

## NOTE

**THE SUPER BRAWL: THE HISTORY AND  
FUTURE OF THE SOUND RECORDING  
PERFORMANCE RIGHT**

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INTRODUCTION .....	180
I. PRE-GAME SHOW .....	181
A. <i>Musical Works vs. Sound Recordings</i> .....	182
B. <i>The Emergence of Sound Recording Rights</i> .....	184
C. <i>Old Radio vs. New Radio</i> .....	187
D. <i>Webcaster I and the Small Webcasters     Settlement Act of 2002</i> .....	187
E. <i>Webcaster II and the Webcaster     Settlement Acts of 2008 and 2009</i> .....	189
F. <i>Sound Recording Performance Rights     in a Digital Market</i> .....	191
II. SOUND RECORDING COPYRIGHT OWNERS' NEW BATTLE.....	192
A. <i>The Proposed Performance Rights Act</i> .....	192
B. <i>The Long Road to Sound Recording Equality</i> .....	194
C. <i>Terrestrial Radio's Use of Sound Recordings:     Taking vs. Promotion</i> .....	195
D. <i>Record Label Bailout</i> .....	198
III. AN ALTERNATE SOLUTION—"ASCAPING"	
SOUND RECORDINGS ONLINE .....	200
A. <i>The Rights at Issue</i> .....	203
B. <i>The Legality of Creating a Sound Recording "PRO"</i> .....	205
C. <i>Consumer Benefits of an Expanded Digital Sound     Recording Performance Right</i> .....	208
D. <i>Fulfilling the Constitution's Promise</i> .....	209
CONCLUSION.....	211

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INTRODUCTION<sup>1</sup>

On February 4, 2009, Senator Patrick Leahy introduced the Performance Rights Act (“PRA”) to the Senate, joined by Representative John Conyers in the House of Representatives. Thirty-eight years after sound recordings were first granted federal copyright protection against unauthorized reproduction and distribution—and more than ten years after gaining a limited digital performance right—legislation is pending that would once again expand the scope of sound recording copyright to encompass terrestrial radio broadcasts. Historically, such broadcasts have been exempt from sound recording performance royalties.

Given the traditional exemption, the introduction of the PRA raises several concerns. Some have suggested that an expanded sound recording performance right is simply an attempt by record labels to collect from a source with deep pockets.<sup>2</sup> Others contend that the Act corrects a copyright “loophole,” fairly compensates artists, and injects much needed capital into the sound recording industry.<sup>3</sup> On another level, however, the Act poses a more fundamental query. At a time when consumers increasingly access music via online performance-based websites like YouTube, MySpace, and Facebook, what are the long-term implications of shifting reform focus from digital to terrestrial music outlets?

Instead of (or in addition to) seeking remuneration from terrestrial radio stations, this Note suggests that sound recording copyright holders

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1. This Note is one of two works by the author to be published this year on music copyright issues in the United States. While both works contain some overlap in the historical analysis, each work addresses a separate and distinct issue. This Note examines the proposed Performance Rights Act and suggests an alternative solution for the expansion of sound recording performance rights online. The other work, titled *Collective Management of Music Copyright in the Digital Age: The Online Clearinghouse* and scheduled for publication in Volume 18 of the TEXAS INTELLECTUAL PROPERTY LAW JOURNAL, proposes a solution to streamline music licensing in a digital era.

2. *Performance Rights Act: Hearing on H.R. 848 Before the H. Comm. on the Judiciary*, 111th Cong. 142, 144–46 (2009) [hereinafter *Statement of Newberry to 111th Cong.*] (statement of Steve Newberry, President and CEO, Commonwealth Broadcasting Corporation) available at [http://judiciary.house.gov/hearings/hear\\_090310.html](http://judiciary.house.gov/hearings/hear_090310.html); see also Matthew S. DelNero, *Long Overdue? An Exploration of the Status and Merit of a General Public Performance Right in Sound Recordings*, 51 J. COPYRIGHT SOC’Y U.S.A. 473, 475 (2004) (“The canon of legal scholarship on this subject is quite broad, with numerous observers having addressed the lack of a general public performance right in sound recordings. . . . There is no known piece of domestic legal scholarship defending the status quo.”).

3. See, e.g., DelNero, *supra* note 2, at 493–506; 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, 1044 (2002) (arguing that “granting copyright equality between the sound recording and the musical composition is constitutionally sound, economically fair, and is necessary for the United States to . . . move closer to a desirable global harmony.”).

should seek to further expand their digital performance right to permit collection of royalties from websites which regularly perform user-generated audiovisual works. While such royalties would not be as lucrative as those collected from terrestrial stations in the short term, such a strategy would secure a right that will become increasingly valuable as music distribution continues to evolve into an online, performance-based platform. In consideration for an annual blanket fee, performance-based sites would not be subject to costly Digital Millennium Copyright Act notice-and-takedown proceedings or copyright infringement actions by participating sound recording copyright owners. Such a compromise would allow sound recording copyright holders and artists to receive just compensation when their works are performed online, save sites like YouTube millions in administrative and legal fees, and permit Internet users to freely and fairly post audiovisual clips online.

This Note will attempt to reconcile the history of the sound recording performance right with the recently introduced PRA, and propose an alternative (or supplemental) strategy for further expanding the right online. Part I summarizes in detail the background for the rights involved with this topic. Part II provides a primer on the music licensing process in the United States, placing particular emphasis on the tumultuous brawl between sound recording copyright owners and webcasters. Parts III and IV focus on the substance of and the political motivations underlying the PRA. Finally, Part V describes the alternative proposal for licensing performances of sound recordings online as introduced above, suggesting a sustainable alternative to the PRA that would benefit consumers and industry alike.

## I. PRE-GAME SHOW

Before considering the details of the PRA, it is important to fully understand the nature of the rights and parties involved. This section explains the differences between musical works and sound recordings and details the development of sound recording copyright, from its roots in 1972 through current efforts for its continued expansion. Next, this section explores the digital sound recording performance right, including the numerous legislative and judicial proceedings that have attempted to balance the needs of sound recording copyright owners and webcasters. Such considerations are important to understanding the full effect that the proposed PRA might have upon terrestrial radio broadcasters.

### A. *Musical Works vs. Sound Recordings*

Virtually all sound recordings embody two separate categories of copyrightable works: the sound recording itself and the underlying musical work.<sup>4</sup> The copyright in the musical work (the lyrics and melody) belongs to the author or composer of the song who typically assigns his or her rights to a publisher for purposes of representation.<sup>5</sup> The publisher then licenses the rights associated with the musical work to collective organizations like the American Society of Composers, Authors, and Publishers and the Harry Fox Agency (discussed in greater detail below), which sublicense common commercial exploitations on behalf of the copyright owner.<sup>6</sup>

Musical works are granted certain exclusive rights by statute including the right to perform, reproduce, and distribute.<sup>7</sup> The most common licenses obtained as a part of music distribution are performance and mechanical licenses.<sup>8</sup> As the name suggests, a performance license must be obtained when a composition is performed publicly.<sup>9</sup> A mechanical license must be obtained when a composition is reproduced in the form of a vinyl record, tape, or CD, and/or is distributed.<sup>10</sup>

Over time, organizations developed to represent the collective interests of songwriters and publishers. Established in 1914, the American Society of Composers, Authors, and Publishers (“ASCAP”) acts as an agent of owners of copyright in musical works for the purposes of licensing performance rights.<sup>11</sup> Broadcast Music, Incorporated (“BMI”) and the Society of European Stage Authors and Composers (“SESAC”) developed later and are the other dominant performing rights organiza-

4. See 17 U.S.C. § 102(a)(2) (2006) (“Works of authorship include . . . musical works, including any accompanying words . . . .”); § 102(a)(7) (“Works of authorship include . . . sound recordings . . . .”).

5. DONALD PASSMAN, *ALL YOU NEED TO KNOW ABOUT THE MUSIC BUSINESS* 206–7 (6th ed. 2007); see also AL KOHN & BOB KOHN, *KOHN ON MUSIC LICENSING* 107–57 (3d ed. 2002) (describing songwriter agreements with music publishers).

6. KOHN & KOHN, *supra* note 5.

7. 17 U.S.C. § 106(1), (3), (4) (2006).

