] in certain geographic areas[]"[244] on moral or religious rather than economic grounds, but is powerless to act.[245] Such a lack of control over one's personal property (i.e., the performance embodied in the sound recording) is a violation of the artist's moral rights and destroys "the liberty offered by obtaining personhood through property."[246] A performance right in sound recordings would remedy this by recognizing that performers must be able to assert control over the public performance of their recordings and the context in which they are played.[247]

Additionally, a sound recording performance right would ensure that artists, as possessors of moral rights in their recorded performances, are not excluded from receiving a share of the profits derived from the public performance of their music on the radio.[248] Without such protection, performers "may miss much of the financial reward of [their] efforts."[249] Similar to the right to resale royalties recognized by statute in California for

[243] Garsek, *supra* note 222, at 213.

[244] Jonathan S. Lawson, Note, *Eight Million Performances Later, Still not a Dime: Why it is Time to Comprehensively Protect Sound Recording Public Performances*, 81 NOTRE DAME L. REV. 693, 714 (2006). One could imagine a situation in which performers, such as the Dixie Chicks, the once-popular country music trio that spoke out against the 2003 invasion of Iraq, not wanting their music to be played on radio stations operated by the military. *See Dixie Chicks "Get Death Threats,"* BBC NEWS (Apr. 24, 2003), http://news.bbc.co.uk/2/hi/entertainment/2972043.stm ("The band say [sic] they have received death threats after [singer Natalie] Maines told a London audience she was ashamed that [President] Bush came from her home state, Texas.").

[245] *See* Robert W. Clarida & Andrew P. Sparkler, *Singing the Campaign Blues: Politicians Often Tone Deaf to Songwriters' Rights*, LANDSLIDE, Nov./Dec. 2010, at 6, *available at* http://www.americanbar.org/content/dam/aba/migrated/intelprop/magazine/LandslideNovDec2010_Clarida.authcheckdam.pdf (examining songwriters' rights with regard to the "unauthorized use of [their] copyrighted music in . . . campaign rallies, YouTube videos, and/or paid advertisements.").

[246] *See* Garsek, *supra* note 222, at 210.

[247] Songwriters have long feared a performance right in sound recordings would diminish their rights by giving sound recording copyright owners the ability to deny broadcasters a license to play the recording and thus block the use of the underlying musical work. The unsuccessful Performance Rights Act of 2009 addressed this concern. Performance Rights Act, H.R. 848, 111th Cong. § 5 (2009); *see also infra* Section V (recommending performers be given the ability to withdraw their work from airing based on personal, moral, or religious beliefs).

[248] Liemer, *supra* note 193, at 55–56.

[249] *Id.* at 55.

visual art, a performance right in sound recordings would guarantee that each time a sound recording is publicly performed "some of the profits . . . go to the artist who created it."[250] Extending performers the right to receive a royalty from the public performance of their music under moral rights theory also furthers copyright's incentive goal.[251] According to one commentator, "allowing artists to reap the financial rewards of their efforts . . . encourage[s] them to create more, to the general benefit of the society. While few enter the arts to get rich, artists may reach new levels of expression if they do not have to worry inordinately about life's basic necessities."[252]

C. Right of Publicity and Right of Performance Theories

As discussed in section IV.B.1 of this article, a sound recording performance right is justified under incentive and economic theories and would address the imbalance of the current arrangement, which favors broadcasters to the detriment of sound recording copyright owners—an inequitable arrangement under free market principles.[253] Similarly, the theories of "right of publicity" and "right of performance," which are concerned with protecting economic interests, also weigh in favor of a sound recording performance right.[254]

At its most fundamental level, the right of publicity "is the right to control the commercial use of one's persona."[255] The origins of this right can be traced to the doctrine of privacy which emerged during the late nineteenth century[256] in response to the sensational or "'yellow' journalism" that had infected the popular

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[250] *Id.*

[251] *See id.* at 55–56 (explaining the impact and benefit of royalties to be paid to artists).

[252] *Id.* at 56.

[253] *See supra* Part IV.B.1.

[254] *See Zacchini v. Scripps-Howard Broad. Co.*, 433 U.S. 562, 576–78 (1977) (explaining the importance of the "right of publicity" to performers and the substantial impact that it has on preserving their incentives to make investments towards "performance[s] of interest to the public."); *see also infra* notes 289–91 (illustrating why the right of publicity should be extrapolated to the "right of performance").

