

CONGRESS KILLED THE RADIO STAR: REVISITING THE TERRESTRIAL RADIO SOUND RECORDING EXEMPTION IN 2015

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For a right to exist under federal copyright law, it must be affirmatively granted in Section 106 of the Copyright Act and fall within the accepted subject matter listed in Section 105. The exclusive right that musicians have in their sound recordings is limited to the right to “perform the copyrighted work publicly by means of a digital audio transmission.” The peculiar wording of “digital audio transmission” exempts radio stations from paying for the right to use the sound recordings that make up all of their music programming.

Congress has tried to end this exemption several times, most recently in a failed attempt to pass the Performance Rights Act (“PRA”) of 2009. Since the failure of the PRA, two developments have further complicated the issue: a private deal by music industry giants—Clear Channel and Warner Music Group—and state copyright law suits over sound recording royalties for pre-1972 recordings. These events further compel the need for a full federal sound recording performance right.

This Note contends that the best way for Congress to finally institute a full performance right is to use the current congressional review of copyright law to eliminate the exemption. As the Copyright Office recently completed a comprehensive review of music licensing law, including this

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change in an already proposed omnibus music copyright bill presents the perfect opportunity to eliminate the exemption.

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I. INTRODUCTION

In February 2009, Michigan Congressman John Conyers, Jr. introduced H.R. 848, a bill “[t]o provide parity in radio performance rights under title 17,”¹ colloquially known as the Performance Rights Act. The bill proposed creating a

¹ H.R. 848, 111th Cong. (2009).

complete public performance right for sound recordings. Had it passed, the bill would have required AM/FM radio stations to compensate sound recording copyright owners when broadcasting the owners' music.² Under current federal copyright law, terrestrial broadcasters (traditional AM/FM radio stations) are only required to compensate the owners of the copyright in the *musical composition* (and not owners of the copyright in the *sound recording*) when songs are broadcast.³ When these same songs are broadcast digitally, U.S. copyright law requires that royalties go to *both* the owners of the musical composition copyright and the sound recording copyright.⁴

The Copyright Office has been advocating for decades to implement a sound recording performance right for terrestrial radio.⁵ Yet, as of 2015, no such right exists. In September 2013, Clear Channel—the nation's largest broadcaster—announced that it had reached private deals with several independent record labels⁶ and Warner Music Group (WMG or Warner Music)—one of the three “major” record labels—to pay royalties for terrestrial airplay (despite having no legal obligation to do so).⁷ However, these deals

² *See id.*

³ *See* 17 U.S.C. § 106(4) (2012). *See generally infra* Part II.A.

⁴ *See id.* §§ 106(4) and 106(6).

⁵ *See, e.g., id.* §§ 106(6) and 114(d); REGISTER OF COPYRIGHTS, SUBCOMM. ON COURTS, CIVIL LIBERTIES, AND THE ADMIN. OF JUSTICE OF THE H. COMM. ON THE JUDICIARY, 95TH CONG., PERFORMANCE RIGHTS IN SOUND RECORDINGS (Comm. Print 1978); Letter from Cameron F. Kerry to Hon. Patrick Leahy (Apr. 1, 2010), *available at* <http://ogc.commerce.gov/sites/ogc.commerce.gov/files/media/files/2015/s379apr0110.pdf>, *archived at* <http://perma.cc/639N-DHYX>; ADMINISTRATION'S WHITE PAPER ON INTELLECTUAL PROPERTY ENFORCEMENT LEGISLATIVE RECOMMENDATIONS, WHITEHOUSE.GOV 17 (2011), http://www.whitehouse.gov/sites/default/files/ip_white_paper.pdf, *archived at* <http://perma.cc/G2ZX-UPDT>.

⁶ *See, e.g.,* Luiz Buff & Nicholas Spanos, *Clear Channel's Giant Step*, MUSIC BUS. J., July 2012, at 6, <http://www.thembj.org/wp/wp-content/uploads/2012/07/MBJ-July-2012-Final.pdf>, *archived at* <http://perma.cc/99KP-GL6X>.

⁷ *See* Press Release, Clear Channel Media and Entertainment, Warner Music Group and Clear Channel Announce Landmark Music Partnership (Sept. 12, 2013), *available at* <http://www.clearchannel.com/>

are thought to have been brokered in order to reduce the amount those same broadcasters have to pay for the *digital* transmissions of the same works.⁸ Furthermore, these deals lack the transparency, equal bargaining power, and international recognition that the implementation of a full performance right in sound recordings under federal copyright law would provide.⁹

The United States is the only democratic and industrialized nation that does not have laws compensating sound recording copyright owners for the public performance of their works over terrestrial radio.¹⁰ Arguments have been made many times for the need for what the music industry calls “platform parity.”¹¹ American copyright law is based on an economic theory of intellectual property. As Justice John Paul Stevens explained in *Sony Corp. v. Universal City Studios, Inc.*, “[t]he purpose of copyright is to create incentives for creative effort.”¹² To achieve this purpose,

Pages/Warner-Music-Group-and-Clear-Channel-Announce-Landmark-Music-Partnership.aspx, archived at <http://perma.cc/46Y6-L2D3>. In 2012, the breakup of EMI left only three major U.S. record labels: Universal Music Group (UMG), Sony Music Entertainment (Sony), and Warner Music Group. As of 2013, these three labels controlled two-thirds of the American recorded music business. See generally Peter Weber, *How Indie Artists Came to Dominate the Music Industry*, THE WEEK (Jan. 2, 2014), <http://theweek.com/articles/453638/how-indie-artists-came-dominate-music-industry>, archived at <http://perma.cc/2SQ9-7PYN>; Ben Sisario, *U.S. and European Regulators Approve Universal’s Purchase of EMI*, N.Y. TIMES, Sept. 22, 2012, at B3.

⁸ See Michelle Davis, *Clear Channel/WMG Deal Is No Substitute for Terrestrial Performance Right*, FUTURE OF MUSIC COAL. (Sept. 16, 2013, 10:58 AM), <http://www.futureofmusic.org/blog/2013/09/16/clear-channelwmg-deal-no-substitute-terrestrial-performance-right>, archived at <http://perma.cc/9SMT-BU75>.

⁹ See *infra* Part III.B.

¹⁰ See Music Licensing Study: Notice of Request for Public Comment, 79 Fed. Reg. 14,739, 14,742 (Mar. 17, 2014).

¹¹ See, e.g., *id.* at 14,742–43; *Ensuring Artists Fair Compensation: Updating the Performance Right and Platform Parity for the 21st Century: Hearing Before the Subcomm. on Courts, the Internet, and Intellectual Property of the H. Comm. on the Judiciary*, 110th Cong. (2007) (statement of Marybeth Peters, Register of Copyrights).

¹² *Sony Corp. v. Universal City Studios, Inc.*, 464 U.S. 417, 450 (1974).

copyright laws must be properly calibrated to create the appropriate level of incentives for creators. As the market changes, so too ought the copyright law, in order to ensure that these incentives are working.

The last omnibus revision of the Copyright Act was passed in 1976 and implemented in 1978.¹³ It was not until 1995, with the passage of the Digital Performance Right in Sound Recordings Act, that recording artists were paid for the public performance of their work (and then only for certain digital performances).¹⁴ In 1998, Congress passed the Digital Millennium Copyright Act, which established, among other things, that different royalty rates would be paid for different categories of digital transmissions, under the supervision of the Copyright Royalty Board (CRB).¹⁵

The rate of change in American copyright law has not kept up with the rate of change and the development of new technologies in the music industry. In order for a vibrant music industry to exist in the United States, Congress ought to adapt copyright law to these changes. The repeated failure to eliminate the terrestrial radio exemption (as well as the relative political strength of the National Association of Broadcasters) has made it clear that the optimal, and perhaps only, way to do so is as part of a comprehensive omnibus revision of federal copyright law.¹⁶ Barring such an attempt, it is unlikely that Congress will succeed in carrying out the necessary adaptation in copyright law.

Part II of this Note examines why the United States has copyright protection for music, how the law distinguishes between musical compositions and sound recordings, and the importance of the public performance right. Part II also evaluates the legal and technological changes that have

¹³ See Copyright Act of 1976, Pub. L. No. 94-553, 90 Stat. 2541 (codified at 17 U.S.C. §§ 101–810 (2012)).

¹⁴ See Digital Performance Right in Sound Recordings Act of 1995, Pub. L. No. 104-39, 109 Stat. 336 (codified as amended at 17 U.S.C. §§ 106(6), 114, 115 (2012)).

¹⁵ See Digital Millennium Copyright Act, Pub. L. No. 105-304, 112 Stat. 2860 (1998) (codified as amended at 17 U.S.C. § 114 (2012)).

¹⁶ See *infra* Section IV.F..

shaped the current landscape of the American music industry. Part III looks at the last few major attempts to provide royalties for the public performance of sound recordings over terrestrial radio, including the recent Clear Channel deal with Warner Music and an ongoing court dispute in California (as well as a growing number of other states) over pre-1972 sound recordings. Finally, Part IV sets forth recommendations for eliminating the terrestrial radio exemption from American copyright law. Part IV also explains why this change should be implemented now, as Congress undertakes a comprehensive review of copyright law¹⁷ (aided by a Copyright Office study on the general state of music licensing),¹⁸ and passed as part of a larger omnibus copyright revision bill instead of as a stand-alone bill.

II. BACKGROUND

A. Why We Have Copyright in Music

It is important to understand the origins and values behind American copyright law in general and specifically those at play in music licensing law. Justice Oliver Wendell Holmes remarked in *Herbert v. Shanley Co.*, the landmark 1917 U.S. copyright case on public performance, that “[i]f music did not pay it would be given up. If it pays, it pays out of the public’s pocket. Whether it pays or not the purpose of employing it is profit and that is enough.”¹⁹ As Justice Holmes recognized, musicians play music as a profession; although the love of creating art for the sake of art remains

¹⁷ See Press Release, House Judiciary Committee Chairman Bob Goodlatte, Chairman Goodlatte Announces Comprehensive Review of Copyright Law (Apr. 24, 2013), available at <http://judiciary.house.gov/index.cfm/2013/4/ChairmanGoodlatteAnnouncesComprehensiveReviewofCopyrightLaw>, archived at <http://perma.cc/LE6V-K6HA>.

¹⁸ Music Licensing Study: Notice of Request for Public Comment, 79 Fed. Reg. 14,739 (Mar. 17, 2014).

¹⁹ *Herbert v. Shanley Co.*, 242 U.S. 591, 595 (1917). Note that the issue before the Court was whether composers were entitled to receive compensation when their compositions were played in restaurants with no cover charge.

strong, laws are set up to create financial incentives for artists to continue creating, while retaining both financial and artistic control over the works they create. American copyright law is based on the provision of incentives for the creation of art that serves the public interest. Following this maxim, artists ought to be compensated so that they can continue to create music for the public good. Furthermore, Justice Sandra Day O'Connor explained in *Harper & Row v. Nation Enterprises* that “[t]he rights conferred by copyright are designed to assure contributors to the store of knowledge a fair return for their labors.”²⁰ The question then becomes one of fairness and designing a system that gives creators these fair returns.

Copyright law in the United States protects two very distinct elements of music: first, the musical composition, “including any accompanying words,”²¹ and second, the sound recording “that result[s] 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[.]”²² Congress recognizes these two distinct rights separately, and the associated licensing structures reflect that separation.

B. Pre-1976 U.S. Copyright Law

Article I, Section 8, Clause 8 of the U.S. Constitution—the Copyright Clause—declares that Congress has the power “[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.”²³ The first U.S. Copyright Act was passed in 1790 and granted the rights of reproduction and distribution.²⁴ In 1856, Congress passed the first law

²⁰ *Harper & Row, Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 546 (1986).

²¹ 17 U.S.C. § 102(a) (2012).

²² *Id.* § 101.

²³ U.S. CONST. art. I, § 8, cl. 8.

²⁴ *See Act of 1790*, 1 Stat. 124.

granting public performance rights on a federal level—for dramatic compositions.²⁵ Congress created “public performance” rights, declaring that authors and copyright owners of dramatic compositions had the exclusive right “to act, perform, or represent the same, or cause it to be acted, performed, or represented, on any stage or public place during the whole period for which the copyright is obtained[.]”²⁶ In 1897, Congress extended the right of public performance to musical compositions.²⁷ Before this, the primary source of income for composers was the sale of sheet music.²⁸ After 1897, musicians could make money from public performances of their work.