8. See KOHN & KOHN, *supra* note 5, at 444–47.

9. See 17 U.S.C. § 101 (2006) (explaining that to “perform” a work means to “recite, render, play, dance, or act it, either directly or by means of any device or process” and to do so “publicly” means to “perform or display it at a place open to the public or at any place where a substantial number of persons . . . is gathered”).

10. See PASSMAN, *supra* note 5, at 201. (“Even though devices haven’t reproduced sounds ‘mechanically’ since the 1940s, the name has stuck and the monies paid to copyright owners for manufacture and distribution are still called *mechanical royalties*.”). The Copyright Act defines these physical embodiments of music as “phonorecords.” 17 U.S.C. § 101 (defining a phonorecord as “material objects in which sounds . . . are fixed by any method now known or later developed . . .”).

11. M. WILLIAM KRASILOVSKY ET AL., *THIS BUSINESS OF MUSIC* 145 (10th ed. 2007).

tions (“PROs”) in the United States today.<sup>12</sup> PROs generally issue “blanket licenses” granting the licensee permission to perform all songs in their music library for a fixed period of time.<sup>13</sup> The cost of a blanket license for “general establishments,” such as restaurants or bars, depends on “seating capacity, frequency of music performances, type of rendition, admission charges, etc.”<sup>14</sup> Television and radio broadcasters also pay large royalties to PROs, with rates based largely on gross advertisement revenue.<sup>15</sup> Royalties are then distributed among member songwriters and music publishers.<sup>16</sup> Both ASCAP and BMI are subject to court-ordered consent decrees requiring district court resolution of any licensing negotiation stalemates.<sup>17</sup>

Sound recording copyrights, on the other hand, are normally owned by the artist or record label and protect the originality of the recording itself as distinct from the underlying written lyrics or melody.<sup>18</sup> Thus, there may be several different sound recordings based on numerous versions or covers of a single musical work.<sup>19</sup> The sound recordings produced by artists are often deemed works made for hire in recording agreements, granting all copyright interest therein to the record label.<sup>20</sup> Despite this general practice, it is estimated that over 1,200 artists own and actively manage the copyright in their own sound recordings.<sup>21</sup>

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12. *Id.* at 145–47.

13. *Id.* at 144.

14. ROBERT A. GORMAN & JANE C. GINSBURG, COPYRIGHT: CASES AND MATERIALS 678 (7th ed. 2006).

15. KRASILOVSKY, *supra* note 11, at 145. PROs also offer a “per program” license to television stations which differs slightly from the traditional blanket license. *See* KOHN & KOHN, *supra* note 5, at 921–22.

16. KRASILOVSKY, *supra* note 11, at 145.

17. *See* United States v. American Socy. of Composers, No. 13-95, 1950 U.S. Dist. LEXIS 1900 (S.D.N.Y. Mar. 14, 1950) (modifying ASCAP’s original consent decree to include a rate court provision); United States v. Broadcast Music, Inc., No. 64 Civ. 3787, 1994 U.S. Dist. LEXIS 21476 (S.D.N.Y. Nov. 18, 1994) (modifying BMI’s original consent decree to include a rate court provision similar to that of ASCAP’s).

18. KOHN & KOHN, *supra* note 5, at 1312.

19. *Id.* at 1311–12.

20. KRASILOVSKY, *supra* note 11, at 27. This practice has resulted in significant controversy, including whether sound recording artists may exercise termination rights. *See* Abbott M. Jones, *Get Ready Cause Here They Come: A Look at Problems on the Horizon for Authorship and Termination Rights in Sound Recordings*, 31 HASTINGS COMM. & ENT. L.J. 127 (2008).

21. MUSICFIRST, RADIO DISTORTION HANDBOOK VOL. 19–25, 8 (2009), <http://musicfirstcoalition.org/media/radio-distortion-handbook/Radio%20Distortion%20Bulletins%20Vol.%2019-25.doc> (last visited Jan. 17, 2010) [hereinafter *MusicFIRST Handbook*].

### B. *The Emergence of Sound Recording Rights*

In 1971, Congress first granted sound recordings federal copyright protection.<sup>22</sup> Thus, for the first time record labels and artists could license their works.<sup>23</sup> But this right was limited only to distribution and reproduction rights (requiring a master use license).<sup>24</sup> Broadcasters resisted the imposition of an additional performance payment and argued that the promotional consideration provided by free radio airplay fairly compensated artists and labels.<sup>25</sup> At the same time, PROs were concerned that their share of the royalty pool collected from broadcasters would be diminished if they had to split performance right royalties with record labels.<sup>26</sup> The resulting alliance among PROs and broadcasters successfully blocked the addition of any sound recording performance right to the 1976 Copyright Act.<sup>27</sup>

With the advent of streaming music on the Internet in the early 1990s, record labels made compelling arguments before Congress that the traditional licensing structure inadequately protected and compensated artists' interests.<sup>28</sup> Streaming content threatened to displace the historic revenue source of sound recordings, namely, the sale of physical records.<sup>29</sup> To quell such apprehension, Congress enacted the Digital Performance Right in Sound Recordings Act of 1995 ("DPRSRA"), which granted copyright holders the exclusive right "to perform the copyrighted work publicly by means of digital audio transmission."<sup>30</sup> But the Act only encompassed "subscription" transmissions—meaning that ad-based or

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22. Act of Oct. 15, 1971, Pub. L. No. 92-140, 85 Stat. 391 (Act effective Feb. 15, 1972).

23. KRASILOVSKY, *supra* note 11, at 64.

24. KOHN & KOHN, *supra* note 5, at 1296–97. *See* KRASILOVSKY, *supra* note 11, at 69–70.

25. KOHN & KOHN, *supra* note 5, at 1296–97.

26. *Id.*

27. *Id.*

28. *See* *Bonneville Int'l Corp. v. Peters*, 347 F.3d 485, 488 (3d Cir. 2003) ("The recording industry was concerned that the traditional balance that had existed with the broadcasters would be disturbed and that new, alternative paths for consumers to purchase recorded music (in ways that cut out the recording industry's products) would erode sales of recorded music."):

29. *Id.*; *see* S. REP. NO. 104-128, at 13 (1995), *reprinted in* 1995 U.S.C.C.A.N. 356, 360 ("the Committee has sought to address the concerns of record producers and performers regarding the effects that new digital technology and distribution systems might have on their core business."); H.R. REP. NO. 104-274, at 17 (1995) ("digital transmission services . . . are most likely to have a significant impact on traditional record sales, and therefore pose the greatest threat to the livelihoods of those whose income depends upon revenues derived from traditional record sales."):

30. Digital Performance Right in Sound Recordings Act, Pub. L. No. 104-39, § 2, 109 Stat. 336 (1995); 17 U.S.C. § 106(6) (2006).

free webcasts were not covered by the DPRSRA.<sup>31</sup> As streaming technologies continued to advance, record labels lobbied Congress to expand the scope of the Act further, culminating in a series of amendments as part of the Digital Millennium Copyright Act of 1998 (“DMCA”).<sup>32</sup> The amendments differentiate between “interactive” and “non-interactive” streaming transmissions.<sup>33</sup> The distinction is based on the presumption that the more interactive a music stream, the greater the chance that it will displace physical sales of music that would traditionally generate reproduction royalties.<sup>34</sup> Purely interactive streaming music services, where listeners may select which sound recordings they wish to hear, present the highest risk for sale displacement, and thus require a digital performance license negotiated directly with the sound recording copyright owner.<sup>35</sup> Non-interactive services, like web radio, are subject to a compulsory license, provided the streaming service complies with numerous statutory requirements.<sup>36</sup> Statutory royalties are paid to a non-profit collective organization named SoundExchange, which distributes royalties equally among artists and sound recording copyright holders.<sup>37</sup> Finally, the amendments provided a limited number of exemptions from the digital performance right altogether.<sup>38</sup> Regardless of how such services compensate the sound recording copyright owner for the digital transmission, a performance license must still be acquired from the musical work copyright owner (generally represented by PROs).<sup>39</sup>

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31. Kimberly L. Craft, *The Webcasting Music Revolution is Ready to Begin, as Soon as We Figure Out the Copyright Law: The Story of the Music Industry at War With Itself*, 24 HASTINGS COMM. & ENT. L.J. 1, 12–13 (2001).