[255] George P. Smith, II, *The Extent of Protection of the Individual's Personality Against Commercial Use: Toward a New Property Right*, 54 S.C. L. REV. 1, 20 (2002).

[256] Steven C. Clay, Note, *Starstruck: The Overextension of Celebrity Publicity Rights in State and Federal Courts*, 79 MINN. L. REV. 485, 487 (1994).

press in the United States.[257] Disgusted by newspapers' pursuit and publication of sordid gossip, Louise Brandeis and Samuel Warren proposed a legal right of privacy in a law review article titled, "The Right to Privacy."[258] They believed the press was "overstepping . . . the obvious bounds of propriety and of decency,"[259] resulting in a "lowering of social standards and of morality."[260] Brandeis and Warren argued that legal protection was necessary to guard individuals against unwanted invasions into "the sacred precincts of private and domestic life[]"—that people should have a "right to be let alone."[261]

Courts and legislatures in the United States evidently agreed and were soon issuing opinions and drafting legislation to provide privacy protection, with courts "achiev[ing] marked advances and success in recognizing the need for a general right of privacy."[262] While recognizing the need "to protect private persons from unwanted publicity,"[263] some courts, however, were "reluctant to apply privacy rights to celebrities, stating [they had] waived [their] right."[264] Thus, the right of publicity developed as "early courts[] attempt[ed] to apply the right of privacy to celebrities."[265]

Courts have justified the right of publicity on several fronts. One argument, for example, derived from the idea that a celebrity's fame is his property, contends that by working hard to achieve notoriety, the celebrity has "creat[ed] something of value, . . . entitl[ing him] to its exclusive possession" and giving him a

257 *See* Smith, *supra* note 255, at 4–5 (explaining the origins of the right to privacy).

258 *See* Samuel D. Warren & Louise D. Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193, 195–96 (1890) ("Gossip is no longer the resource of the idle and of the vicious, but has become a trade, which is pursued with industry as well as effrontery. To satisfy a prurient taste the details of sexual relations are spread broadcast in the columns of the daily papers.").

259 *Id.* at 196.

260 *Id.*

261 *Id.* at 193, 195.

262 Smith, *supra* note 255, at 7.

263 Clay, *supra* note 256, at 487.

264 *Id.* at 488 (citing O'Brien v. Pabst Sales Co., 124 F.2d 167, 169–70 (5th Cir. 1941) (ruling that there is no violation of privacy when the publicity gained is sought actively by the plaintiff claiming injury)).

265 *Id.* at 488–89. One need not be famous to receive protection under right of publicity laws. That cases often involve celebrities is a function of their identity having more commercial value than that of an unknown individual. *See* Smith, *supra* note 255, at 20. The term "right of publicity" was coined in Haelan Laboratories, Inc. v. Topps Chewing Gum, Inc., 202 F.2d 866, 868 (2d Cir. 1953).

"moral claim . . . to any money flowing from the[] fame."[266] Another argument, analogous to the incentive rationale discussed in section IV.B.1, holds the position that the right of publicity is justified because it incentivizes "the population to undertake socially enriching activities."[267] Yet a third consideration advocates the right as a means for celebrities to control the commercial use of their identities and to guard against their unauthorized use and overexposure, which "would quickly render [the] identity valueless."[268]

As originally formulated, the right of publicity protected only one's name and likeness from appropriation, but over time it "gr[ew] to encompass virtually any indicia of identity."[269] The expansion of the right of publicity from its original narrow scope has caused some to question the wisdom of the courts and lawmakers in this area. For many critics, the tipping-point was *White v. Samsung Electronics America, Inc.*[270]—a case in which the defendant, to promote its electronics products, created an advertisement parodying the long-running television game show "*Wheel of Fortune*" and its hostess Vanna White.[271] The advertisement, which was intended to show the durability of Samsung's products well into the future, recreated the game show's set and used a futuristic robot dressed in an evening gown and blond wig to serve as the hostess.[272] White sued alleging Samsung had violated her right of publicity by wrongfully appropriating her "likeness" in the advertisement for commercial gain.[273] The Ninth Circuit ruled in White's favor, finding that

[266] *Id.* at 491.