In 1909, Congress passed a new general copyright act (1909 Act) and codified the right of public performance for dramatic works and musical compositions.²⁹ This time, Congress limited the right in musical compositions to a “public performance for profit.”³⁰ Moreover, the 1909 Act did not contain any definitions of the terms “public,” “performance,” or “for profit”³¹ and led to several decades of litigation over the exact meaning of the scope of the right.³²

Even before the 1909 Act was passed, Victor Talking Machine Company (Victor)—the leading phonograph record manufacturer at the time—sought declaratory relief that the

²⁵ See Act of Aug. 18, 1856, 11 Stat. 138; see generally BORGE VARMER, SUBCOMM. ON PATENTS, TRADEMARKS, AND COPYRIGHTS OF THE S. COMM. ON THE JUDICIARY, COPYRIGHT LAW REVISION, STUDY NO. 16: LIMITATIONS ON PERFORMING RIGHTS (Comm. Print 1958), <http://www.copyright.gov/history/studies/study16.pdf>, archived at <http://perma.cc/6ZFY-KCAK>.

²⁶ Act of Aug. 18, 1856, 11 Stat. 138, 138–39.

²⁷ See Act of Jan. 6, 1897, 29 Stat. 481 (amending § 4966 of the Revised Statutes).

²⁸ See generally 2 WILLIAM F. PATRY, COPYRIGHT LAW AND PRACTICE 880 (Greenwood Press ed., 1994).

²⁹ See Copyright Act of 1909, Pub. L. No. 60-349, 35 Stat. 1075 (repealed 1976).

³⁰ See *id.* § 1(e).

³¹ See generally Copyright Act of 1909, Pub. L. No. 60-349, 35 Stat. 1075 (repealed 1976).

³² See, e.g., *M. Witmark & Sons v. L. Bamberger & Co.*, 291 F., 776 (D.N.J. 1923); *Taylor v. State*, 188 P.2d 671 (Wash. 1948).

unauthorized copying of its records was illegal.³³ When the general revision process began for the 1909 Act, Victor abandoned its attempts at change through the courts and instead sought the inclusion of sound recordings in the general copyright act.³⁴ According to the Copyright Office, “[w]hile the 1909 Act provided protection for copyright holders of musical compositions whose works were reproduced in sound recordings, it included no explicit protection for sound recordings *per se*.”³⁵ Without such protection, both the Copyright Office and the federal courts refused to acknowledge copyright protection for sound recordings in the following decades.³⁶

The first entertainment radio broadcasts began in 1910, and the first commercial radio station (KDKA in Wilkensburg, Pennsylvania) was established in 1920.³⁷ In 1917, the Supreme Court gave teeth to the public performance right for music in *Herbert v. Shanley*.³⁸ In

³³ See *Victor Talking Mach. Co. v. Armstrong*, 132 F., 711, 711–12 (S.D.N.Y. 1904).

³⁴ See BARBARA RINGER, SUBCOMM. ON PATENTS, TRADEMARKS, AND COPYRIGHTS OF THE S. COMM. ON THE JUDICIARY, COPYRIGHT LAW REVISION, STUDY NO. 26: THE UNAUTHORIZED DUPLICATION OF SOUND RECORDINGS 3 (Comm. Print 1957), <http://www.copyright.gov/history/studies/study26.pdf>, archived at <http://perma.cc/4GBD-X93L>.

³⁵ MARIA A. PALLANTE, U.S. COPYRIGHT OFFICE, FEDERAL COPYRIGHT PROTECTION FOR PRE-1972 SOUND RECORDINGS 8 (Dec. 2011), <http://copyright.gov/docs/sound/pre-72-report.pdf>, archived at <http://perma.cc/L4NE-89EE>.

³⁶ *Id.* at 8–9.

³⁷ Public Broadcasting Service, *American Experience: The Development of Radio*, <http://www.pbs.org/wgbh/amex/rescue/sfeature/radio.html>, archived at <http://perma.cc/PQJ9-R4Z2> (last visited Mar. 25, 2015).

³⁸ *Herbert v. Shanley Co.*, 242 U.S. 591, 593 (1917). The case dealt with a restaurateur who played music in the background of his restaurant for patrons to listen to while they ate. The Shanley company did not charge admission at the door, so it claimed it was not performing composer Herbert’s work publically for profit. The Court had to decide “whether the performance of a copyrighted musical composition in a restaurant or hotel without charge for admission to hear it infringes the exclusive right of the owner of the copyright to perform the work publicly for profit.” *Id.* The Court found that, despite not charging admission, the performances were

Shanley, the Court upheld the idea that while composers do not necessarily compose solely for profit, restaurateurs, hoteliers, and others choose to present music to their customers because it is profitable for their businesses. And if it is profitable for those businesses, Congress and the courts consider it a public performance for profit, a right that copyright law reserves to the owners of the copyright.³⁹

Commercial radio was unknown when the 1909 Act was passed. Early on, radio stations hired bands to perform music live, and royalties were paid to the American Society of Composers, Authors, and Publishers (ASCAP)⁴⁰ for the use of the musical compositions they played.⁴¹ However, no major changes were made to copyright law for several decades. As radio grew in popularity, so too did recorded music. As recorded music became more popular, radio stations saw pre-

indeed public performances. Justice Holmes explained that “[t]he defendants’ performances are not eleemosynary. They are part of a total for which the public pays, and the fact that the price of the whole is attributed to a particular item which those present are expected to order is not important.” *Id.* at 594–95.

³⁹ The Copyright Act initially indicated that the public performance right was limited to instances where compositions were played publically for profit. The language concerning “for profit” was later removed. See Copyright Act of 1909, Pub. L. No. 60-349, 35 Stat. 1075 (repealed by the Copyright Act of 1976).

⁴⁰ ASCAP was the first performance rights organization (“PRO”). As the name suggests, ASCAP’s membership was (and still is) comprised of composers, authors, and publishers of musical compositions. The organization represents the interests of its members by licensing the right to publically perform their music through blanket licenses, granting the right to perform all of the music in their repertoire, and enforcing the need to pay for said licenses by pursuing litigation against individuals and organizations who do not obtain the necessary licenses. For more information on ASCAP, see BRUCE POLLOCK, *A FRIEND IN THE MUSIC BUSINESS: THE ASCAP STORY* (Hal Leonard Books ed., 2014).

⁴¹ See generally Jeff Lunden, *Collecting Money for Songwriters, A 100-Year Tug of War*, NPR MUSIC NEWS (Feb. 13, 2014, 2:00 AM), <http://www.npr.org/2014/02/13/275920416/collecting-money-for-songwriters-a-100-year-tug-of-war>, archived at <http://perma.cc/99UP-YHK5>.

recorded music as a way to keep costs down.⁴² This way, stations would not have to constantly employ entire orchestras and bandleaders every time they wanted to play music.⁴³

In response to this new development, the American Federation of Musicians had record labels include markings on the albums they sold that read “not licensed for radio broadcast” (or similar language) in order to deter the practice.⁴⁴ Then, in 1940, bandleader Paul Whiteman sued RCA to stop NBC Radio (a subsidiary of RCA) from broadcasting his recordings without his permission.⁴⁵ Judge Learned Hand, in the Second Circuit case *RCA Manufacturing Co. v. Whiteman*, decided that federal law prevented the enforcement of these restrictions on records.⁴⁶ In *RCA*, he declared that once the physical record was sold, broadcasters had the right to do what they wished with the record irrespective of the restrictions, including broadcast it on air without compensation to the artists.⁴⁷ According to music licensing expert Bob Kohn, “[s]ince the decision was written by the respected copyright jurist, Judge Learned Hand, . . . performers had little hope of enforcing the restriction further in state courts or other federal courts.”⁴⁸

The *RCA* case was a major blow for musicians who hoped to gain a financial share in the success of the growing radio business and its use of recorded music. These musicians argued that the work they put into recording earned them the right to protection under the law for the broadcast of their work and that RCA’s actions constituted unfair

⁴² See MICHELLE HILMES, *ONLY CONNECT: A CULTURAL HISTORY OF BROADCASTING IN THE UNITED STATES*, 173–76 (Cengage Learning ed., 4th ed. 2013).

⁴³ See *id.*

⁴⁴ See AL KOHN & BOB KOHN, *KOHN ON MUSIC LICENSING* 18–19 (Aspen ed., 4th ed. 2010).

⁴⁵ See generally *RCA Mfg. Co v. Whiteman*, 114 F.2d 86 (2d Cir. 1940).

⁴⁶ *Id.* at 88–89.

⁴⁷ *Id.*

⁴⁸ KOHN & KOHN, *supra* note 44, at 19.

competition.⁴⁹ Despite this, the *RCA* court said that the law in its existing form did not provide this protection.⁵⁰ Furthermore, the musicians lacked the political power to change the law. In fact, the two largest record labels were themselves owned by radio corporations—“[t]he Victor Division of RCA Victor and the Columbia Phonograph Corporation of the Columbia Broadcasting System both had been purchased in the first place precisely to furnish their parent companies with a product to use in broadcasting.”⁵¹

In 1971, Congress granted federal copyright protection for sound recordings but failed to grant sound recording copyright owners the exclusive right to publicly perform these works.⁵² History professor and music scholar William Howard Kenney explains that “[t]he federal circuit court [in *RCA*] alluded to the need for new congressional legislation if musicians were to get what they demanded. That legislation did not come until 1976, and it then brought minimal change in the common-law property rights of musicians in records.”⁵³

C. Copyright Act of 1976 (1976 Act)

Between the 1909 Act and the early 1970s, massive technological advances such as radio, movies, and records changed the shape of American life and rendered much of existing copyright law outmoded. New forms of expression

⁴⁹ See *RCA*, 114 F.2d at 86 (“Whiteman based his claim to injunctive relief on the grounds that such indiscriminate and unauthorized use of his records interfered with his common-law property right in and to his musical interpretations and renditions inscribed on said records; hindered his chances of obtaining contracts for the use of his services; forced him to compete with himself; curtailed his income based on royalties from such records; interfered with his agreement with RCA Victor Talking Machine Co.; and that defendants’ actions constituted unfair competition with Whiteman in his various fields of activity.”).

⁵⁰ See *id.*

⁵¹ WILLIAM HOWARD KENNEY, *RECORDED MUSIC IN AMERICAN LIFE: THE PHONOGRAPH AND POPULAR MEMORY, 1890-1945* 191 (Oxford University Press ed., 1999).

⁵² See Sound Recording Act of 1971, Pub. L. No. 92-140, 85 Stat. 391. The Act did not retroactively protect works before its enactment date.

⁵³ KENNEY, *supra* note 51, at 190.

could potentially be copyrighted, there were new ways to copy works, and it was necessary to define what constituted copyright infringement.⁵⁴ Facing these technological changes as well as the United States' decision in 1955 to participate in the Universal Copyright Convention,⁵⁵ Congress finally passed a major revision to federal copyright law.⁵⁶ According to the Association of Research Libraries, the 1976 Copyright Act "preempted all previous copyright law and extended the term of protection to life of the author plus 50 years."⁵⁷ The Act covered the scope and subject matter of copyrightable works, exclusive rights, copyright terms, copyright notice and registration, copyright infringement, fair use, defenses, and remedies for infringement.⁵⁸ Section 106 of the new Copyright Act listed all of the exclusive rights granted to copyright owners.⁵⁹ In Section 106(4), Congress clarified what types of works were given the exclusive right of public performance, notably leaving out sound recordings.⁶⁰

⁵⁴ See Ass'n of Research Libraries, *Copyright Timeline: A History of Copyright in the United States*, <http://www.arl.org/focus-areas/copyright-ip/2486-copyright-timeline#20C>, archived at <http://perma.cc/3Y3W-R2FC> (last visited Mar. 25, 2015).

⁵⁵ Congress also considered the anticipated U.S. participation in the Berne Convention for the Protection of Literary and Artistic Works.

⁵⁶ See U.S. Copyright Office, *United States Copyright Office—A Brief Introduction and History*, <http://www.copyright.gov/circs/circ1a.html>, archived at <http://perma.cc/KSG4-G5QQ> (last visited Mar. 25, 2015); Berne Convention Implementation Act of 1988, Pub. L. No. 100-568, 102 Stat. 2853. Though the initial Berne Convention was created in 1886, the United States refused to join when it was originally created and did not join for an additional 100 years. See Copyright Act of 1976, Pub. L. No. 94-553, 90 Stat. 2541 (codified at 17 U.S.C. §§ 101–810 (2012) and as amended at 44 U.S.C. §§ 505, 2113 (2012) and 18 U.S.C. § 2318 (2012)).