32. See Digital Millennium Copyright Act, Pub. L. No. 105–304, 112 Stat. 2860 (1998); Craft, *supra* note 31, at 15–16.

33. See 17 U.S.C. § 114(d)(2–4).

34. KOHN & KOHN, *supra* note 5, at 1329.

35. *Id.* at 1332–33.

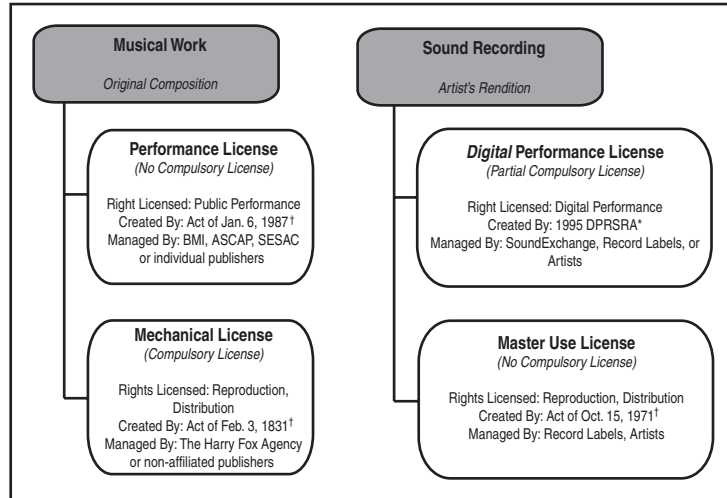
36. See § 114(d)(2) (requiring, for instance, that the transmission not provide a program schedule in advance or induce the making of a phonorecord by the transmission recipient); § 114(f) (distinguishing between “subscription” and “non-subscription” non-interactive digital transmissions); § 114(d) (stating that the factors considered in determining whether a subscription or non-subscription service qualifies for a compulsory license under § 114(f) differ based on whether the non-interactive service existed prior to 1998 and uses the same medium of transmission after that date that it was using before—if not, it is subject to increased statutory requirements). Compare § 114(d)(2)(A–B), with § 114(d)(2)(A, C).

37. See SoundExchange, About, <http://www.soundexchange.com/about> (last visited Jan. 17, 2010); 17 U.S.C. § 114(g)(2).

38. 17 U.S.C. § 114(d)(1).

39. See § 114(d)(4)(B)(i).

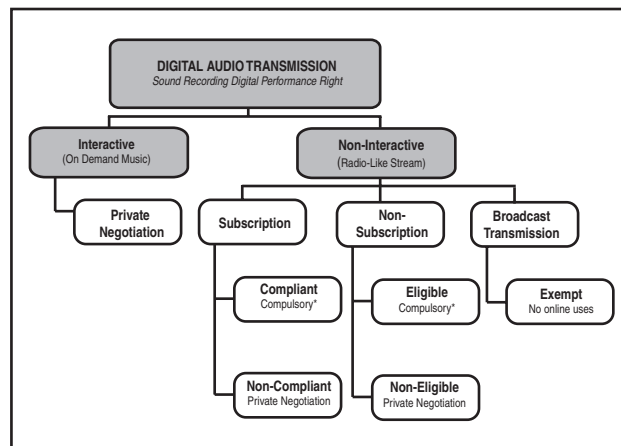
**FIGURE 1**  
**UNITED STATES MUSIC COPYRIGHT LICENSING STRUCTURE**



\*The Digital Performance Right in Sound Recordings Act of 1995 and Digital Millennium Copyright Act of 1998 created a limited performance right in sound recordings, that applies to only to “digital audio transmission.”

<sup>†</sup>Incorporated into the 1976 Copyright Act.

**FIGURE 2**  
**SOUND RECORDING DIGITAL PERFORMANCE RIGHT LICENSING STRUCTURE**



\*Whether a subscription or non-subscription service qualifies for a compulsory license under § 114(f) depends on whether the non-interactive service existed prior to 1998 and uses the same medium of transmission it used prior to 1998. If not, it is subject to heightened statutory requirements. *Compare* § 114(d)(2)(A–B), *with* § 114(d)(2)(A, C).

Note that this figure represents digital sound recording performance royalties only. Regardless of the level of interactivity or subscription classification, a performance license must still be obtained from the musical work copyright holder.



### C. *Old Radio vs. New Radio*

The 1998 DMCA amendments to the Copyright Act had the effect of significantly limiting those digital transmissions that were excused from paying a digital performance royalty.<sup>40</sup> Of particular relevance to this Note, nonsubscription broadcast transmissions were exempt from such royalty payments.<sup>41</sup> The immediate result of the amendment was a period of ambiguity as to who or what it was that qualified for this exemption.<sup>42</sup> Many terrestrial radio broadcasters, for instance, retransmitted their analog performances over the Internet without compensating the sound recording copyright owner.<sup>43</sup> Web radio stations (webcasters), on the other hand, were placed in the precarious position of paying royalties to both the musical work copyright owner and the sound recording copyright owner for their streaming performances.<sup>44</sup> Sound recording copyright owners argued that the broadcaster exception did not apply to any Internet music transmissions, including terrestrial radio retransmissions online.<sup>45</sup>

In 2000, the Copyright Office settled the dispute by ruling that retransmissions by terrestrial radio stations are non-subscription digital transmissions that are not exempt from the sound recording digital performance right.<sup>46</sup> The Copyright Office held that Congress' amendments were intended to allow "for the continued transmission of an *over-the-air* radio broadcast signal without regard to whether the transmission is made in an analog or digital format."<sup>47</sup> The report went on to suggest that "Congress' intent would be thwarted if an FCC-licensed radio broadcaster was allowed to transmit its radio signal over a digital communication network, such as the Internet, without any restrictions on the programming format."<sup>48</sup> The Copyright Office's ruling was later upheld by the Third Circuit.<sup>49</sup>

### D. *Webcaster I and the Small Webcasters Settlement Act of 2002*

Once it was established that all digital audio transmissions streamed over the Internet were subject to the sound recording digital performance

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40. Craft, *supra* note 31, at 19.

41. See 17 U.S.C. § 114(d)(1)(A) (2006).

42. Craft, *supra* note 31, at 19.

43. *Id.*

44. *Id.* at 6

45. *Id.* at 7–8.

46. Copyright Office Rulemaking, Public Performance of Sound Recordings: Definition of a Service, 65 Fed. Reg. 77,292 (Dec. 11, 2000).

47. *Id.* at 77,301.

48. *Id.*

49. *Bonneville Int'l Corp. v. Peters*, 347 F.3d 485 (3d Cir. 2003).

right, considerations turned to the statutory royalty rate. Both the DPRSRA and DMCA amendments adopted a voluntary negotiation period between copyright holders and webcasters followed by arbitration in the event an agreement could not be reached.<sup>50</sup> The arbitration power was granted to a Copyright Arbitration Royalty Panel (“CARP”)<sup>51</sup> instructed to “establish rates and terms that most clearly represent the rates and terms that would have been negotiated in the marketplace between a willing buyer and seller.”<sup>52</sup> The determination of the panel was subject to review by the Librarian of Congress and the Register of Copyrights.<sup>53</sup>

The statutory licensing process was first tested in July 1999 after negotiations broke down between a group of webcasters and the Recording Industry Association of America (“RIAA”).<sup>54</sup> CARP released its royalty rate determinations three years later, requiring webcasters to pay royalties on a per-performance basis (i.e., a royalty must be paid each time a sound recording is streamed to a listener).<sup>55</sup> In its ruling (“Webcaster I”), CARP established royalty rates of seven-hundredths of a cent per performance for commercial webcasters and two-hundredths of a cent per performance for noncommercial webcasters.<sup>56</sup> The Librarian of Congress largely upheld the CARP determination on review.<sup>57</sup>

The rates were met with fierce opposition by smaller webcasters, who argued that the willing buyer and seller standard used by CARP was far too broad to adequately differentiate between larger commercial webcasters like Yahoo! and smaller mom-and-pop commercial webcasters.<sup>58</sup> While many smaller streaming services were driven out of business by the CARP rates, others lobbied Congress for help.<sup>59</sup> Congressional response was swift and resulted in the passage of the Small Webcaster Settlement Act of 2002, which gave noncommercial and small

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50. Erich Carey, *We Interrupt This Broadcast: Will the Copyright Royalty Board's March 2007 Rate Determination Proceedings Pull the Plug on Internet Radio?*, 19 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 257, 268 (2008).