[267] *Id.* at 492.

[268] *Id.* at 492–93.

[269] David Westfall & David Landau, *Publicity Rights as Property Rights*, 23 CARDOZO ARTS & ENT. L.J. 71, 75 (2005). Although the contours of the right vary by state, there is substantial overlap between statutes. For example, in Indiana, a state with one of the most progressive statutes in the country, one's name, voice, signature, photograph, image, likeness, distinctive appearance, gestures and mannerisms are protected. IND. CODE ANN. § 32-36-1-7 (West, Westlaw through 2011 1st Reg. Sess.); Jonathan L. Faber & Wesley A. Zirkle, *Spreading its Wings and Coming of Age: With Indiana's Law as a Model, the State-Based Right of Publicity is Ready to Move to the Federal Level*, RES GESTAE, Nov. 2001, at 31. For comparison, California does not statutorily protect one's image, distinctive appearance, gestures, or mannerisms. *See* CAL. CIV. CODE § 3344 (West, Westlaw through ch. 4 of 2012 Reg. Sess.); Westfall, *supra*, at 91–92.

[270] 971 F.2d 1395 (9th Cir. 1992).

[271] *Id.* at 1396.

[272] *Id.*

[273] *Id.* at 1397.

although the robot featured in the advertisement did not literally look like White, it was enough that the elements of the advertisement (i.e., the letter board set; the robot's wig, jewelry, and dress; the turning of the letters), when taken together, evoked her image in the public's mind.[274]

One observer noted in discussing *White* and similar cases that "[t]he courts have moved to ensure at least that the profits derived from these valuable personas are more equitably channeled."[275] In so doing, "the judiciary . . . has maintained that a person should have the right to control how his image is commercialized, or if it will be used at all."[276] As noted, though, some observers find the enlargement of the right of publicity unwise.[277] One such commentator contends persuasively that the expansion of the right "to protect all aspects of celebrity identity has proceeded with little or no critical judicial analysis," and proposes it be replaced by a "right of performance."[278] This new doctrine would protect against the "direct exploitation of a performance."[279]

D. The Right of Performance

Some commentators have found support for the right of performance in *Zacchini v. Scripps-Howard Broadcasting Co.*,[280]

[274] *Id.* at 1399. Although *White* significantly expanded the right of publicity, the decisions in *Midler v. Ford Co.*, 849 F.2d 460 (9th Cir. 1988), and *Waits v. Frito-Lay, Inc.*, 978 F.2d 1093 (9th Cir.1992), which preceded *White*, were not insubstantial in their enlargement of the right's scope. Both *Midler* and *Waits* dealt with voice misappropriation in the context of music. *Midler*, 849 F.2d at 461; *Waits*, 978 F.2d at 1096. *Midler* involved the use of a "soundalike" singer to imitate and therefore trick listeners into thinking the person singing the song on the commercial was Bette Midler. *Midler*, 849 F.2d at 461. The court, finding for Midler, expanded publicity rights to cover the distinctive sound of one's voice. *Id.* at 463–64. The court stated, "A voice is as distinctive and personal as a face. The human voice is one of the most palpable ways identity is manifested." *Id.* at 463. In *Waits*, the defendant snack food company hired a singer to impersonate singer/songwriter Tom Waits for use in an advertisement. *Waits*, 978 F.2d at 1096. The court again found in favor of the performer. *Id.* at 1112. Referencing its decision in *Midler*, the court stated it recognized "that when voice is a sufficient indicia of a celebrity's identity, the right of publicity protects against its imitation for commercial purposes without the celebrity's consent." *Id.* at 1098 (citing *Midler*, 849 F.2d at 463).

[275] Smith, *supra* note 255, at 25–26.

[276] *Id.* at 26.

[277] *See* Clay, *supra* note 256, at 501, 511–13, 516–17.

[278] *Id.* at 486–87.

[279] *Id.* at 514.