⁵⁷ Ass'n of Research Libraries, *supra* note 54.

⁵⁸ See 17 U.S.C. §§ 101–810 (2012); Ass'n of Research Libraries, *supra* note 54.

⁵⁹ See 17 U.S.C. § 106 (2012).

⁶⁰ *Id.* § 106(4) (emphasis added) (providing the exclusive rights "in the case of literary, *musical*, dramatic, and choreographic works, pantomimes, and motion pictures and other audiovisual works, to perform the copyrighted work publicly").

According to the Copyright Act of 1976 (1976 Act), the right to publically perform a work entails two elements. It can either mean “to perform or display it at a place open to the public or at any place where a substantial number of persons outside of a normal circle of a family and its social acquaintances is gathered.”⁶¹ Alternatively, it can mean “to transmit or otherwise communicate a performance or display of the work to a place specified by [the first part of this definition] or to the public, by means of any device or process, whether the members of the public capable of receiving the performance or display receive it in the same place or in separate places and at the same time or at different times.”⁶² Essentially, the public performance right entails the right to perform a work in the traditional sense of the word at a public place or to transmit a signal to a large number of people (i.e., over the radio). This right is usually exercised by artists or their representatives licensing the right to publically perform their works to someone else.⁶³

D. The Jukebox Problem

The 1976 Act resolved a longstanding debate in the music industry over the status of jukeboxes (or “coin-operated phonorecord players”) by implementing a compulsory license for jukebox performances of copyrighted music.⁶⁴ The performance rights organizations [PROs] had engaged in a decades-long battle with jukebox manufacturers and restaurateurs over the fact that the 1909 Copyright Act specifically omitted coin-operated machines from the requirement to pay for the public performance right.⁶⁵ In

⁶¹ *Id.* § 101.

⁶² *Id.*

⁶³ See, e.g., *Common Music Licensing Terms*, ASCAP, <http://www.ascap.com/licensing/termsdefined.aspx>, archived at <http://perma.cc/M3GZ-4H9K>, (last visited Mar. 25, 2015).

⁶⁴ See Copyright Act of 1976, Pub. L. No. 94-553, 90 Stat. 2541 (codified as amended at 17 U.S.C. § 116 (1976) (repealed 1993)).

⁶⁵ See Copyright Act of 1909, Pub. L. No. 60-349, 35 Stat. 1075 (repealed 1976) (“The reproduction or rendition of a musical composition by or upon coin-operated machines shall not be deemed a public

1909, coin-operated phonorecord players like jukeboxes were fairly uncommon; by 1936, however, half of all records being produced “were destined for jukeboxes.”⁶⁶ As jukeboxes became more popular, the PROs struggled to get legislation passed to require that the jukebox operators pay royalties for public performances on the jukeboxes they owned. For years, they were unable to reach a compromise.

The PROs finally prevailed in 1976 with the passage of the new omnibus act. Since it occurred as part of a general omnibus revision process, there was less resistance to a new law. Both sides were able to agree on a compulsory license, embodied in Section 116 of the 1976 Act.⁶⁷ The compulsory license allowed copyright owners to get paid, but the rate was set by the Copyright Royalty Judges and was therefore likely much lower than whatever would be paid in an open negotiation.⁶⁸ The general revision process allowed an issue that had been fought over for decades to fold into a larger bill, generating less controversy and passing through

performance for profit unless a fee is charged for admission to the place where such reproduction or rendition occurs.”).

⁶⁶ MARK COLEMAN, *PLAYBACK: FROM THE VICTORIA TO MP3, 100 YEARS OF MUSIC, MACHINES, AND MONEY* 43 (Da Capo Press ed., 2009).

⁶⁷ See Copyright Act of 1976, Pub. L. No. 94-553, 90 Stat. 2541 (Jan. 1, 1978) (codified as amended at 17 U.S.C. § 116(2) (1976) (repealed 1989)).

⁶⁸ See Jukebox License Office, *History of the Jukebox License*, <http://www.jukeboxlicense.com/history.htm>, archived at <http://perma.cc/LYT6-EXEU> (last visited Mar. 25, 2015). While it is hard to prove definitively how an openly negotiated rate would turn out (since none has ever existed), we can look generally to the difference between the on-demand rates that are paid by organizations like Spotify under Section 114 and the Copyright Royalty Board rates set for companies like Pandora that comply with the performance complement in Section 114(d)(2). Furthermore, the right to walk away from a negotiation, which is only available with a full right (as opposed to a compulsory set rate), allows artists and labels to get a higher rate. After the 1976 Act was passed, copyright owners would be unable to enjoin jukebox operators from performing their music publically on their machines. Instead, they would only be able to sue them ex post for failure to pay the established royalty rate. Later, the compulsory jukebox license was eliminated when Congress determined that the license was incompatible with the Berne Convention. In the Berne Convention Implementation Act of 1988, the compulsory license was eliminated and replaced with a voluntarily negotiated license.

Congress without the scrutiny that might have resulted from eliminating the jukebox exception with a stand-alone bill.

E. The Digital Performance Right in the Sound Recordings Act of 1995

After decades without any public performance right in sound recordings, Congress passed a limited performance right for them with the Digital Performance Right in Sound Recordings Act of 1995 (“DPRA”).⁶⁹ The development of the Internet and digital music allowed for higher quality transmission and new ways to disseminate music. New technologies posed new threats to the survival of the music industry.⁷⁰ In the face of these threats, Congress allowed a partial sound recording performance right to enter copyright law.⁷¹ The DPRA added to Section 106 of the Copyright Act by granting copyright owners the exclusive right “to perform the copyrighted work publicly by means of a digital audio transmission.”⁷²

When the DPRA was passed, Congress purposefully kept terrestrial radio stations from having to pay for the right to broadcast sound recordings.⁷³ According to the Senate Report:

It is [our] intent to provide copyright holders of sound recordings with the ability to control the distribution of their product by digital transmissions, without hampering the arrival of new technologies, and without imposing new and unreasonable burdens on radio and television broadcasters, which often

⁶⁹ See Digital Performance Right in Sound Recordings Act of 1995, Pub. L. No. 104-39, 109 Stat. 336 (codified as amended at 17 U.S.C. §§ 106, 114–115 (2012)).

⁷⁰ See H.R. REP. NO. 104-274, at 13 (1995).

⁷¹ See 17 U.S.C. §§ 114–115 (2012).

⁷² See *id.* § 106(6); see generally *infra* Part II.C.

⁷³ See S. REP. NO. 104-128, at 2 (1995); U.S. COPYRIGHT OFFICE, COPYRIGHT AND THE MUSIC MARKETPLACE, 44 (Feb. 2015), available at <http://copyright.gov/docs/musiclicensingstudy/copyright-and-the-music-marketplace.pdf>, archived at <http://perma.cc/22BE-VW8D>.

promote, and appear to pose no threat to, the distribution of sound recordings.⁷⁴

At the time, Congress was concerned that new streaming technologies posed a major threat to record sales, and the goal of the DPRA was to address that issue directly, while leaving the status quo in place in terms of traditional radio broadcasters.⁷⁵

The DPRA established a three-tiered system for who would have to pay what royalties. The three categories addressed were: “broadcast transmissions [transmissions made by FCC-licensed terrestrial broadcast stations], which were exempted from the performance right; subscription transmissions, which were generally subject to a statutory license; and on-demand transmissions, which were subject to the full exclusive right.”⁷⁶

In 1998, the Digital Millennium Copyright Act (“DMCA”) amended several areas the DPRA had missed,⁷⁷ including adding specific provisions detailing how to deal with digitally streamed music. It established, by law, how the proceeds from licensing transmissions would be divided both directly and indirectly.⁷⁸ It also allowed for an independent “agent designated to distribute receipts from the licensing of

⁷⁴ S. REP. NO. 104-128, at 14–15 (1995).

⁷⁵ See U.S. COPYRIGHT OFFICE, COPYRIGHT AND THE MUSIC MARKETPLACE, *supra* note 73, at 44.

⁷⁶ U.S. COPYRIGHT OFFICE, THE DIGITAL MILLENNIUM COPYRIGHT ACT OF 1998: U.S. COPYRIGHT OFFICE SUMMARY, 16 (Dec. 1998), available at <http://www.copyright.gov/legislation/dmca.pdf>, archived at <http://perma.cc/N822-TL5W>.

⁷⁷ Justin Oppelaar, *Music Biz Grapples with New Legislation: Online Delivery Muddles Compensation Rights*, VARIETY (Jan. 16, 2001, 11:00 PM), <http://variety.com/2001/biz/news/music-biz-grapples-with-new-legislation-1117792037/>, archived at <http://perma.cc/5EMW-JFGH>. According to Mr. Oppelaar, the DMCA “covered artists and labels for things like radio channels on digital cable and satellite subscription services, but what they were really interested in were the Webcasts. Unfortunately, the Act only covered performances for which listeners paid subscription fees, cutting out most Webcasters, which rely on secondary revenues like ad sales and e-commerce.” *Id.*

⁷⁸ 17 U.S.C. § 114(g) (2012).

transmissions” to collect proceeds for digital performances of sound recordings and specified how this body would distribute those royalties to the artists and the copyright owners.⁷⁹ In November 2001, the industry created SoundExchange (which is still in operation today) to serve this function.⁸⁰

Section 114(g)(2) of the Copyright Act explains how SoundExchange must distribute the royalties it receives. Fifty percent of the receipts are paid to the “copyright owner of the exclusive right under section 106(6).”⁸¹ Forty-five percent goes “to the recording artist or artist featured on such sound recording.”⁸² The remaining five percent must be distributed to “nonfeatured [sic] musicians” and “nonfeatured [sic] vocalists” who performed on a given recording.⁸³ When licenses are obtained outside of the statutory Section 114 licensing process, the DPRA only specifies that featured and non-featured recording artists “shall be entitled to receive payments from the copyright owner of the sound recording in accordance with the terms of the artist’s contract.”⁸⁴ As such, the use of the statutory license guarantees a level of transparency in the payment of performance royalties.

Outside of the statutory license, however, artists are paid based on the terms in their individual recording contracts, and record labels often include clauses ensuring that almost all of these royalties go to the labels.⁸⁵ When new artists sign deals with a record label, they are in relatively poor bargaining positions and often sign contracts that allow record companies to recoup all expenses and other costs as

⁷⁹ *See id.* § 114(g)(2).

⁸⁰ *See* Oppelaar, *supra* note 77.

⁸¹ 17 U.S.C. § 114(g)(2)(A) (2012).

⁸² *Id.* § 114(g)(2)(D).

⁸³ *Id.* §§ 114(g)(2)(B)–(C).

⁸⁴ *Id.* §§ 114(g)(1)(A)–(B).

⁸⁵ *See generally* Stephen Marcone, *The Poverty of Artist Royalties*, MUSIC BUS. J. (May 2013), available at <http://www.thembj.org/2013/05/the-poverty-of-artist-royalties>, archived at <http://perma.cc/3G9Y-G5WQ>.

they see fit, from the money webcasters pay them for the license to perform the sound recording.⁸⁶

Notably, the DPRA and the DMCA failed to extend the performance right to traditional terrestrial radio. In the House Report, Congress claimed this was due to “the mutually beneficial economic relationship between the recording and traditional broadcasting industries.”⁸⁷ Despite Congress’ view of the situation, many artists disagreed—and continue to disagree—over just how mutually beneficial that relationship is.

F. How Artists Make Money from Music

To illustrate how the process of music royalties works, it is useful to follow the path of a single song. Take, for example, Billy Joel’s song “New York State of Mind,” released on his 1976 album *Turnstiles*.⁸⁸ Joel wrote the music and lyrics to the song and recorded the song on the album himself. After Joel’s version appeared on *Turnstiles*, “New York State of Mind” was recorded by Barbra Streisand in 1977, Mel Tormé in 1977, Shirley Bassey in 1982, and by Joel and Tony Bennett in 2001.⁸⁹ Every time a version of “New York State of Mind” is played on the radio, Joel and his publisher receive royalties since they own the musical composition copyright, but none of the other recording artists receive royalties when their versions are played on the radio. No money goes to Streisand, Tormé, Bassey, or Bennett.