51. Originally, this body was titled the Copyright Royalty Arbitration Panel (CRAP). However, the acronym was deemed inappropriate and the title later changed. William Patry, *Why There Is No Copyright Royalty Tribunal*, THE PATRY COPYRIGHT BLOG, (May 26, 2005, 1:10PM), <http://williampatry.blogspot.com/2005/05/why-there-is-no-copyright-royalty.html>.

52. 17 U.S.C. § 114(f)(2)(B)(2006).

53. Determination of Reasonable Rates and Terms for the Digital Performance of Sound Recordings and Ephemeral Recordings, 67 Fed. Reg. 45,240, 45,242 (July 8, 2002) (codified at 37 C.F.R. pt. 261) [hereinafter *Webcaster I*].

54. Carey, *supra* note 50, at 276–77.

55. *Webcaster I*, *supra* note 53, at 45,242.

56. *In re* Rate Setting for Digital Performance Right in Sound Recording and Ephemeral Recordings, Docket No. 2000-9 CARP DTRA 1 & 2 (Feb. 20, 2002), available at [http://www.copyright.gov/carp/webcasting\\_rates.pdf](http://www.copyright.gov/carp/webcasting_rates.pdf).

57. Carey, *supra* note 50, at 278.

58. *Id.*

59. *Id.* at 278–79.

commercial webcasters additional time to negotiate.<sup>60</sup> The Act authorized SoundExchange to enter into “agreements on behalf of all copyright owners and performers for the purpose of establishing an alternative payment structure for small commercial webcasters.”<sup>61</sup> This licensing-rate standard was designed to incorporate “the unique business, economic, and political circumstances of small webcasters.”<sup>62</sup> Compromise between commercial webcasters and SoundExchange was reached in December 2002, with rates based on a percentage of the webcasters’ gross revenue.<sup>63</sup> Noncommercial webcasters were subject to a flat annual fee subject to certain restrictions.<sup>64</sup>

After four years of negotiation, arbitration, and Congressional intervention, a temporary peace fell over the digital performance right battlefield. The calm was short-lived, however, and in 2005, when the negotiated license terms ended, the brawl began anew.

#### *E. Webcaster II and the Webcaster Settlement Acts of 2008 and 2009*

In 2004, Congress did away with the Copyright Arbitration Royalty Panel system due to widespread complaints.<sup>65</sup> In its place, three Copyright Royalty Judges were appointed to the Copyright Royalty Board (“CRB”) by the Librarian of Congress.<sup>66</sup> The CRB differs from CARP in that rate determinations may be appealed only to the U.S. Court of Appeals for the District of Columbia Circuit and not to the Librarian of Congress.<sup>67</sup>

The newly-formed CRB was first called upon after negotiations between webcasters and labels broke down, and it released its royalty rate determinations for the 2006–2010 licensing term on May 1, 2007

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60. Small Webcaster Settlement Act of 2002, Pub. L. No. 107-321, 116 Stat. 2780 (codified as amended in scattered sections of Title 17).

61. Notification of Agreement Under the Small Webcaster Settlement Act of 2002, 68 Fed. Reg. 35,008, 35,008 (June 11, 2003).

62. *Id.* at 35,009 (quoting 17 U.S.C. § 114(f)(5)(C)).

63. Notification of Agreement Under the Small Webcaster Settlement Act of 2002, 67 Fed. Reg. 78,510, 78,511 (Dec. 24, 2002) (stating “the royalty rate shall be 10 percent of the eligible small webcaster’s first \$250,000 in gross revenues and 12 percent of any gross revenues in excess of \$250,000 during the applicable year, or 7 percent of the webcaster’s expenses during the applicable year, whichever is greater.”).

64. Notification of Agreement Under the Small Webcaster Settlement Act of 2002, 68 Fed. Reg. 35,008, 35,010 (June 11, 2003).

65. General complaints of the panel included “CARP decisions are unpredictable and inconsistent[, a]rbitrators lack appropriate expertise to render decisions and frequently reflect either a ‘content’ or ‘user’ bias[, and t]he process is unnecessarily expensive.” See H.R. REP. NO. 108-408, at 18 (2004).

66. Copyright Royalty and Distribution Reform Act of 2004, Pub. L. No. 108-419, 118 Stat. 2341, 2341 (codified as amended in scattered sections of Title 17).

67. Carey, *supra* note 50, at 284.

(“Webcaster II”).<sup>68</sup> Using the willing buyer and seller model of Webcaster I, the CRB adopted the rate-calculating procedures used in the market for interactive digital transmission.<sup>69</sup> As discussed above, interactive services must negotiate licenses directly with sound recording copyright owners for a digital performance license and are not subject to statutory licensing or CRB arbitration in the event of deadlock. The Board rejected a proposal to set sound recording performance royalties equal to those of musical work performance royalties on the basis that “evidence shows that sound recording rights are paid multiple times the amounts paid for musical works.”<sup>70</sup> Considering the alternatives, the CRB adopted the interactive market rate as the best benchmark for satisfying the willing buyer and standard.<sup>71</sup> As in Webcaster I, the CRB required webcasters to pay on a per-performance basis, with rates set at one eight-hundredth of a cent per performance in 2006, eleven-hundredths of a cent per performance in 2007, fourteen-hundredth of a cent per performance in 2008, eighteen-hundredth of a cent per performance in 2009, and nineteen-hundredth of a cent per performance in 2010.<sup>72</sup> The CRB’s ruling was later upheld by the U.S. Court of Appeals for the District of Columbia Circuit.<sup>73</sup>

The reaction to the CRB rates was immediate and dramatic.<sup>74</sup> Small and large webcasters alike predicted the CRB rates would result in the “end of Internet radio.” For instance, Pandora Internet Radio (“Pandora”), the largest and most successful online music webcaster, maintained that it was “on the verge of collapse” as a result of the new rates.<sup>75</sup> After the CRB’s May ruling, it was estimated that webcasters were required to pay roughly 50% of their annual \$150 million revenues in royalties.<sup>76</sup> Pandora stated that it would have to pay nearly 70% of its

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68. Digital Performance Right in Sound Recordings and Ephemeral Recordings, Final Determination of Rates and Terms, 72 Fed. Reg. 24,084 (May 1, 2007) (codified at 37 C.F.R. pt. 380) [hereinafter *Webcaster II*].

69. Carey, *supra* note 50, at 287.

70. *Webcaster II*, *supra* note 68, at 24,094.

71. *Id.* at 24,095.

72. *Id.*

73. *Intercollegiate Broad. Sys., Inc. v. Copyright Royalty Bd.*, 571 F.3d 69 (D.C. Cir. 2009).

74. Carey, *supra* note 50, at 291 (“These rate increases have proven so dramatic that even the largest commercial webcasters have expressed an intention to cease webcasting operations if the rates remain in effect.”).

75. Peter Whoriskey, *Giant of Internet Radio Nears Its ‘Last Stand’*, THE WASHINGTON POST, Aug. 18, 2008, <http://www.washingtonpost.com/wp-dyn/content/article/2008/08/15/AR2008081503367.html>.

76. *Id.*

income in sound recording performance royalties under the CRB rates.<sup>77</sup> In contrast, cable and satellite providers of music pay digital sound recording performance royalties in the amount of 6–8% of their approximately \$2 billion in annual revenues.<sup>78</sup> Some scholars have suggested that the CRB's misapplication of the willing buyer and seller standard, along with the panel's adoption of the per performance royalty payment structure, has threatened the viability of Internet radio.<sup>79</sup>

In an effort to alleviate the enormous pressure brewing between webcasters and labels, Congress enacted the Webcaster Settlement Act of 2008, sending the Digital Media Association (“DiMA,” the national trade organization representing webcasters) into negotiations with SoundExchange.<sup>80</sup> While the Act gave the parties until February 15, 2009, to agree to licensing rates and terms, negotiations resulted in a stalemate for many, leaving the future of Internet radio unsettled.<sup>81</sup> In May 2009, webcasters and sound recording copyright owners were given additional time to negotiate with the introduction of the Webcaster Settlement Act of 2009.<sup>82</sup> Many webcasters, including Pandora, successfully negotiated royalty rates under the Act that extend through 2015.<sup>83</sup>

#### F. Sound Recording Performance Rights in a Digital Market

As the foregoing discussion highlights, webcasters and sound recording copyright owners have faced an uphill battle since passage of the DPRSRA in 1995 and its subsequent amendments. Yet the industry is beginning to adapt to the business realities of the digital sound recording performance right. Webcasters today have come to understand the

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77. *Performance Rights Act: Hearing on H.R. 4789 Before the Subcomm. on Courts, the Internet, and Intellectual Property of the H. Comm. on the Judiciary*, 110th Cong. 160 (2008) (prepared statement of Pandora Media, Inc.).