[280] 433 U.S. 562 (1977).

a U.S. Supreme Court decision that validated the right of publicity as a cause of action.[281] The well-known case involved a "human cannonball" act that was recorded by a local television station and aired in its entirety for the viewing audience.[282] Claiming economic injury, the plaintiff performer sued the television station.[283] The Court held in favor of the plaintiff and overturned the Ohio Supreme Court's ruling.[284] In his opinion, Justice White wrote that "the broadcast of [the] petitioner's entire performance, unlike the unauthorized use of another's name for purposes of trade or the incidental use of a name or picture by the press, goes to the heart of petitioner's ability to earn a living as an entertainer."[285] As the Court recognized, members of the community would have less reason to pay for attendance if they could watch it for free on television.[286]

The theory at the heart of the right of performance illuminates the analysis of a sound recording performance right.[287] Unlike the right of publicity, "the right of performance is concerned with protecting direct performance opportunities."[288] As discussed throughout this article, radio play is no longer a guarantee of record sales, but in fact is a substitute, and thus represents the loss of a paid performance the artist would have received via the purchase of a sound recording.

The theories underlying the right of publicity and right of performance support amending U.S. copyright law to provide a sound recording performance right. The right of publicity recognizes the importance of controlling one's image and persona,

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[281] *Id.* at 576–79; *see* Clay, *supra* note 256, at 514 n.48; Michael Madow, *Private Ownership of Public Image: Popular Culture and Publicity Rights*, 81 CALIF. L. REV. 127, 208 n.395 (1993) ("In my view, it is a very serious mistake to characterize the interest *Zacchini* sought to vindicate here as a 'right of publicity.' The 'right of publicity' protects a celebrity's interest in the economic value of his *identity*. What *Zacchini* complained of was the appropriation of the economic value of his *performance*, not the marketable *public image* he had perhaps acquired through the success of that performance. Following Douglas Baird's suggestion, I would refer to the type of right involved in *Zacchini* as a 'right of performance.' . . . I would reserve the term 'right of publicity' for the commercial value of identity.") (citation omitted).

[282] *Zacchini*, 433 U.S. at 563–64.

[283] *Id.* at 564.

[284] *Id.* at 578–79.

[285] *Id.* at 576.

[286] *Id.* at 575.

[287] *See supra* Part IV (explaining arguments in favor of justifying a performance right in sound recordings).

[288] Clay, *supra* note 256, at 515.

and the right of performance seeks to ensure that the performance of creative works, such as sound recordings, do not "direct[ly] compete[] with a celebrity's primary income-earning potential" (e.g., record sales).[289] Without a performance right, sound recording copyright owners have little control over the public performance of their work and experience a loss of revenue as a result.[290] Similar to the performer in *Zacchini*, a sound recording copyright owner is economically injured when broadcast radio becomes a substitute for purchasing records.[291]

V. RECOMMENDATIONS

Although dozens of bills seeking a performance right in sound recordings have been introduced over the past eight decades, all have fallen short of achieving their goal.[292] As discussed in section III of this article, the draft language of the Performance Rights Act of 2009 got many things right in its attempt to balance the interests of diametrically opposed stakeholders. The following are recommendations that would strengthen future draft legislation.

One recommendation would be to create a graduated royalty schedule, wherein no sound recording performance royalty would be paid by broadcasters during the first year of a recording.[293] Royalty payments would begin the second year and increase over time to a maximum defined percentage.[294] For administrative

289 Clay, *supra* note 256, at 487.

290 *See supra* text accompanying notes 182–90.

291 *See* Liebowitz, *supra* note 4, at 4.

292 *See supra* text accompanying notes 29–39.

293 A similar scheme was noted by Matthew S. DelNero. DelNero, *supra* note 29, at 198. DelNero credits the idea of a graduated royalty scheme to Peter L. Felcher, a New York attorney writing in Billboard Magazine. *Id.* at 198 & n.218. However, in researching the idea, this author discovered that DelNero was mistaken in this attribution. The article written by Peter L. Felcher was entitled "Performance Right Protects Songwriters" but contained nothing on the subject of a graduated royalty. Peter L. Felcher, *Performance Right Protects Songwriters*, BILLBOARD, Aug. 12, 1995, at 6, *available at* http://books.google.com/books?id=xAsEAAAAMBAJ. The article did however share the page with a short piece written by another individual named Dick Asher entitled "A Performance Right Compromise," which elucidated this theory. The credit goes to Mr. Asher. In his letter Asher writes: "This compromise first came to me when I was employed by CBS and trying to get the company to take positions favorable to the music business that might conflict with broadcasting interests." Dick Asher, *A Performance Right Compromise*, BILLBOARD, Aug. 12, 1995, at 6, *available at* http://books.google.com/books?id=xAsEAAAAMBAJ.