To understand how the terrestrial radio exemption functions, it is important to first understand the basic structure of copyright as it deals with music licensing in the United States, as well as some of the major players in the

⁸⁶ See generally DONALD S. PASSMAN, *ALL YOU NEED TO KNOW ABOUT THE MUSIC BUSINESS* 83–87 (Free Press ed., 8th ed. 2012).

⁸⁷ H.R. REP. NO. 104-274, at 15 (1995).

⁸⁸ BILLY JOEL, *TURNSTILES* (Columbia Records 1976).

⁸⁹ BARBRA STREISAND, *STREISAND SUPERMAN* (Columbia Records 1977); MEL TORMÉ, *TORMÉ: A NEW ALBUM* (Gryphon Records 1977); SHIRLEY BASSEY, *ALL BY MYSELF* (Applause Records 1982); TONY BENNETT, *PLAYIN’ WITH MY FRIENDS: BENNETT SINGS THE BLUES* (Sony 2001).

industry. As discussed previously, there are two basic rights at play in music.⁹⁰ The first right is based on the musical composition—the music and the lyrics that make up a song—and the second is for a particular recording of that song. The right to the musical composition copyright generally belongs to the songwriters at the onset, and is often shared, through contractual deals, with their respective publishers.⁹¹

When a song is initially written, copyright law grants the exclusive rights to the composition to the composer and the lyricist. The vast majority of music, however, is written under a publishing deal, whereby a portion or all of the composer's ownership rights are transferred to a publisher, in exchange for an advance on expected royalties or some other split.⁹² Composers then join a PRO that will collect royalties and pay the composer and their publisher for the licenses they sell for use of their works. The featured artist, record producers, and record labels generally share the right to the sound recording copyright (usually contained in a “master” recording), with some additional royalties often owed to backup singers, studio musicians, and other technicians who worked on the master recording.⁹³

To play songs, television stations, satellite broadcasters, online music services, and radio stations have to obtain

⁹⁰ See *infra* Part II.A.

⁹¹ See Todd Brabec & Jeff Brabec, *Music Publishers and What They Do*, ASCAP (2007), <http://www.ascap.com/Home/Music-Career/articles-advice/ascapcorner/corner1.aspx>, archived at <http://perma.cc/QQD2-QJDF> (last visited Mar. 25, 2015).

⁹² See generally AL KOHN & BOB KOHN, KOHN ON MUSIC LICENSING 159–77 (Aspen Publishers eds., 4th ed. 2010). Songwriting can be broken into two main types, a “co-publishing agreement, under which the publisher’s share is split between the writer (or his own music publishing firm) and the music publisher,” and an “administration agreement” whereby the writers “retain all interest in the copyrights and merely grant to the music publisher the right to administer the publishing of the compositions.” *Id.*

⁹³ For reference on basic music licensing, see *Music Royalties USA—Quick Start Guide*, MUSIC BUS. ASS’N (Aug. 6, 2014), http://musicbiz.org/wp-content/uploads/2013/10/MusicRoyalties_MusicBiz_FINAL.jpg, archived at <http://perma.cc/3VAG-PCCT>.

various licenses to use both the sound recording and the musical composition. They obtain the rights to publically perform musical composition from the three main PROs—ASCAP, BMI,⁹⁴ and SESAC.⁹⁵ Additionally, the royalties are collected for sound recordings through SoundExchange.

When Joel wrote “New York State of Mind,” he wrote both the music and lyrics and published the song himself, meaning he owned the entire right to the musical composition.⁹⁶ Joel was at the time—and remains today—a member of ASCAP, which licenses the rights to the underlying musical composition on his behalf.⁹⁷ Additionally, Joel released the album under his record label, Columbia Records, and therefore shares the copyright in the sound recording with the record label.

When *any version* of “New York State of Mind” is played via *digital* broadcast (by a service like Pandora, Spotify, or Sirius XM), ASCAP pays Joel for the musical composition performance through royalties it collects from digital broadcasters according to blanket licenses it issues to these services.⁹⁸ SoundExchange collects royalties on Joel’s behalf through the compulsory licenses for these same broadcasts and pays Joel based on the mandated 50-45-5 split required by Section 114.⁹⁹ When the Streisand version of the song is played, Joel still receives royalties from ASCAP for the performance of the musical composition, but Streisand, her

⁹⁴ Broadcast Music International.

⁹⁵ SESAC, which originally stood for the “Society of European Stage Authors and Composers,” is the smallest of the PROs.

⁹⁶ Joel has since signed a publishing agreement. See *Legendary Singer/Songwriter Billy Joel Signs Global Publishing Agreement*, UNIVERSAL MUSIC GRP. (Aug. 30, 2012), <http://www.universalmusic.com/corporate/detail/2176>, archived at <http://perma.cc/S7JU-HVRC>.

⁹⁷ See ASCAP, *ACE Search: Work ID: 440088522: New York State of Mind*, <http://www.ascap.com/home/ace-title-search/index.aspx>, archived at <http://perma.cc/FX2B-XWER> (last visited Mar. 25, 2015).

⁹⁸ See *ASCAP Payment System: Who Does ASCAP Collect From?*, ASCAP, <http://www.ascap.com/members/payment/whocollect.aspx>, archived at <http://perma.cc/9JRH-FG36> (last visited Dec. 16, 2014). Mar. 25, 2015).

⁹⁹ See 17 U.S.C. § 114(g)(2) (2012).

record label, and her featured artists are paid by SoundExchange for the sound recording. When these same versions get played on terrestrial radio stations, Joel gets paid for the musical composition, but no royalties are paid out for the use of the sound recording.

III. ATTEMPTED SOLUTIONS; PUBLIC AND PRIVATE

The music industry has not given up hope on gaining a full performance right for sound recordings. Multiple potential solutions, both public and private, have surfaced over the past several years, to varying degrees of success. This Part will review four attempts at getting sound recording copyright owners paid for the terrestrial broadcasts of their music. First, it will evaluate a legislative proposal—the Performance Rights Act of 2009. Second, it will look at a private market solution between two of the industry’s largest players—Clear Channel and Warner Music. Third, it will turn to developments in several state courts regarding pre-1972 sound recordings that may have widespread implications. Finally, it will address the current congressional review of copyright law generally and the Copyright Office’s Music Licensing Study’s general proposal for updating music licensing law.

A. H.R. 848: The Performance Rights Act of 2009

A bill “[t]o provide parity in radio performance rights under title 17, United States Code, and for other purposes[,]” the Performance Rights Act of 2009 (PRA) was introduced in the House of Representatives on February 4, 2009 by Representative John Conyers, Jr.¹⁰⁰ Senator Patrick Leahy introduced an equivalent bill in the Senate titled, “[a] bill to provide fair compensation to artists for use of their sound recordings.”¹⁰¹ The House’s version of the Act proposed changing the language of Section 106 of the Copyright Act,

¹⁰⁰ H.R. 848, 111th Cong. (2009).

¹⁰¹ S. 379, 111th Cong. (2009).

which outlines the exclusive rights copyright owners hold, from “in the case of sound recordings, to perform the copyrighted work publicly by means of a *digital* audio transmission,”¹⁰² to simply, “by means of an audio transmission.”¹⁰³ The bill called for “a flat annual fee instead of royalty payments for individual broadcast stations with gross revenues of less than \$1.25 million and for non-commercial, public broadcast stations.”¹⁰⁴ According to copyright professor and attorney Mark A. Fischer, “[w]hile sponsors and advocates of the legislation have labeled this bill as an attempt to achieve parity in radio performance rights, foes assert that the law will stifle musical growth and that royalties will end up largely in the hands of record companies and not performers.”¹⁰⁵ The bill eventually gained fifty-two cosponsors in the House and eight in the Senate.¹⁰⁶

The National Association of Broadcasters (NAB) lobbied heavily against the passage of the PRA and gained strong support in the House of Representatives to stop it from passing.¹⁰⁷ The NAB’s central argument was that radio’s

¹⁰² 17 U.S.C. § 106(6) (2012) (emphasis added).

¹⁰³ H.R. 848, 111th Cong. (2009).

¹⁰⁴ MARK A. FISCHER, FISH & RICHARDSON P.C., *REVOLUTIONS ALL THE TIME: MUSIC, LAW & TECHNOLOGY* 34 (2009), available at <http://www.fr.com/files/Publication/42589b6a-794e-49ce-bbb5-5b997d8a5f49/Preview/PublicationAttachment/f399d169-b22c-4b3b-a819-6dee37b2ebff/Revolutions%20All%20the%20Time%201-27-10.pdf>, archived at <http://perma.cc/B9RH-52L5>.

¹⁰⁵ *Id.* at 35.

¹⁰⁶ See *Cosponsors: H.R. 848 – Performance Rights Act*, CONGRESS.GOV, <http://www.congress.gov/bill/111th-congress/house-bill/848/cosponsors?q=%7B%22search%22%3A%5B%22hr+848%22%5D%7D>, archived at <http://perma.cc/SPL8-K3FW>; See *Cosponsors, S. 379 – Performance Rights Act*, CONGRESS.GOV, <http://www.congress.gov/bill/111th-congress/senate-bill/379/cosponsors>, archived at <http://perma.cc/W9ZW-TCKA>.

¹⁰⁷ See, e.g., Fawn Johnson, *Senate Panel Approves Radio Royalties for Performers*, WALL ST. J. (Oct. 15, 2009, 11:34 PM), <http://www.wsj.com/news/articles/SB10001424052748704112904574475621508210340?mg=reno64-wsj&url=http%3A%2F%2Fonline.wsj.com%2Farticle%2F%2FSB10001424052748704112904574475621508210340.html>, archived at <http://perma.cc/RQ52-ESDU>.

promotional value is worth millions and that the additional cost of sound recording royalties would be destructive to its business.¹⁰⁸ They claimed that since record labels do not pay radio stations to promote their albums and artists, broadcasters in turn should not have to pay to use the labels' music.¹⁰⁹ The NAB referred to the PRA as a "performance tax" and opposed its implementation because "the record labels and artists receive a great benefit from the free airplay provided by radio stations."¹¹⁰

An artist advocacy group known as the musicFIRST Coalition went to the Federal Communications Commission (FCC) in June 2009 to request a declaratory ruling against the NAB.¹¹¹ MusicFIRST accused broadcasters of violating their obligations to the public interest and claimed that "instead of providing the best practicable service to the community, certain broadcasters are engaged in a concerted effort to promote their own pecuniary interests by distorting an important public debate."¹¹² Their essential contention was that member stations of the NAB were refusing to sell advertising time to the musicFIRST Coalition for their advertisements in favor of the PRA. Furthermore, they contended that the NAB was airing its own advertisements but mislabeling them as "public service announcements."¹¹³ MusicFIRST even accused the NAB of allegedly threatening

¹⁰⁸ *Id.*

¹⁰⁹ See NATIONAL ASSOCIATION OF BROADCASTERS, LEGISLATIVE PRIORITIES: 111TH CONGRESS 15–16, http://www.nab.org/documents/advocacy/NAB_111th_Legislative_Priorities.pdf, archived at <http://perma.cc/YGF5-FMHD>.

¹¹⁰ *Id.*

¹¹¹ See *MusicFIRST Asks FCC to Investigate Broadcasters' Refusal to Air "Local Choice" Ads*, MUSICFIRST, http://musicfirstcoalition.org/news_item&NewsID=3765647627535 (last visited Apr. 10, 2015), archived at <http://perma.cc/N4UQ-D4G6>.

¹¹² Samuel L. Feder & Lindsay C. Harrison, Jenner & Block LLP on Behalf of Petitioner musicFIRST Coalition, Request for Declaratory Ruling Before the FCC at 4 (June 9, 2009), available at <http://cdn.arstechnica.net/MusicFirstPetition6-09-009.pdf>, archived at <http://perma.cc/8M2G-KENP>.

¹¹³ See MUSICFIRST, *supra* note 111.

“retaliation against recording artists who spoke out in favor of the legislation.”¹¹⁴ Whatever the exact cause, the NAB was successful in stopping the PRA; the legislation stalled and never came to a vote in either the House or the Senate.