78. *Id.* at 27 (2008) (statement of Zoe Lofgren, Member, House Comm. on the Judiciary).

79. *See Carey, supra* note 50, at 292–94.

80. The Webcaster Settlement Act of 2008, Pub. L. No. 110-435, 122 Stat. 4974 (codified as amended in scattered sections of Title 17).

81. Antony Bruno, *No Deal Reached for DIMA, SoundExchange*, BILLBOARD MAGAZINE, Feb. 17, 2009, [http://www.billboard.biz/bbbiz/content\\_display/industry/e3i0a2ed4a24bf26fb80de30f0b467a5e45](http://www.billboard.biz/bbbiz/content_display/industry/e3i0a2ed4a24bf26fb80de30f0b467a5e45).

82. The Webcaster Settlement Act of 2009, Pub. L. No. 111-36, 123 Stat. 1926 (codified as amended in scattered sections of 17 U.S.C.).

83. David Oxenford, *Pureplay Webcasters and SoundExchange Enter into Deal Under Webcaster Settlement Act to Offer Internet Radio Royalty Rate Alternative for 2006–2015*, BROADCAST LAW BLOG, (July 7, 2009), <http://www.broadcastlawblog.com/2009/07/articles/internet-radio/pureplay-webcasters-and-soundexchange-enter-into-deal-under-webcaster-settlement-act-to-offer-internet-radio-royalty-rate-alternative-for-20062015/> (noting that rates were set at approximately 12–14% of annual revenue for smaller webcasters and the greater of 25% revenue or a per-performance royalty for larger webcasters (defined as those making more than \$1.25 million in revenue annually)).

challenges of establishing an Internet radio business where both musical work and sound recording performance royalties are a necessary and foreseeable expense. The right to broadcast sound recordings online is no longer free, and the stage is set for sound recording copyright owners to expand their digital right even further.

## II. SOUND RECORDING COPYRIGHT OWNERS' NEW BATTLE

As the battle with webcasters over digital performance royalties continues, sound recording copyright owners have turned their attention to terrestrial radio broadcasters. These sound recording performance rights have been pursued before—sound recording copyright holders have lobbied for legislative adoption of such rights more than twenty-four times since 1926.<sup>84</sup> It wasn't until 1995 that Congress finally heeded the calls of sound recording copyright owners and granted a partial performance right, being careful to preserve the traditional relationship between the record companies and the radio broadcasters.<sup>85</sup> With the introduction of the PRA it would appear that record labels are seeking to drastically redefine their relationship with terrestrial music broadcasters.

### A. *The Proposed Performance Rights Act*

The PRA, in its current form, was first introduced in 2007, but failed to garner sufficient votes to pass in the House in 2008.<sup>86</sup> On February 4, 2009, S. 379 and H.R. 848 were reintroduced in both the House and Senate.<sup>87</sup> The bill expands the scope of § 106(6) of the Copyright Act to include performances made publicly “by means of an audio transmission,” thereby encompassing terrestrial AM/FM broadcasts.<sup>88</sup> Like non-interactive webcasters, terrestrial radio stations would be subject to statutorily prescribed royalty rates under § 114 of the Copyright Act, which would be set at a later date by the Copyright Royalty Board.<sup>89</sup> In an attempt to eliminate regulatory burdens for terrestrial stations, the

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84. DelNero, *supra* note 2, at 475.

85. S. REP. NO. 104-128, at 15 (1995).

86. See Anne Mullins, *Shenanigans: Good News for MusicFIRST*, POLITICO, Apr. 2, 2009, [http://www.politico.com/blogs/anneschroeder/0409/Shenanigans\\_Good\\_News\\_for\\_MusicFIRST\\_.html](http://www.politico.com/blogs/anneschroeder/0409/Shenanigans_Good_News_for_MusicFIRST_.html) (quoting NAB Executive Vice President Dennis Wharton, an opponent to the PRA, “It’s not a big surprise if it gets out of committee; our goal is to get more than half the members of the House to oppose the bill—like they did last year.”).

87. Performance Rights Act, H.R. 848, S. 379, 111th Cong. (2009).

88. H.R. 848 § 2(a); S. 379 § 2(a).

89. H.R. 848 § 2(c); S. 379 § 2(b).

PRA also eliminates many of the statutory requirements applicable to webcasters.<sup>90</sup>

In lieu of statutory rates, smaller commercial broadcast stations whose annual gross revenues are less than \$1,250,000, may pay an annual royalty fee of \$5,000.<sup>91</sup> Under the Senate Judiciary Committee's version of the bill, commercial stations with annual revenues of less than \$500,000 would pay only \$2,500 per year, with further graduated reductions for stations grossing less than \$100,000 annually.<sup>92</sup> According to one estimate, nearly 80% of radio stations operating in the United States today would qualify for a flat, annual rate.<sup>93</sup> Similarly, nonprofit broadcasting entities and college radio stations would be subject to an annual fee of \$1,000.<sup>94</sup> Stations that make only incidental uses of sound recordings, like talk radio stations and religious broadcasts, would be completely exempt under the Act.<sup>95</sup> At the House hearings in March 2009, the Chairman of the RIAA emphasized that those broadcast stations that show a "great deal of promotion" for sound recordings would also be granted a royalty discount in line with preexisting statutory guidelines.<sup>96</sup> The bill also ensures that, regardless of recording agreements, artists and musicians receive 50% of all performance royalties collected from stations.<sup>97</sup> The other 50% of collected royalties would be distributed to the sound recording copyright owner, which, in thousands of instances, is also the artist.<sup>98</sup>

Those in support of the bill include the RIAA, SoundExchange, and the MusicFIRST Coalition (which includes twelve affiliated sound recording organizations).<sup>99</sup> The main entity opposing the bill is the National Association of Broadcasters ("NAB"), representing small and

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90. S. 379 § 2(d).

91. H.R. 848 § 3(a)(1); S. 379 § 3(a)(1).

92. S. 379 § 3(a)(1).

93. *Performance Rights Act: Hearing on H.R.848 Before the H. Comm. on the Judiciary*, 111th Cong. 193 (2009) [hereinafter *Statement of Bainwol*] (statement of Mitch Bainwol, Chairman and CEO, Recording Industry Association of America), available at [http://judiciary.house.gov/hearings/hear\\_090310.html](http://judiciary.house.gov/hearings/hear_090310.html).

94. H.R. 848 § 3(a)(1)

95. *Id.* at § 3(b).

96. *Statement of Bainwol*, *supra* note 93, at 197; see 17 U.S.C. § 114(f)(2)(B) ("Such [CRB] rates and terms shall distinguish among the different types of eligible nonsubscription transmission services . . . based on criteria including . . . [whether the use] may promote the purchase of phonorecords by consumers.").