294 *See* DelNero, *supra* note 29, at 198 & n.220. Asher proposes "a public performance royalty to singers and musicians commencing five years after a

purposes, sound recordings would be "deemed 'born' . . . on Jan[uary] 1 of the year . . . they were . . . released."[295] Such a scheme would account for the promotion benefit enjoyed from radio play early in a recording's life, while ensuring the recording artist is compensated for the use of the recording as the promotion benefit wanes.[296]

A second recommendation concerns performers' moral rights. As discussed in section IV.B.3, performers should have some control over the public performance of their sound recordings. Specifically, performers should have the ability to withdraw their work from airing based on personal, moral, or religious beliefs.[297] This ability, however, would not allow sound recording copyright owners to block the use of the underlying musical work by another recording artist, and would therefore have little, if any, impact on the rights of songwriters. If a performer records a song and then refuses to allow the sound recording to be performed, nothing prevents another artist from recording the same musical work and allowing it to be performed on the radio.[298]

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record's initial release[.]" Asher, *supra* note 293, at 6. According to Asher, this is a reasonable timeframe:

> In considerably less than five years, the bulk of the record sales usually have taken place. The major career benefits that performers receive, such as increased attendance and financial guarantees for their live performances and additional opportunities in other media, also have usually taken place within five years after release.

Id.

However, in the digital age, five years is much too long, especially when one considers that modern consumers have short attention spans, fickle tastes, and additional opportunities in media evaporate as soon as the next pop star or musical act appears (which is almost daily).

295 Asher, *supra* note 293, at 6.

296 *Id.*

297 *See supra* notes and text accompanying notes 237–47.

298 17 U.S.C.A. § 115 (West, Westlaw through P.L. 112-89 (excluding P.L. 112-55, 112-74, 112-78, 112-81) approved 1/3/12); *see Mechanical Licensing Laws*, HARRY FOX AGENCY, http://www.harryfox.com/public/MechanicalLicenseslic.jsp (last visited Feb. 17, 2012) ("Under the U.S. Copyright Act, the right to use copyrighted, non-dramatic musical works in the making of phonorecords for distribution to the public for private use is the exclusive right of the copyright owner [of the musical work]. However, the Act provides that once a copyright owner has [permitted the] record[ing] and distribut[ion of] such a work to the U.S. public or permitted another to do so, a compulsory mechanical license is available to anyone else who wants to record and distribute the [musical] work in the U.S. upon the payment of license fees at the statutory 'compulsory' rate as set forth in Section 115 of the Act."). Mechanical licenses thus give artists and record companies the ability to make "covers" of previously recorded songs (e.g., multiple versions of the song "My Heart Will Go On"). *See* Gary Myers & George Howard, *The Future of Music: Reconfiguring*

VI. CONCLUSION

The debate over a performance right in sound recordings has raged for more than three-quarters of a century.[299] While the arguments have remained largely the same over time, the opposing positions have become more polarized and extreme, stifling almost any hope of compromise.[300] This article has endeavored to explore the history of sound recording performance rights legislation in the United States and to examine many of the recurrent arguments that continue to derail proposed legislation. Perhaps understanding the past will illuminate a path forward. To that end, this article has evaluated the merits of a sound recording performance right utilizing incentive and economic theories, moral rights theory, and right of publicity and right of performance theories, and has found the right to be fully supported.

Congress endeavored to address the concerns of both sides when it crafted the Performance Rights Act of 2009—seeking to balance the interests of broadcasters and sound recording copyright owners alike.[301] While U.S. copyright law awaits the actions of Congress, performers, record companies, and sound recording copyright owners continue to be harmed, their interests ignored. A performance right in sound recordings must be provided to align U.S. copyright law with the larger international community, to rightly compensate recording artists for their talent, time, and investment, to protect performers' moral rights, and to serve as an incentive for the production of new works.

Public Performance Rights, 17 J. INTELL. PROP. L. 207, 214–16 (2010) (providing a brief history and overview of mechanical licenses); *supra* notes 233–36 and accompanying text.

299 *See supra* notes 29–30 and accompanying text.

300 *See id.*

301 *See supra* text accompanying notes 88–102.