B. The Private Solution: The Warner Music - Clear Channel Deal

After the PRA died in Congress, two of the largest players on both sides of the radio industry entered into a private agreement whereby some artists would be paid royalties for their sound recordings when they were played over terrestrial radio. On September 12, 2013, broadcast giant Clear Channel entered into a “landmark partnership” with Warner Music, thereby “aligning the two companies’ interests in driving digital growth, increasing radio listenership, breaking new music, and creating new marketing opportunities for established artists.”¹¹⁵ Clear Channel’s decision to pay Warner Music’s artists does not mean it is an ardent supporter of the public performance right for sound recordings. Instead, it decided to pay Warner Music terrestrial royalties in exchange for a reduction of digital royalties. According to Hannah Karp of *The Wall Street Journal*, “[i]n exchange [for terrestrial royalties], Warner Music, owned by Access Industries Inc., is allowing Clear Channel to pay for digital use of its material partly with a revenue-sharing scheme, instead of simply charging Clear Channel a fee for every play.”¹¹⁶

¹¹⁴ *Id.*; see also Free Market Royalty Act, H.R. 3219, 113th Cong. (2013).

¹¹⁵ See Press Release, Clear Channel Media and Entertainment, *supra* note 7. As of September 16, 2014, Clear Channel is known as iHeartMedia, Inc.; Clear Channel Communications, Inc. is now iHeartCommunications, Inc., and CC Media Holdings, Inc. is now iHeartMedia, Inc. See Letter to Investors, iHEARTMEDIA, INC. (Sept. 16, 2014), available at <http://www.iheartmedia.com/Investors/Pages/letter-to-investors.aspx>, archived at <http://perma.cc/CYK9-Z3S9>.

¹¹⁶ Hannah Karp, *Warner’s Radio Deal Means Revenue Sharing, and Hopefully Airplay*, WALL ST. J. CORPORATE INTELLIGENCE (Sept. 12, 2013, 7:31 PM), <http://blogs.wsj.com/corporate-intelligence/2013/09/12/clear->

The current compulsory digital rate is set under Section 114 by the Copyright Royalty Board. But Section 114 allows for “[l]icense agreements voluntarily negotiated at any time between 1 or more copyright owners of sound recordings and 1 or more entities performing sound recordings [to] be given effect in lieu of any decision by the Librarian of Congress or determination by the Copyright Royalty Judge.”¹¹⁷ By entering into voluntary negotiations with Warner Music, Clear Channel is able to pay whatever Warner Music will agree to, which, in this case, is likely much less than the CRB compulsory rate.

According to *Forbes* music business contributor Bobby Owsinski, “[a]lthough the terms of the deal haven’t been released to the public, insiders have intimated that Clear Channel will pay [Warner Music] 1% of advertising for terrestrial broadcasts and 3% for digital, which could amount to some \$50 million over three years, including an up front payment.”¹¹⁸ Right away, the difference in the rates paid out is apparent. Without the legal right to the public performance, Warner Music and its artists have very little bargaining power in the negotiation. Owsinski continues to explain that in exchange for what Clear Channel paid out, “it receives a discounted rate on digital streams from the 22 cents per 100 streams it pays now to no less than 12 cents per 100 streams.”¹¹⁹ Warner Music artists will now receive *half* of the royalties to which they were previously entitled for digital performances in exchange for terrestrial royalties they may never see.

channel-does-a-deal-royalties-via-revenue-sharing, *archived at* <http://perma.cc/8TGV-UWJD>.

¹¹⁷ 17 U.S.C. § 114(f)(3) (2012).

¹¹⁸ Bobby Owsinski, *The Clear Channel – Warner Music Deal: Not What It’s Cracked Up To Be*, *FORBES* (Sept. 16, 2013, 8:00 AM), <http://www.forbes.com/sites/bobbyowsinski/2013/09/16/the-clear-channel-warner-music-deal-not-what-its-cracked-up-to-be>, *archived at* <http://perma.cc/74FS-T3EB>.

¹¹⁹ *Id.*

Warner Music is the third largest record label,¹²⁰ and some have argued that “the fraction of terrestrial-advertising revenue these labels will receive is less important than the extra airplay they may get through various programs.”¹²¹ While this is great for the record labels, it does not necessarily translate into royalties for their artists. Warner Music COO Rob Weisenthal stated: “From high visibility live and televised events to unique digital services, the breadth and strength of Clear Channel’s platforms will enable us to propel our artists’ careers in an extremely competitive marketplace.”¹²²

According to Ed Christman of Billboard Magazine, the Warner Music deal was not the first such private deal. Christman noted that, as of September 2013, Clear Channel had “already cut deals with indie labels including Big Machine Label Group, Glassnote Entertainment Group, eOne, DashGo, Robbins Entertainment, rpm Entertainment, Wind-up Records, Fearless Records, Zojak Records, and Dualtone Records to pay artist performance royalties to their artists when their songs are played on terrestrial radio broadcasts.”¹²³

Digital royalties, when obtained through the standard Section 114 statutory license and paid out through SoundExchange, guarantee that featured recording artists, even ones signed to major record labels or ones who have assigned away the copyright in their sound recording, receive at least 45% of the royalties paid for the use of their work to

¹²⁰ See Ryan Faughnder, *Clear Channel and Warner Music Group Announce Partnership*, L.A. TIMES (Sept. 12, 2013), <http://articles.latimes.com/print/2013/sep/12/entertainment/la-et-ct-clear-channel-wmg-20130912>, archived at <http://perma.cc/9WWT-D3U9>.

¹²¹ Karp, *supra* note 116.

¹²² Press Release, Clear Channel Media and Entertainment, *supra* note 7.

¹²³ Ed Christman, *Here’s Why Warner Music’s Deal with Clear Channel Could be Groundbreaking for the Future of the U.S. Music Biz (Analysis)*, BILLBOARD BIZ (Sept. 12, 2013, 7:32 PM), <http://www.billboard.com/biz/articles/news/5694973/heres-why-warner-musics-deal-with-clear-channel-could-be-groundbreaking>, archived at <http://perma.cc/M6M9-DWTN>.

SoundExchange.¹²⁴ The Clear Channel-Warner Music deal exempts Warner Music from paying artists based on the required division of profits under Section 114(g)(2) and instead allows Warner Music to pay its artists for the royalties it receives only under the terms of individually negotiated recording contracts, as allowed under Section 114(g)(1).¹²⁵ The Clear Channel deal removes all transparency for artists and allows their record label contracts to determine how they are paid, without the protection given to them by the mandated split in Section 114.

Steven Cutler, Executive Vice President of Business Development and Corporate Strategy for iHeartMedia, Inc.¹²⁶ spoke about the deal with Warner Music during testimony submitted to the Copyright Royalty Board in relation to the 2016–2020 determination of royalty rates for the digital performance sound recordings.¹²⁷ According to Cutler, “iHeartMedia’s primary strategy for reducing the cost of music licensing was to pursue direct licenses with individual record labels that set rates substantially below the rates iHeartMedia would otherwise be required to pay.”¹²⁸ Cutler’s testimony also listed twenty-six additional independent record labels with which Clear Channel also reached similar deals.¹²⁹

Perhaps most important is the fact that Warner Music is betting on this deal, and it is a bet that they could easily

¹²⁴ 17 U.S.C. § 114(g)(2)(D) (2012).

¹²⁵ *Id.* § 114(g)(1).

¹²⁶ In 2014, Clear Channel changed its name to iHeartMedia, Inc. *See supra* note 115.

¹²⁷ *See generally* Testimony of Steven Cutler, Executive Vice President, Business Development and Corporate Strategy, iHeartMedia, Inc., *In re Determination of Royalty Rates for Digital Performance in Sound Recordings and Ephemeral Recordings (Web IV)*, No. 14-CRB-001-WR (2016–2020), available at http://www.loc.gov/crb/rate/14-CRB-001-WR/statements/iHeartMedia/Vol%203_02%20Testimony%20of%20S%20Cutler/2014_10_07_Testimony_of_S_Cutler_PUBLIC.pdf, archived at <http://perma.cc/ZR9L-X5KN>.

¹²⁸ *Id.* at 2.

¹²⁹ *See id.* at 3–4.

lose. Digital streaming is steadily growing.¹³⁰ Cutting the rates that Warner Music artists receive for digital performance sound recordings gives Warner Music more control over the income it receives from Clear Channel, but in doing so it leaves out the artists and loses out on the higher future royalties it might receive from the continued growth of digital streaming.

C. California Dreaming—*Flo & Eddie, Inc. v. Sirius XM Radio, Inc.*

Another brewing issue in the background of this debate is a recent California District Court decision that *may* have granted a full public performance right for the use of sound recordings for pre-1972 recordings.¹³¹ Because sound recordings were not granted federal copyright protection until the 1971 Sound Recording Act, all works produced prior to 1972 are governed exclusively by state law, while post-1972 works are governed by federal law.¹³² California is one of several states to statutorily protect pre-1972 sound recordings.¹³³ In general, the lack of federal protection for

¹³⁰ See International Federation of the Phonographic Industry (IFPI), *IFPI Digital Music Report 2014: Lighting Up New Markets* 5, 7 (2014), <http://www.ifpi.org/downloads/Digital-Music-Report-2014.pdf>, archived at <http://perma.cc/3Y5W-WNH4>.

¹³¹ See *Flo & Eddie Inc. v. Sirius XM Radio Inc.*, No. CV 13-5693 PSG (RZx), 2014 WL 4725382, at *3, *9 (C.D. Cal. Sept. 22, 2014); Tyler Ochoa, *A Seismic Ruling on Pre-1972 Sound Recordings and State Copyright Law—Flo & Eddie v. Sirius XM Radio (Guest Blog Post)*, TECH. & MKTG. L. BLOG (Oct. 1, 2014), <http://blog.ericgoldman.org/archives/2014/10/a-seismic-ruling-on-pre-1972-sound-recordings-and-state-copyright-law-flo-eddie-v-sirius-xm-radio-guest-blog-post.htm>, archived at <http://perma.cc/6JZJ-Y98H>.

¹³² See Copyright Office Notice of Inquiry, Federal Copyright Protection of Sound Recordings Fixed Before February 15, 1972, 75 Fed. Reg. 67,777 (Nov. 3, 2010).

¹³³ See CAL. CIV. CODE § 980(a)(2) (West 2007). “The author of an original work of authorship consisting of a sound recording initially fixed prior to February 15, 1972, has an exclusive ownership therein until February 15, 2047, as against all persons except one who independently makes or duplicates another sound recording that does not directly or indirectly recapture the actual sounds fixed in such prior sound recording,

pre-1972 works is a major issue for copyright scholars and copyright owners.¹³⁴ But the specific *lack* of federal protection for these works has given California courts the opportunity to make some very interesting developments in terms of the sound recording performance right, which is only possible because state law is not preempted by federal law in this specific area.¹³⁵

Professor Tyler Ochoa of Santa Clara Law School explains that “[a] federal court in California has held that a California statute, Civil Code §980(a)(2), protects sound recordings fixed before February 15, 1972 against unauthorized public performance.”¹³⁶ In doing so, the court protected *both* the rights of digital public performance *and* terrestrial public performance. While the decision will likely be appealed several times before anyone actually has to start paying out royalties on such recordings, this could have major long-term implications for those in the sound recording copyright business. The case arose when Flo & Eddie, Inc. (Flo & Eddie), the corporate entity that owns the rights to the sound recordings of the 1960s group The Turtles (whose hits include “Happy Together”),¹³⁷ sued Sirius XM Radio for not paying out royalties for the public performance of works it owned.¹³⁸ In a stunning defeat for Sirius and a victory for sound recording copyright owners everywhere, the California District Court sided with Flo & Eddie.¹³⁹ Moreover, since the case was presented as a class

but consists entirely of an independent fixation of other sounds, even though such sounds imitate or simulate the sounds contained in the prior sound recording.”

¹³⁴ See Eva E. Subotnik & June M. Besek, *Constitutional Obstacles? Reconsidering Copyright Protection for Pre-1972 Sound Recordings*, 37 COLUM. J.L. & ARTS 327, 328, 330 (2014).

¹³⁵ See Ochoa, *supra* note 131.

¹³⁶ *Id.*

¹³⁷ *The Singles*, THE TURTLES FEATURING FLO & EDDIE: THE OFFICIAL SITE, <http://theturtles.com/the-singles>, archived at <http://perma.cc/54PV-7GPH> (last visited Mar. 15, 2015).

¹³⁸ See *Flo & Eddie, Inc. v. Sirius XM Radio, Inc.*, No. CV 13-5693 PSG (RZx), 2014 WL 4725382, at *1–2 (C.D. Cal. Sept. 22, 2014).