97. See S.379 § 5; 17 U.S.C. § 114(g)(2)(A).

98. See S.379 § 5; 17 U.S.C. § 114(g)(2)(A); see *MusicFIRST Handbook*, *supra* note 21, at 8.

99. For more information on the organizations, see MusicFIRST, <http://www.musicfirstcoalition.com> (last visited Jan. 17, 2010); Recording Industry Association of America, <http://www.riaa.com> (last visited Jan. 17, 2010); SoundExchange, <http://www.soundexchange.com> (last visited Jan. 17, 2010).

large broadcasters nationwide. NAB has created an online radio coalition at NoPerformanceTax.org.<sup>100</sup> At the time of writing, the bill has been reported out of the House and Senate Judiciary Committees and is pending full floor votes in both houses.<sup>101</sup>

### B. *The Long Road to Sound Recording Equality*

As discussed above, powerful broadcasting and PRO lobbyists fought against the imposition of an additional performance right in the 1976 Act. However, this alone does not account for the seemingly lopsided statutory scheme. After all, sound recording copyright owners are represented by equally powerful lobbyists. The RIAA, for instance, represents nearly 85% of sound recording copyright owners in the United States, which is as large as or larger than any musical work trade association.<sup>102</sup> What, then, accounts for the performance right disparity? The answer is that broadcasters have continually convinced Congress that radio airplay constitutes free advertising for sound recordings.<sup>103</sup> Consumers were considered more likely to purchase music if they heard new songs via radio, and thus a symbiotic relationship was said to have existed between record labels and broadcasters—free promotion was exchanged for free use of sound recordings.<sup>104</sup>

One important threshold issue which must therefore be considered is whether the promotional value of radio airplay continues to fairly compensate sound recording copyright owners in the digital era. This fundamental issue was debated at the hearings before the House Subcommittee on Courts, the Internet, and Intellectual Property in 2008 and the Senate Committee on the Judiciary in 2009.<sup>105</sup>

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100. See No Performance Tax, <http://www.noperformancetax.org> (last visited Jan. 17, 2010).

101. See GovTrack.us, S.379, Performance Rights Act available at <http://www.govtrack.us/congress/bill.xpd?bill=s111-379> (last visited Jan. 17, 2010); GovTrack.us, H.R. 848, Performance Rights Act, available at <http://www.govtrack.us/congress/bill.xpd?bill=h111-848> (last visited Jan. 17, 2009).

102. See *Statement of Bainwol*, *supra* note 93, at 194 n.1.

103. See S. Rep. No. 93-983, at 225–26 (1974) (“For years, record companies have gratuitously provided records to stations in hope of securing exposure by repeated play over the air. The financial success of recording companies and artists who contract with these companies is directly related to the volume of record sales, which in turn depends in great measure on the promotion efforts of broadcasters.”).

104. Carey, *supra* note 50, at 264–65.

105. See generally, *Performance Rights Act: Hearing on H.R.4789 Before the Subcomm. on Courts, the Internet, and Intellectual Property of the H. Comm. on the Judiciary*, 110th Cong. (2008) [hereinafter *PRA Hearings Before 110th Congress*], available at [http://judiciary.house.gov/hearings/hear\\_061108.html](http://judiciary.house.gov/hearings/hear_061108.html); *Performance Rights Act: Hearing on H.R. 848 Before the H. Comm. on the Judiciary*, 111th Cong. (2009) [hereinafter *PRA Hearings Before 111th Congress*], available at [http://judiciary.house.gov/hearings/hear\\_090310.html](http://judiciary.house.gov/hearings/hear_090310.html).



*C. Terrestrial Radio's Use of Sound Recordings:  
Taking vs. Promotion*

In this battle, those for and against the bill frame the equities at stake in two very different lights. Speaking on behalf of broadcasters at the 2009 hearing before the House Committee on the Judiciary, NAB argued that studies show a direct correlation between the number of spins or plays on the local radio and the sales of albums and singles resulting in approximately \$1.5–2.4 billion in free promotion annually.<sup>106</sup> Emphasizing the symbiotic relationship between the two groups, NAB maintained that the publicity gained by artists in terms of record sales, digital downloads, tour promotion, and merchandise sales more than adequately compensates artists for the stations' use of sound recordings.<sup>107</sup>

Record labels, on the other hand, deny the existence of any symbiotic relationship. Mitch Bainwol, chairman of the RIAA, noted that “the argument that this is symbiotic . . . we don't get to participate in this question of balance. They get to take our property, use it, and we can't say no. They call it symbiotic; I call that a taking.”<sup>108</sup> While conceding that terrestrial radio stations undoubtedly contribute some promotional value, supporters of the PRA like Bainwol nevertheless contend that digital technology has significantly affected the value of traditional radio promotion.<sup>109</sup> Whereas the listening public once had limited access to

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106. *Statement of Newberry, supra* note 2, at 147.

107. *Id.* at 147–52. Interestingly, NAB made the same argument when ASCAP sought to collect performance royalties for musical works in the 1920s. WILLIAM H. YOUNG & NANCY K. YOUNG, *MUSIC OF THE WORLD WAR II ERA*, 91 (Greenwood Publishing Group 2008) (“broadcasters replied [to ASCAP's royalty demands] that spinning a disc on the air equaled free advertising, caused listeners to purchase the recording, and therefore required no royalty.”). In the landmark case *M. Witmark & Sons v. L. Bamberger & Co.*, the court dismissed radio broadcasters' claim that promotional consideration adequately compensated the musical work copyright owner. 291 Fed. 776, 779–80 (D.N.J. 1923). While the court ultimately found the argument to be “immaterial” to a claim of infringement, it nonetheless went on to condemn the proposition, finding that:

The defendant [broadcaster] argues that the plaintiff should not complain of broadcasting of its song because of the great advertising service thereby accorded to the copyrighted number. . . . But the copyright owners and the music publishers themselves are perhaps the best judges of the method of popularizing musical selections. There may be various methods of bringing them to the attention of music lovers. It may be that one type of song is treated differently than a song of another type. But, be that as it may, the method, we think, is the privilege of the owner.

*Id.* at 779–80.

108. *Statement of Bainwol, supra* note 93, at 247. Note that while it is debatable whether sound recording broadcasts are “takings” given the lack of a performance right, broadcasters have seemingly conceded the point, at least from a legal perspective, given their consideration argument in the first instance. In other words, if there is no applicable property right in sound recordings, why are broadcasters debating the sufficiency of their consideration?

109. *See id.*

new music outside of terrestrial radio broadcasts, consumers are becoming increasingly exposed to music via digital performances by satellite radio broadcasts and webcasts, both of which pay sound recording performance royalties.<sup>110</sup> There is no reason, Bainwol argues, for terrestrial radio to continue to enjoy a performance right exemption when Internet and satellite stations do not. Furthermore, broadcasters' promotional consideration argument significantly overlooks older songs that are still regularly performed on terrestrial radio but derive little to no promotional value from radio airplay.<sup>111</sup>

Broadcasters also argue that, promotion aside, record labels' calls for equal rights in sound recordings are disingenuous. Under the PRA, copyright holders are not seeking rights equal to those granted to musical works. By seeking only to collect from the largest radio broadcasters, and effectively exempting the smaller ones, NAB argues that the recording industry is attempting to "siphon funds from the coffers of the top 25 percent of radio broadcasters into a recording industry suffering from flagging revenues due to piracy and an antiquated business model."<sup>112</sup> Indeed, roughly 80% of broadcasters would be covered by an annual \$5,000 cap on royalty payments, designed to protect smaller stations.<sup>113</sup> Moreover, unlike musical works, public performances of sound recordings at commercial establishments like restaurants, bars, and nightclubs would not be subject to royalty payments under the Act.

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110. *Id.* (statement of Brad Sherman, Member, House Comm. on the Judiciary).

111. Posting of Jonathan Lamy to RIAA Music Notes Blog, [http://www.riaa.com/blog.php?content\\_selector=Techdirt-On-Performance-Rights-Act](http://www.riaa.com/blog.php?content_selector=Techdirt-On-Performance-Rights-Act) (June 17, 2009) ("[Y]es, this legislation would benefit Britney Spears. But more importantly, it would finally provide some recognition to the slew of Motown greats whose hits have been routinely played on radio but who earn nothing and who derive little promotional value from radio airplay.").

112. *Statement of Newberry*, *supra* note 2, at 155.

113. *Statement of Bainwol*, *supra* note 93, at 197.