¹³⁹ See *id.* at *9, *11–12.

action, Sirius will be making payments not just to Flo & Eddie, but also to all of the artists whose pre-1972 works it uses.

In a recent article, Ochoa explained several of the various background issues in *Flo & Eddie, Inc. v. Sirius XM Radio, Inc.* The first major issue to understand in this case is that only state laws govern pre-1972 sound recordings. According to Ochoa:

[B]efore sound recordings were added to the federal copyright act in 1972, sound recording copyright owners turned to state law for protection against record piracy A few states, like California, protected sound recordings by statute, while others (including New York) protected sound recordings by common-law decisions. In *Goldstein v. California*, 412 U.S. 546 (1973), the U.S. Supreme Court held that such state laws were valid and were not preempted by federal law. Congress ratified this decision in Section 301(c) of the 1976 Copyright Act Thus, sound recordings fixed before February 15, 1972, continue to be governed exclusively by state law; while sound recordings fixed on or after February 15, 1972, are governed exclusively by federal law.¹⁴⁰

This allows for issues relating to pre-1972 sound recordings to be heard in state courts, outside of the confines of federal law, and outside of the sole purview of federal copyright law. It also gives rise to considerations of common-law copyright issues.

The current debate in *Flo & Eddie* stems from the dissatisfaction many artists and record labels have with the royalty rates that are being paid out under the Section 114 compulsory licenses for digital audio transmissions.¹⁴¹ According to Ochoa, the case was brought in order for artists and labels to gain leverage in their negotiations with companies that broadcast both digitally and terrestrially

¹⁴⁰ Ochoa, *supra* note 131.

¹⁴¹ *Id.*

over the digital royalty rates.¹⁴² The copyright owners argue that “the federal compulsory license applies only to sound recordings fixed after February 15, 1972; that under state law, recordings fixed before that date are *not* subject to any compulsory license, and therefore that public performance rights must be negotiated with the record labels for such performances.”¹⁴³

If upheld, this case will be a major victory for sound recording copyright owners. It will allow them to negotiate for higher rates from broadcasters on pre-1972 works and potentially even use these royalties as leverage for obtaining higher rates for *post-1972* works. It is particularly interesting that the decision in no way limited the scope of violations to digital audio transmission public performances under California law, essentially granting a general public performance right in sound recordings in California. According to Ochoa, “[t]hat means that traditional AM/FM broadcasters and television broadcasters, who are expressly exempt [from paying royalties] under federal law with respect to *post-February 15, 1972* sound recordings, can expect to be sued next” regarding pre-1972 recordings.¹⁴⁴

The pre-1972 sound recordings issue is far from resolved. In addition to filing its case in California, Flo & Eddie filed cases in New York and Florida; decisions are pending in both states. On November 14, 2014, Judge Colleen McMahon denied Sirius XM’s motion to dismiss in the Southern District of New York.¹⁴⁵ As states take on this issue one at a time, the problem will only become more complicated, making it more difficult to administer a solution.

¹⁴² *See id.*

¹⁴³ *Id.* (emphasis in original).

¹⁴⁴ *Id.* (emphasis added).

¹⁴⁵ *See Flo & Eddie, Inc. v. Sirius XM Radio, Inc.*, No. 13-CIV-5784(CM)(HP), 2014 WL 6670201 (S.D.N.Y. Nov. 14, 2014).

D. Judiciary Committee Copyright Law Review and the 2014 Music Licensing Study

In the summer of 2014, the Copyright Office began a study to “evaluate the effectiveness of existing methods of licensing music.”¹⁴⁶ The study was conducted as part of the Copyright Office’s role in advising the Congressional Judiciary Committee in its ongoing comprehensive review of U.S. copyright law that began in 2013.¹⁴⁷ As part of its Music Licensing Study, the Copyright Office solicited public opinion on twenty-four questions on a wide range of issues confronting music and copyright.¹⁴⁸ Specifically, the Copyright Office asked, “How do differences in the applicability of the sound recording public performance right impact music licensing?”¹⁴⁹ As part of this study, the Copyright Office held two periods of public comments and ran three public roundtables in Los Angeles, Nashville, and New York City.¹⁵⁰ In the first comment period alone, the Copyright Office received eighty-five submissions; it received an additional fifty-one submissions in the second round.¹⁵¹

The final result of this study was a 245-page report released in February 2015 that proposed a large restructuring of music licensing.¹⁵² This report echoed the

¹⁴⁶ Music Licensing Study, *supra* note 18.

¹⁴⁷ See Press Release, House Judiciary Committee Chairman Bob Goodlatte, *supra* note 17.

¹⁴⁸ See generally Music Licensing Study, *supra* note 18.

¹⁴⁹ See *id.* at 14,742–43.

¹⁵⁰ See generally *id.*; see Music Licensing Study: Notice of Public Roundtables, 79 Fed. Reg. 25,626 (Apr. 10, 2014); Music Licensing Study: Second Request for Comments, 79 Fed. Reg. 42,833 (July 18, 2014).

¹⁵¹ U.S. Copyright Office, Music Licensing Study, *Comments in Response to the March 17, 2014 Notice of Inquiry Due on May 23, 2014*, http://copyright.gov/docs/musiclicensingstudy/comments/Docket2014_3/index.html, archived at <http://perma.cc/N9LK-236M>. U.S. Copyright Office, Music Licensing Study, *Comments in Response to the July 23, 2014 Request for Additional Comments Due on Sept. 12, 2014*, http://copyright.gov/docs/musiclicensingstudy/comments/Docket2014_3/extension_comments/, archived at <http://perma.cc/DLY5-NNKN>.

¹⁵² See generally U.S. COPYRIGHT OFFICE, COPYRIGHT AND THE MUSIC MARKETPLACE, *supra* note 73.

proposal the Copyright Office has made for decades, calling for a full public performance right in sound recordings.¹⁵³ The report reiterated that the Copyright Office “has long supported the creation of a full sound recording performance right, advocating for Congress to expand the existing right so it is commensurate with the performance right afforded to other classes of works under federal copyright law.”¹⁵⁴

Using the recommendations from the Copyright Office study, Congressman Jerrold Nadler of New York has said that he is hoping to craft an omnibus music-licensing bill that would address many of the proposals.¹⁵⁵ Nadler explained that—along with colleagues in both parties—he is “developing legislation to address the various problems in existing law in one unified bill . . . bringing fairness and efficiency to our music licensing system, and ensuring that no particular business enjoys a special advantage against new and innovative technologies.”¹⁵⁶ Nadler has spoken out strongly against the terrestrial radio exemption, so it is likely that his proposal for new legislation will address that as well.¹⁵⁷

¹⁵³ See, e.g., REGISTER OF COPYRIGHTS, SUBCOMM. ON COURTS, CIVIL LIBERTIES, AND THE ADMIN. OF JUSTICE OF THE H. COMM. ON THE JUDICIARY, 95TH CONG., PERFORMANCE RIGHTS IN SOUND RECORDINGS at V (Comm. Print 1978).

¹⁵⁴ U.S. COPYRIGHT OFFICE, COPYRIGHT AND THE MUSIC MARKETPLACE, *supra* note 73, at 138.

¹⁵⁵ See Press Release, Representative Jerrold Nadler, Rep. Nadler Calls for Comprehensive Update of Music Copyright Laws (June 10, 2014), available at <http://nadler.house.gov/press-release/rep-nadler-calls-comprehensive-update-music-copyright-laws>, archived at <http://perma.cc/R5DK-GVF2>.

¹⁵⁶ *Id.*

¹⁵⁷ See *id.* In his press release, Congressman Nadler claimed that:

[o]f course, one of the most glaring inconsistencies and injustice is that our performing artists, background musicians and others rights holders of sound recordings receive absolutely no compensation when their music is played over-the-air on terrestrial—meaning AM/FM—radio. Congress required payment when sound recordings are transmitted digitally in 1995. But we have yet to extend this basic protection to artists when their songs are

IV. RECOMMENDATIONS

In this final Part, this Note recommends that the current congressional review of U.S. copyright law and the Copyright Office's Music Licensing Study proposal provide a renewed opportunity for implementing a full performance right in sound recordings by folding the change into a larger bill. The most likely, and perhaps only, way to get this legislation passed is to do so through an omnibus music licensing bill that addresses many of the issues facing the music industry at once while simultaneously balancing the interests of all involved parties.

A. Create a General Public Performance Right for Sound Recordings

The first element of these recommendations is to rewrite Section 106 of the Copyright Act to create a full public performance right for sound recordings. Section 106(6) protects sound recording public performances but limits the protection to performances made "by means of a digital audio transmission."¹⁵⁸ This Note proposes that Section 106(6) should be eliminated and, in its place, Section 106(4) should be updated to include "sound recordings" in the list of other works that are given full performance rights.¹⁵⁹

The historical justification for maintaining the exemption for terrestrial radio is that the relationship between record labels and radio broadcasters is mutually beneficial.¹⁶⁰ The National Association of Broadcasters maintains that radio stations do not *distribute* music but instead serve a special

played on AM/FM radio. This is incredibly unjust. The bottom line is that terrestrial radio profits from the intellectual property of recording artists for free. I'm aware of no other instance in the United States where this is allowed, and it needs to be remedied.

Id.

¹⁵⁸ 17 U.S.C. § 106(6) (2012).

¹⁵⁹ *See id.* § 106(4).

¹⁶⁰ *See, e.g.*, U.S. COPYRIGHT OFFICE, COPYRIGHT AND THE MUSIC MARKETPLACE, *supra* note 73, at 44.

purpose in the industry. They claim that “broadcasters do not distribute music at all. Instead, broadcasters provide original programming for free to the public. Only one component of that programming is the performance of music. The inaccurate conflation of performance and distribution when analyzing the statutory licenses and services that use them is a fundamental error.”¹⁶¹ Broadcasters argue that they serve a promotional value to the record labels, getting their content out to a public that might otherwise be unaware of their product.¹⁶² The NAB claims that this promotional value is worth anywhere from \$1.5 to \$2.4 billion annually to the record labels.¹⁶³

Even if the promotional value is as much as the NAB claims, it does not automatically follow that promotional value should eliminate the need to pay licensing fees. For example, including a song in a major motion picture provides great promotional value for the artists; nonetheless, there is still a requirement for the film producers to pay for the right to include the song in the movie and on the soundtrack.¹⁶⁴ The National Academy of Recording Arts & Sciences argued in its response to the Copyright Office’s request for comments that “[b]roadcast radio is the only industry in America that bases its business on using the intellectual property of another without permission or compensation.”¹⁶⁵

¹⁶¹ Paul Fakler, *Comments of National Association of Broadcasters, In the Matter of Music Licensing Study: Notice and Request for Public Comment*, No. 2014-03, Before the U.S. Copyright Office, 13 (May 23, 2014), available at http://copyright.gov/docs/musiclicensingstudy/comments/Docket2014_3/National_Association_of_Broadcasters_MLS_2014.pdf, archived at <http://perma.cc/2K4P-YLEG>.

¹⁶² See generally *id.* at pt. III.B.

¹⁶³ See *id.* at 16 (referring to a 2008 study prepared for the NAB); James Dertouzos, *Radio Airplay and the Record Industry: An Economic Analysis* (June 2008), http://www.nab.org/documents/resources/061008_Dertouzos_Ptax.pdf, archived at <http://perma.cc/7F45-N23N>.

¹⁶⁴ Cf., e.g., 17 U.S.C. § 115 (2012); *Leadsinger, Inc. v. BMG Music Publ’g*, 512 F.3d 522 (9th Cir. 2007).

¹⁶⁵ Timothy Matson, *Comments of National Academy of Recording Arts & Sciences, In the Matter of Music Licensing Study: Notice and Request for Public Comment*, No. 2014-03, Before the U.S. Copyright

Without a full performance right in sound recordings, artists are not being compensated for their work. Radio stations bring in billions of dollars a year in advertising revenue.¹⁶⁶ Including music in their programming is exceptionally valuable for radio stations. According to a GAO report on the 2009 PRA, “on average, radio stations with a music format generate \$225,000 more in annual revenues than nonmusic [sic] stations, such as talk or sports stations.”¹⁶⁷ Terrestrial radio does all of this selling a very similar product to what digital radio sells—namely music—and to a larger audience as well. According to the Copyright Office, “in 2014, with 298 million active listeners, terrestrial radio had ‘more than double the total of Pandora (79 million), Sirius XM (27 million) and Spotify (14 million) combined.’”¹⁶⁸

Broadcasters argue that they provide an advertising service and that radio play drives popularity and sales, benefiting the record labels and artists.¹⁶⁹ However,

Office, 9 (May 23, 2014), *available at* http://copyright.gov/docs/musiclicensingstudy/comments/Docket2014_3/National_Academy_of_Recording_Arts_and_Sciences_MLS_2014.pdf, *archived at* <http://perma.cc/VC65-EHH7>.