TABLE 1  
COMPARISON OF PERFORMANCE RIGHTS

Music Provider	Sound Recording Performance License Required?	Musical Work Performance License Required?
Cable/Satellite	Yes—6–8% percent of gross revenues	Yes
Internet Radio	Yes—Commercial webcasters pay .18¢ per performance in 2009 (unless otherwise negotiated)	Yes
Terrestrial Broadcasters ( <i>pre</i> -PRA)	No	Yes
Terrestrial Broadcasters ( <i>post</i> -PRA)	Yes—\$5,000 for approx. 75% of stations, statutory rate TBD for larger stations	Yes
Commercial Establishments (Bars, Restaurants, etc.) ( <i>pre</i> -PRA and <i>post</i> -PRA)	No	Yes

In response, sound recording copyright owners acknowledge that a full sound recording performance right is justified, but note that their progress has been incremental and that if exemptions are “the price of gaining a minimum level of protection for the future, we are willing to pay it.”<sup>114</sup> On a more fundamental level, the broadcasters’ argument erroneously assumes that complete musical work parity is a prerequisite for sound recording copyright protection.<sup>115</sup> Additionally, the argument contradicts broadcasters’ more fundamental proposition that musical works and sound recordings are entirely different works of authorship, and that exclusive rights granted to each cannot be meaningfully compared.<sup>116</sup>

Finally, copyright holders highlight that the United States is one of the only industrialized nations in the world that does not provide sound

114. Lamy, *supra* note 111 (quoting former RIAA CEO Jay Berman).

115. See discussion *infra* Part IV.D.

116. See NoPerformanceTax.org, About the Issue, <http://www.noperformancetax.org/issue.asp> (last visited Jan. 17, 2010) (“It’s widely understood that songwriters do not have the same name recognition to financially exploit themselves to make money. Performers can make money from touring and personal appearances, merchandise and other licensing and branding opportunities like perfume and clothing lines.”).

recordings with a general performance right.<sup>117</sup> Because of this disparity, American performers and sound recording copyright owners are not entitled to performance royalties collected overseas due to international treaty reciprocity requirements.<sup>118</sup> It is estimated that over \$600 million in performance royalties have gone uncollected because of the United States' lack of a full sound recording performance right.<sup>119</sup> However, broadcasters maintain that foreign jurisdictions provide fundamentally different rights to sound recordings, that radio exists under an entirely different operating framework in many parts of the world, and that it is therefore improper to compare the rights offered by foreign countries to those granted in the United States.<sup>120</sup> Other legal commentators have noted that foreign royalties may be overstated, and that other countries might opt-out of international performance right obligations should the United States ever seek to collect foreign royalties.<sup>121</sup>

#### D. Record Label Bailout

Throughout this debate, the National Association of Broadcasters, along with several members of Congress, have argued that the PRA is nothing more than an attempt by record labels to recoup lost profits from a source with deep pockets.<sup>122</sup> Globally, recorded music sales have plummeted nearly 20% since 2000, with signs of increased losses in recent years.<sup>123</sup> Since 1997, record sales have dropped over 40% in the United States alone.<sup>124</sup> The music industry remains in turmoil despite

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117. *Statement of Bainwol, supra* note 93, at 195; *see also* DelNero, *supra* note 2, at 191–92.

118. *Statement of Bainwol, supra* note 93, at 195; *see also* DelNero, *supra* note 2, at 191–92.

119. KRASILOVSKY, *supra* note 11, at 65.

120. JANE MAGO, BENJAMIN IVINS, & SUZANNE HEAD, SHOULD THE U.S. LEAD OR FOLLOW? WHY OTHER COUNTRIES' IMPOSITION OF A TAX ON THE PERFORMANCE OF SOUND RECORDINGS DOES NOT JUSTIFY SUCH A U.S. TAX, March 2009, *available at* [http://www.freeradioalliance.org/International\\_Performance\\_Tax\\_Paper.pdf](http://www.freeradioalliance.org/International_Performance_Tax_Paper.pdf) (arguing, for instance, that many radio stations are government-owned or subsidized in foreign countries that collect sound recording performance royalties).

121. DelNero, *supra* note 2, at 191–192; Emily F. Evitt, *Money, That's What I Want: The Long and Winding Road to a Public Performance Right in Sound Recordings*, 21 *INTELL. PROP. & TECH. L.J.* 10, 11 (2009).

122. *See* NoPerformanceTax.org, About the Issue, <http://www.noperformancetax.org/issue.asp> (last visited Jan. 17, 2010).

123. Measured by the total percentage change in the value of recorded world music sales between 2000 and 2007. International Federation of the Phonographic Industry, Music Market Statistics, [http://www.ifpi.org/content/section\\_statistics/index.html](http://www.ifpi.org/content/section_statistics/index.html) (follow individual "Recorded Music Sales" hyperlinks for each of the years 2000–2007).

124. This percentage represents the difference in the number of CD, cassette, LP/EP, and digital album units shipped between 1997 and 2007. Recording Industry Association of America, Recording Industry, 2007 U.S. Manufacturers' Unit Shipments and Value Chart, *available at* <http://76.74.24.142/81128FFD-028F-282E-1CE5-FDBF16A46388.pdf>.

infringement actions brought on behalf of copyright owners attempting to combat the effects of illegal music distribution.<sup>125</sup> With these considerations in mind, Congressman Ric Keller argued at the 2008 House hearings that record labels are hurting for two principal reasons: online piracy and an antiquated business model. He made it clear, however, that “these two things that are hurting the music industry were not caused by broadcasters.”<sup>126</sup>

The effect of illegal digital music distribution was squarely addressed in the 2009 House hearing on the PRA.<sup>127</sup> Representative Charles Gonzalez from Texas asked both Steven Newberry and Mitch Bainwol why the PRA was of such crucial importance to record labels now.<sup>128</sup> Mr. Newberry answered that record labels have lost millions as a result of online piracy and that they are thus seeking to recoup such losses by going after only the most successful terrestrial broadcasters.<sup>129</sup> Mr. Bainwol refuted such assertions, arguing that online use and distribution of music has served only to “dramatize” the inherent inequity in the music licensing structure.<sup>130</sup> He contended that consumers increasingly access music via performances on the Internet, thus cutting off one of the largest sources of record label income—reproduction and distribution royalties.<sup>131</sup> “If we care about creativity,” Bainwol argued, “we’ve got to find a way to connect to the emerging model.”<sup>132</sup>

This argument seems to undercut record labels’ demand for artist equality. If this legislation is really about connecting to the emerging model online, why should terrestrial radio stations foot the bill while labels scramble to keep up with digital market trends? After all, terrestrial broadcasters can hardly be responsible for emerging online consumer behavior. Mr. Bainwol went on to argue that “in that context [of the emerging online performance model], having the single biggest platform enjoy a benefit relative to Pandora, relative to Real Networks, relative to any of the other DiMA companies, makes absolutely no

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125. See, e.g., *Metro-Goldwyn-Mayer Studios, Inc. v. Grokster, Ltd.*, 545 U.S. 913 (2005); *In re Aimster Copyright Litigation*, 334 F.3d 643 (7th Cir. 2003); *A&M Records, Inc. v. Napster, Inc.*, 239 F.3d 1004 (9th Cir. 2001); see also Mark F. Schultz, *Fear and Norms and Rock & Roll: What Jambands Can Teach Us About Persuading People To Obey Copyright Law*, 21 *BERKELEY TECH. L.J.* 651, 661 (2006) (“The RIAA’s experience with its lawsuits has echoed the general experience with such deterrence-based strategies: they are enthusiastically pursued but not necessarily effective.”).

126. *PRA Hearings Before 110th Congress*, *supra* note 105, at 26 (statement of Ric Keller, Member, House Comm. on the Judiciary).

127. *PRA Hearings Before 111th Congress*, *supra* note 105, at 246–47.

128. *Id.*

129. *Id.* at 246.

130. *Id.* at 247.