¹⁶⁶ See, e.g., Paul Bond, *U.S. Radio Industry Grows Annual Advertising Revenue 1 Percent to \$17.4 Billion*, THE HOLLYWOOD REPORTER (Feb. 17, 2012, 3:10 PM), <http://www.hollywoodreporter.com/news/radio-industry-grows-annual-advertising-revenue-292439>, *archived at* <http://perma.cc/R6HV-3A9F>.

¹⁶⁷ U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-10-826, TELECOMMUNICATIONS: THE PROPOSED PERFORMANCE RIGHTS ACT WOULD RESULT IN ADDITIONAL COSTS FOR BROADCAST RADIO STATIONS AND ADDITIONAL REVENUE FOR RECORD COMPANIES, MUSICIANS, AND PERFORMERS 1 (2010).

¹⁶⁸ U.S. COPYRIGHT OFFICE, COPYRIGHT AND THE MUSIC MARKETPLACE, *supra* note 73, at 44 (quoting Zach O'Malley, *Truth in Numbers: Six Music Industry Takeaways From Year-End Data*, FORBES (Jan. 22, 2015, 1:50 PM), <http://www.forbes.com/sites/zackomalleygreenburg/2015/01/22/truth-in-numbers-six-music-industry-takeaways-from-year-end-data/>).

¹⁶⁹ See generally NATIONAL ASSOCIATION OF BROADCASTERS, *Legislative Priorities 111th Congress*, *available at* http://www.nab.org/documents/advocacy/NAB_111th_Legislative_Priorities.pdf, *archived at* <http://perma.cc/YGF5-FMHD>.

especially in the case of independent musicians, this is not necessarily the case. Much of independent music radio play *follows* popularity—it does not drive it. According to Richard Bengloff of the American Association of Independent Music (A2IM), “[s]even and a half years ago, over the air radio wasn’t even playing that much independent music. . . . Of course, radio didn’t embrace [Mumford and Sons, Vampire Weekend, the Lumineers, and other independent artists] until they already broke, because they seemed to be late to the party on independent music.”¹⁷⁰

Artist Taylor Swift and her record label, Big Machine Records, made national news when they pulled their work from the popular music streaming service Spotify because of what they viewed as the lack of fair royalties.¹⁷¹ Spotify pays royalties for sound recordings because it broadcasts digitally, and yet even there, artists feel they do not earn enough.¹⁷² Without a full exclusive right of public performance, no sound recording copyright owner can even attempt the same thing with terrestrial radio. Their music gets played without their permission, and they lack the ability to receive compensation.

¹⁷⁰ See Richard Bengloff, American Association of Independent Music (A2IM), *Remarks at the U.S. Copyright Office Roundtable on Music Licensing, Session 4: Fair Royalty Rates and Platform Parity*, 252–55 (June 23, 2014), available at <http://copyright.gov/docs/musiclicensingstudy/transcripts/mls-nyc-transcript06232014.pdf>, archived at <http://perma.cc/RB9Q-RJCM>.

¹⁷¹ See, e.g., Andrew Flanagan, *Taylor Swift Catalog Removed from Spotify*, BILLBOARD (Nov. 3, 2014, 11:04 AM), <http://www.billboard.com/articles/business/6304382/taylor-swift-catalog-removed-from-spotify>, archived at <http://perma.cc/WL88-PMT8>.

¹⁷² Of note, Spotify obtains the licenses to the music it broadcasts through direct negotiations. It could choose, however, to obtain these licenses through the Section 114 compulsory scheme, and then, so long as it adhered to the performance complement (for example, by restricting the number of songs played by a particular artist or from a particular album per hour), it would be able to obtain all of its desired music without the option for individual artists and record labels to withdraw their works. See *supra* note 67 and accompanying text.

B. Allow for International Reciprocity

Congressman Nadler remarked at the Copyright Office's Roundtable on Music Licensing in June 2014 that "when American artists' songs are played in Europe, or any other place that provides a sound recording right, these countries withhold performance royalties from American artists, since we refuse to pay their artists, we don't have reciprocity."¹⁷³ The 1996 World Intellectual Property Organization (WIPO) Performances and Phonograms Treaty (WPPT)—to which the United States is a signatory—mandates a sound recording right but *not* that a public performance right be given to sound recording copyright owners.¹⁷⁴ However, most of the signatory countries provide a full sound recording performance right. Based on the concept of reciprocal treatment, foreign jurisdictions only have to provide American artists with the rights those artists receive in the United States.¹⁷⁵ For years, the United States has been a net exporter of music.¹⁷⁶ American artists cannot collect royalties abroad because American law does not grant the right for foreign artists to collect royalties when their music is played on the radio here.

The NAB, for its part, claims that "[c]ountries that currently choose to deny U.S. publishers and songwriters royalties on the grounds that the U.S. does not have a reciprocal full right of public performance will very likely continue to do so, even if [domestic] broadcasters were

¹⁷³ Jerrold Nadler, *Remarks at The U.S. Copyright Office Roundtable on Music Licensing*, 158 (June 23, 2014), available at <http://copyright.gov/docs/musiclicensingstudy/transcripts/mls-nyc-transcript06232014.pdf>, archived at <http://perma.cc/RB9Q-RJCM>.

¹⁷⁴ 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, 1079–80 (2001–2002).

¹⁷⁵ See Robert Brauneis, *National Treatment in Copyright and Related Rights: How Much Work Does it Do?*, GW Law Faculty Publications & Other Works, Paper 810, 6 (2013).

¹⁷⁶ See Paul Farhi & Megan Rosenfeld, *American Pop Penetrates Worldwide*, *WASH. POST*, Oct. 25, 1998, at A1.

compelled to pay royalties.”¹⁷⁷ Their argument is that because U.S. law is not entirely parallel with foreign protection for sound recordings on a broader level, other countries could use the remaining distinctions between U.S. and international copyright law to deny U.S. artists foreign sound recording broadcast royalties.¹⁷⁸

Furthermore, the NAB contends that some foreign copyright regimes already do pay U.S. artists sound recording royalties when their music is played abroad. The NAB points out that “the U.K. adheres to ‘simultaneous publication rules’ which grant U.S. sound recordings the same rights as U.K. sound recordings when they are released in both countries simultaneously.”¹⁷⁹

Still, U.S. artists’ ability to collect royalties is subject not to a treaty but to individual foreign countries’ decisions as to whether or not to pay them. International reciprocity is most important for American artists in certain genres that are more popular abroad than they are in the United States. American music tastes often differ from foreign music tastes. Many independent, jazz, and classical artists get major play

¹⁷⁷ Paul Fakler, *Further Comments of National Association of Broadcasters, In the Matter of Music Licensing Study: Notice and Request for Public Comment*, No. 2014-03, Before the U.S. Copyright Office, 3 (Sept. 12, 2014), available at http://copyright.gov/docs/musiclicensingstudy/comments/Docket2014_3/extension_comments/National_Association_Broadcasters_NAB.pdf, archived at <http://perma.cc/GL5B-P6A6>.

¹⁷⁸ See *id.* Fakler argues that

[f]oreign nations that have a performance right in sound recordings have implemented a full performance right, which applies to all public performances of any kind, including those made by hotels, bars, restaurants, retail shops, gyms, and nightclubs. Other countries are likely to demand a similarly comprehensive scheme before paying out any potential royalties. For example, when the U.S. adopted royalties to be paid for the sale of certain recording devices and blank CDs, France, which provided royalties for a more comprehensive list of recording equipment, refused any reciprocal payments to U.S. interests.

Id.

¹⁷⁹ See *id.* at 3–4.

overseas and are unable to collect royalties because of the lack of reciprocity.¹⁸⁰ According to the GAO report, U.S. artists missed out on somewhere between seventy and one hundred million dollars in 2007 alone (on top of what they cannot collect domestically without a performance right).¹⁸¹ Instituting a full sound recording performance right in U.S. copyright law would allow American artists to collect royalties abroad, bringing increased royalties for all U.S. artists.

C. Revisit Payola Restrictions

As discussed above in Part VI.C, the NAB maintains that the relationship between broadcasters and record labels is mutually beneficial because radio serves tremendous promotional value.¹⁸² U.S. law limits the ability of record labels to pay broadcasters in exchange for airtime.¹⁸³ Paul Fakler, Counsel for the NAB, has argued that these restrictions fail to allow for a clear understanding of the value of airtime to broadcasters compared to the value to musicians:

If the record companies were suddenly allowed to demand a royalty, and yet the radio stations, say Payola laws were all repealed at the same time, I can tell you, everybody who is, actually, in the business of promoting records, knows where the net flow of

¹⁸⁰ See Bengloff, *supra* note 170, at 252–55.

¹⁸¹ See U.S. GOV'T ACCOUNTABILITY OFFICE, *supra* note 167, at 30.

¹⁸² See Fakler, *Comments of National Association of Broadcasters*, *supra* note 161, at 13.

¹⁸³ See 47 U.S.C. § 317 (2012); see generally FCC, Consumer Guide: The FCC's Payola Rules (2014), available at <http://transition.fcc.gov/cgb/consumerfacts/PayolaRules.pdf>, archived at <http://perma.cc/9HEH-DN88> (last visited Mar. 25, 2015); Nick Messitte, *How Payola Laws Keep Independent Artists Off Mainstream Radio*, FORBES (Nov. 30, 2014, 10:25 AM), <http://www.forbes.com/sites/nickmessitte/2014/11/30/how-payola-laws-keep-independent-artists-off-mainstream-radio/>, archived at <http://perma.cc/ADC3-A9NM>.

cash would go. It would be going to the radio stations.¹⁸⁴

Fakler's argument seems to indicate that even the NAB might be more amenable to paying out royalties if many Payola (illegal "pay for play") restrictions were limited.¹⁸⁵

Alternatively, Todd Dupler of the Recording Academy argues that the GAO:

has already shown that there is an inconclusive relationship with promotion. And even if promotion is everything that the broadcasters say that it is, give [recording artists] a performance right [T]hen that would be factored into the rate setting, and [broadcasters] may not have to pay anything to use music if the promotional value was so great.¹⁸⁶

The contention is that, without the performance right and with the limits of Payola restrictions, the actual value of radio play to the various parties is almost impossible to discover. Dupler's argument suggests eliminating the restrictions on Payola, instituting a performance right, and allowing parties to agree to an equitable deal.

D. Expand the Section 114 Compulsory License to Ensure Transparency

The next element of any new legislation is the need for a compulsory scheme, similar to (if not simply the extension of) the one used in Section 114. The use of a compulsory license system would force royalty payments to flow into

¹⁸⁴ Paul Fakler, Counsel, National Association of Broadcasters, *Remarks at the U.S. Copyright Office Roundtable on Music Licensing, Session 4: Fair Royalty Rates and Platform Parity*, 275–76 (June 23, 2014), available at <http://copyright.gov/docs/musiclicensingstudy/transcripts/mls-nyc-transcript06232014.pdf>, archived at <http://perma.cc/RB9Q-RJCM>.

¹⁸⁵ The NAB, however, has not made any official statement that would affirm this position.

¹⁸⁶ Todd Dupler, *The Recording Academy, Remarks at the U.S. Copyright Office Roundtable on Music Licensing, Session 4: Fair Royalty Rates and Platform Parity*, 281–82 (June 23, 2014), available at <http://copyright.gov/docs/musiclicensingstudy/transcripts/mls-nyc-transcript06232014.pdf>, archived at <http://perma.cc/RB9Q-RJCM>.

SoundExchange and not directly to record labels. This would allow musicians to collect based on the 50/45/5 split set up in Section 114.¹⁸⁷

By including a compulsory licensing scheme, artists would be allowed to collect royalties in a similar fashion to the SoundExchange method under Section 114. Record contracts often circumvent paying artists for record sales and other revenue streams, but the Section 114 license royalties bypass the record company and flow directly to artists. Artists are not often, if ever, well versed in copyright or contract law when they sign their initial record contracts;¹⁸⁸ as a result, artists often sign deals making it nearly impossible for them to receive a fair share of what the record labels earn from their music. The transparency provided by the Section 114 compulsory license gives artists clear expectations about what percentage of revenues they should receive.

The U.S. Copyright Office has echoed this thought, stating that “[a]ssuming Congress adopts a terrestrial performance right, it would seem only logical that terrestrial uses should be included under the section 112 and 114 licenses that govern internet and satellite radio.”¹⁸⁹

E. Let the Fair(er) Market Decide

Congressman Jerrold Nadler remarked that “[i]t is well past time to harmonize the rules, and put an end to Congress creating arbitrary winners and losers.”¹⁹⁰ Congressman

¹⁸⁷ See 17 U.S.C. § 114(g)(2) (2012); see *infra* Part II.E.

¹⁸⁸ Cf. KOHN & KOHN, *supra* note 44, at 584 (“[T]he music copyright owner often overlooks the additional flow of revenue that could be earned from performance royalties. . . . Sometimes the shortsightedness is due to inexperience or misunderstanding of the dynamics of music publishing revenues.”).

¹⁸⁹ See U.S. COPYRIGHT OFFICE, COPYRIGHT AND THE MUSIC MARKETPLACE, *supra* note 73, at 2.

¹⁹⁰ Representative Jerrold Nadler, *Remarks at the U.S. Copyright Office Roundtable on Music Licensing*, 158 (June 23, 2014), available at <http://copyright.gov/docs/musiclicensingstudy/transcripts/mls-nyc-transcript06232014.pdf>, archived at <http://perma.cc/RB9Q-RJCM>.

Nadler went on to explain that any new system “should be platform neutral, across the board. It shouldn’t matter which button you push in your car, as to the rate that the creators of the music get for that performance.”¹⁹¹ Radio is a seventeen billion dollar per year industry with most income coming from ad sales, which broadcasters are able to sell because they have a captive listening audience.¹⁹² As James Duffett-Smith, Head of Licensing for Spotify, explained, radio is a “17 billion dollar business of distributing music . . . and yet the people who created those recordings, play no direct role, at all, in the revenue that it generates.”¹⁹³ A fair market, however, does not necessarily mean that the exact same rates that apply to services like Pandora should be set for terrestrial radio. The broadcast industry argues that the costs of running a terrestrial station radio are much higher than those of running a digital service.¹⁹⁴ Terrestrial radio stations provide news, weather, and sports, employ DJs, and are subject to regulations by the FCC. All of these costs must be considered when determining a fair market rate for terrestrial broadcasters.¹⁹⁵

According to a study run by Clear Channel and media agency MediaVest that was released in January 2014, “[t]raditional AM/FM radio is still the most popular way for people to listen to music.”¹⁹⁶ *The Los Angeles Times*

¹⁹¹ *Id.* at 160.

¹⁹² See James Duffett-Smith, Head of Licensing Bus. Affairs, Spotify, *Remarks at the U.S. Copyright Office Roundtable on Music Licensing, Session 4: Fair Royalty Rates and Platform Parity*, 260 (June 23, 2014), available at <http://copyright.gov/docs/musiclicensingstudy/transcripts/mls-nyc-transcript06232014.pdf>, archived at <http://perma.cc/RB9Q-RJCM>.

¹⁹³ *Id.* at 261.

¹⁹⁴ See generally Fakler, *Comments of National Association of Broadcasters*, *supra* note 161.

¹⁹⁵ See Bob Kohn, Author, Kohn on Music Licensing, *Remarks at the U.S. Copyright Office Roundtable on Music Licensing, Session 4: Fair Royalty Rates and Platform Parity*, 315–17 (June 23, 2014), available at <http://copyright.gov/docs/musiclicensingstudy/transcripts/mls-nyc-transcript06232014.pdf>, archived at <http://perma.cc/RB9Q-RJCM>.

¹⁹⁶ Ryan Faughnder, *Traditional Radio Still Popular as Streaming Grows*, *Study Says*, L.A. TIMES (Jan. 8, 2014), <http://articles.latimes.com/>

explained that “according to the study . . . over half [of those surveyed] said they listen to regular AM/FM radio at least once a day, more than any other platform.”¹⁹⁷ Music consumption habits are indeed changing, but mostly in that people listen to music in more ways. Digital music has grown, and continues to grow, but traditional radio is still a major outlet for Americans to consume music. According to the study:

About 24% [of those MediaVest surveyed] said they watch music videos online every day through services such as YouTube. Streaming AM/FM radio through computers and mobile apps is a factor, at 13% and 11% respectively. Customized streaming music, including Pandora, Spotify and Rdio, got around 22%, while 14% of people use satellite radio. Clear Channel and MediaVest said those services have increased listening overall.¹⁹⁸

According to SoundExchange, “[n]early 90 million Americans listen to Internet radio stations each week, and more than 25 million listen to satellite radio.”¹⁹⁹

Moreover, without platform parity, the music industry cannot develop based on consumer demand. Instead, it develops based on which services are aided by existing copyright law. Traditional radio broadcasters have a major advantage over services like Pandora, Spotify, and other new music listening platforms. The lack of platform parity impairs the ability of new services to build and grow, putting these new technologies at a comparative disadvantage. Despite having significant revenue and millions of listeners, digital streaming services are finding it difficult to turn a

2014/jan/08/entertainment/la-et-ct-radio-study-20140107, *archived at* <http://perma.cc/E8K9-RLYN> (last visited Feb. 12, 2015).

¹⁹⁷ *Id.*

¹⁹⁸ *Id.*

¹⁹⁹ *SoundExchange Fact Sheet*, SOUNDEXCHANGE 1 (July 29, 2014), <http://www.soundexchange.com/wp-content/uploads/2014/07/SoundExchange-Factsheet-07-29-14.pdf>, *archived at* <http://perma.cc/47A7-48Y9>.

profit, largely due to high royalty rates.²⁰⁰ The Digital Media Association argues that “platform distinctions do not make sense in the digital environment where the very same consumer electronics devices—such as automobile in-dash receivers—are capable of receiving digital and/or analog transmissions of the same sound recording[.]”²⁰¹

New services compete with traditional radio to sell a finished product—music listening experiences—but pay higher costs for the raw material that goes into making those products—the rights to the underlying musical works and sound recordings. Since younger audiences turn more toward streaming services, artists whose music appeals to a radio crowd also lose out.²⁰² Copyright law is impacting which types of music are well compensated and which services receive breaks on licensing rates—and consumers and artists are losing out.

The NAB claims that the private deals reached between Clear Channel and various labels indicate that a legislative solution creating platform parity is not needed.²⁰³ Congressman Melvin Watt, however, claims that “[i]n fact, those deals expose the unfairness and inadequacy of the current system and they strongly point out the need for a legislative solution that will apply market wide.”²⁰⁴ Scott Borchetta, President and CEO of Big Machine Label Group, echoed this call. Remarking on his label’s deal with Clear

²⁰⁰ See, e.g., Mark Rogowsky, *Pandora Finds Little Profit in Reinventing Radio*, FORBES (Sept. 10, 2012, 4:27 AM), <http://www.forbes.com/sites/markrogowsky/2012/09/10/pandora-finds-little-profit-in-reinventing-radio>, archived at <http://perma.cc/F6ZW-SKK9>.

²⁰¹ Lee Knife, *Comments of the Digital Media Association (DiMA), In the Matter of Music Licensing Study*, No. 2014-03, Before the U.S. Copyright Office, 41 (May 23, 2014).

²⁰² See generally *Streaming Music is Gaining on Traditional Radio Among Younger Music Listeners*, NPD GRP. (Apr. 2, 2013), <http://www.npd.com/wps/portal/npd/us/news/press-releases/streaming-music-is-gaining-on-traditional-radio-among-younger-music-listeners>, archived at <http://perma.cc/B3KV-95D5>.

²⁰³ See 159 CONG. REC. E1404 (2013) (statement of Sen. Melvin L. Watt).

²⁰⁴ *Id.*

Channel, he said that “[f]or the first time in the history of terrestrial radio [in the United States], artists will begin to receive performance royalties for airplay. But the absolute need for legislation cannot be emphasized enough.”²⁰⁵

F. Adopt the MusicBus Bill

Perhaps the most important feature of any bill designed to implement a sound recording performance right for terrestrial radio is that it cannot be a standalone bill. As with the jukebox debate discussed in Part II.D of this note, this issue has been entrenched in American politics for decades. Efforts to eliminate the exemption or secure private rights have proved difficult.²⁰⁶ Congressman Nadler is currently undertaking the task of completing a bipartisan, comprehensive bill to address many of the issues with the current state of music licensing.²⁰⁷ According to Congressman Nadler, “the existing landscape is marred by inconsistent rules that place new technologies at a disadvantage against their competitors, and inequalities that deny fair compensation to music creators.”²⁰⁸ The Recording Academy (the organization that presents the Grammy awards) President Neil Portnow presented a similar suggestion in front of Congress; he proposed a MusicBus, a music omnibus bill that could “address myriad inequities in copyright law that prevent music creators from receiving fair pay across all platforms, and would do so in one fell swoop—updating or correcting what has long been subject to a patchwork of legal fixes.”²⁰⁹

²⁰⁵ See *Advocacy Year in Review 2012*, THE RECORDING ACAD. 8 (2013), http://www.grammy.org/files/pages/advocacy_issue1_web.pdf, archived at <http://perma.cc/KPF9-WM2X>.

²⁰⁶ See generally *infra* Part III.

²⁰⁷ See Press Release, Representative Jerrold Nadler, *supra* note 155.

²⁰⁸ *Id.*

²⁰⁹ Daryl P. Friedman, *MusicBus Gaining Speed As Members of Congress Climb On*, GRAMMY.ORG (Jun. 18, 2014, 11:01 AM), available at <http://www.grammy.org/blogs/musicbus-gaining-speed-as-members-of-congress-climb-on>, archived at <http://perma.cc/D9UV-J6SD>.

The music industry is made up of a large number of distinct organizations with competing concerns. While the merits of the NAB's claims were discussed earlier in this Note, the NAB has legitimate concerns about the impact of a full performance right in sound recordings. Furthermore, songwriters and publishers, along with their PROs, are likely concerned about the cannibalization of the revenues they receive for the musical composition performances.²¹⁰ Traditional radio broadcasters and digital webcasters argue that there is essentially only one pie—one set of revenues—that they can use to pay for licenses for music and that paying more (or at all) for one right (either the sound recording or the musical composition) must lead to an equivalent drop in what is paid for the other. The PROs may be concerned that if radio broadcasters have to start paying for sound recordings, they will have to take that money out of what they are currently paying the PROs for the right to use musical compositions.

Most importantly, the current political landscape is the result of fifty to sixty years of successful lobbying by broadcasters. The record labels have little power compared with the broadcasters. Congressmen want airtime on radio and television and need the cooperation of broadcasters to obtain it. If the radio right is bundled into a larger music bill—similar to what was done in 1976 with the Jukebox license—Congress can strike a better balance between all parties and face less resistance from the NAB.

V. CONCLUSION

Without the exclusive right to publicly perform sound recordings, artists enter an uneven playing field in negotiations with broadcasters. The Clear Channel deal with

²¹⁰ Songwriters are already concerned about the disparity between the rate for musical composition licenses—which is set by the ASCAP and BMI rate courts in the Southern District of New York—and the statutorily mandated rate for sound recording licenses. In response to this, they have introduced the Songwriter Equity Act of 2014, H.R. 4079, 113th Cong. (2014).

Warner Music is proof of this. An historical review of music law and the evolution of the royalties paid to composers and artists, as sequentially presented in this Note, indicates that U.S. copyright law from its inception has consistently been at least a generation behind current technology. From the phonograph to Pandora, artists have had to separately and collaboratively fight for what they have felt is fair compensation for their artistry. While it is difficult to predict future technological changes, it is time to create a comprehensive platform that is fair to broadcasters, artists, and consumers alike and one that does not favor existing over emerging technology but rather is technologically neutral. Such a model should enable more creativity and earlier adoption of new technology. This would further lead to greater consumer enjoyment and expenditure, resulting in a greater pie to share for everyone involved.

Copyright should no longer stand in the way of a strong American music industry that rewards talent. The United States must lead global efforts to produce artistic works, and American copyright structure must encourage a robust creative industry, not hinder it.