131. *Id.*

132. *Id.*

sense.”<sup>133</sup> But terrestrial broadcasters quite clearly do not enjoy a benefit in the context of the emerging performance market online. If terrestrial broadcasters want to stream music on the Internet, they have to pay a digital performance royalty per the 2000 Copyright Office determination.<sup>134</sup> For the sake of consistency, then, labels should focus on the fact that like terrestrial radio, web and satellite broadcasts of sound recordings also promote artists’ music and yet are both subject to digital performance royalties. Even if it were true that terrestrial radio better promotes sound recordings than Internet radio does today, it is extremely likely that web radio will provide more promotional value than its terrestrial peers in the future.<sup>135</sup> Indeed, industry projections estimate that by 2020, Internet radio will trail terrestrial radio listenership by as little as 50,000 listeners per week.<sup>136</sup> What then will account for the inequity? Surely, labels could argue, it should be in the discretion of a copyright holder to determine which promotional uses should be permitted, online and off.<sup>137</sup> Finally, the argument that labels are seeking an expanded performance right primarily because of current economic troubles is undermined by the fact that the recording industry has fought legislatively for the right over two dozen times since 1926.<sup>138</sup>

### III. AN ALTERNATE SOLUTION—“ASCAPING” SOUND RECORDINGS ONLINE

As physical record sales continue to decline, one can’t help but recognize that sound recording performance royalties represent a largely untapped source of compensation. With the increasing prevalence of digital music performances, however, it is questionable how long even terrestrial radio performance royalties could adequately encourage crea-

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133. *Id.*

134. Public Performance of Sound Recordings: Definition of a Service, 65 Fed. Reg. 77,292 (Dec. 11, 2000) (to be codified at 37 C.F.R. pt. 201).

135. See BRIDGE RATINGS, DIGITAL MEDIA GROWTH PROJECTIONS, Apr. 25, 2007, [http://www.bridgeratings.com/press\\_042507-digitalprojectionsupd.htm](http://www.bridgeratings.com/press_042507-digitalprojectionsupd.htm).

136. *Id.*

137. See William H. O’Dowd, *The Need for a Public Performance Right in Sound Recordings*, 31 HARV. J. ON LEGIS. 249, 264–65 (1994) (“even if we assumed that increased exposure through digital audio broadcast and cable services would improve record sales, that would not automatically lead to the conclusion that copyright owners should be denied the right to authorize those transmissions.”); see also Michael O. Sutton, ed., Annual Report, 1990–1991 A.B.A. SEC. PAT. TRADEMARK & COPYRIGHT L. 187, 188 (“it can be said that the authors of *The Hunt for Red October* or *The Color Purple* were ‘benefitted’ by the release of the movie versions of those books, but few would argue that those authors should not also be compensated for these visual performances as well.”).

138. DelNero, *supra* note 2, at 475.

tivity.<sup>139</sup> Mitch Bainwol was entirely correct when he warned that his industry must connect to the emerging performance market. However, this market is online and represents a fundamental shift in the way consumers access music. Mr. Bainwol failed to identify that performances accessed via popular music sites like YouTube, Myspace, and Facebook, among others (“Performance-Based Sites”), would fall outside the purview of sound recording performance royalties even if the proposed bill should pass. Thus, in the interests of sustainable licensing revenues, sound recording copyright owners must adopt a strategy that better connects to online distribution platforms.<sup>140</sup>

A circumspect assessment of the performance right licensing landscape should naturally focus on the behemoth U.S. musical work performing rights organizations. These collectives are extremely successful in large part because of their blanket licenses. As discussed above, PROs allow licensees to pay an annual flat fee in return for the use of any song in their repertoire. Licensees are given nearly unfettered discretion in the type and amount of music that they play and in return pay a relatively small percentage of their gross annual income.<sup>141</sup> The blanket licenses granted by the PROs are so effective that the organizations have been able to secure payments from AOL, RealNetworks, and YouTube, among others.<sup>142</sup> Performing Rights Organizations like ASCAP, BMI, and SESAC are thriving, generating \$1.5 billion for songwriters and publishers in 2007 alone.<sup>143</sup>

Today, sound recording copyright owners are struggling to implement and expand their own performance right. With the enormous success of musical work PROs in mind, sound recording copyright owners should consider shifting their focus from terrestrial performances to digital ones. Many Performance-Based Sites currently pay little to nothing to sound recording copyright owners for user-generated content, and it is due time to consider why not. When a physical auditorium hosts a rock concert or sporting event on their property, for instance, a license is

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139. In 1978 the Register of Copyrights found that sound recording performance royalties would likely amount to “less than one-half of one percent of [the music industry’s] estimated net sales.” Performance Rights in Sound Recordings, 43 Fed. Reg. 12,763, 12,764–65 (Mar. 27, 1978).

140. The alternative set forth in this Note does not mean to suggest that the Performance Rights Act is unjustified. Rather, the proposal identifies a more sustainable right that might better secure sound recording royalties and ensure that performers and record labels are given the financial incentive to continue to create new works.

141. See Gorman, *supra* note 14; KRASILOVSKY, *supra* note 11 and accompanying text.

142. See U.S. v. ASCAP, 559 F. Supp. 2d 332 (S.D.N.Y. 2008); U.S. v. ASCAP, 616 F. Supp. 2d 447 (S.D.N.Y. 2009).

143. Robert P. Merges, *The Continuing Vitality of Music Performance Rights Organizations 2* (UNIV. OF CAL., BERKELEY SCH. OF LAW, PUB. LAW & LEGAL THEORY RESEARCH PAPER SERIES, Paper No. 1266870, 2008), available at <http://ssrn.com/abstract=1266870>.

negotiated with ASCAP, BMI, and SESAC to cover any and all musical work performances that take place during the events. This fee is simply a cost of doing business and provides a safe harbor against claims of copyright infringement. Obviously, physical auditoriums need not worry about obtaining a sound recording performance right because no such right exists. Online, however, one does.<sup>144</sup> Thus, in order to better connect to the emerging performance market of which Bailwol spoke, sound recording copyright owners should elicit a flat, annual performance fee from Performance-Based Sites which regularly perform user-generated audiovisual works that incorporate protected sound recordings on their site. Websites like YouTube and Facebook host millions of user-uploaded sound recording performances on their sites daily and should compensate sound recording copyright holders accordingly.<sup>145</sup> Like terrestrial radio, Performance-Based Sites collect advertising revenues by allowing users to exploit the recordings of others. Unlike terrestrial radio, it is clear that consumer trends are shifting to an online platform. Whereas the music industry has acted decisively over the last decade to ensure that webcasters pay their dues, many Performance-Based Sites have escaped any financial obligation for their performance of sound recordings.

Performance-Based Sites currently seek shelter from copyright claims under § 512 of the DMCA.<sup>146</sup> Section 512 outlines a complex process by which Internet service providers like YouTube can be granted safe harbor from the infringing actions of their users.<sup>147</sup> As part of this safe harbor, the statute includes a notice and takedown procedure that requires service providers to immediately remove any hosted files a copyright holder identifies as infringing, notwithstanding any defensive claims of fair use.<sup>148</sup> Once the file has been removed, the burden shifts to the user to assert his or her right to have the materials replaced.<sup>149</sup> In general, most users have neither the determination nor the legal expertise to contest a takedown action.

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144. See Digital Performance Right in Sound Recordings Act of 1995, Pub. L. No. 104-39, 109 Stat. 336 (1995) (codified as amended at 17 U.S.C. § 106(6)(2008)).

145. Warner Music Group recently entered into a licensing agreement with YouTube that covers both label-distributed music videos and user-generated content. Greg Sandoval, *As Expected Warner Music, YouTube Make Up*, CNET News, Sept. 29, 2009, [http://news.cnet.com/8301-1023\\_3-10363384-93.html](http://news.cnet.com/8301-1023_3-10363384-93.html). Notwithstanding such agreements, however, the lack of a right to collect for user-generated audiovisual works means that individual agreements must be negotiated for every Performance-Based Site. Moreover, such arrangements do not compensate smaller sound recording copyright owners or independent artists.

146. See Digital Millennium Copyright Act, 17 U.S.C. § 512 (2008).

147. *Id.*

148. See § 512 (c)(1-3).

149. § 512 (g)(3).



Despite widespread utilization of the DMCA notice and takedown procedures, § 512 does not proscribe private license negotiations. Indeed, over the past few years, YouTube has struck several deals with Sony Music Entertainment, Universal Music Group, and Warner Music Group for use of commercially produced music videos.<sup>150</sup> These arrangements have resulted in varying degrees of success.<sup>151</sup> Because most of the user-generated content on Performance-Based Sites does not fall within the purview of the sound recording performance right, however, serious licensing considerations have been largely precluded. The following section considers precisely why sound recording copyright owners do not currently enjoy the right to collect royalties from these websites, and what legislative steps would be required to permit such remuneration.

#### A. *The Rights at Issue*

Section 106(6) of the Copyright Act defines the digital sound recording performance right as the right “to perform the copyrighted work [sound recording] publicly by means of a digital audio transmission.”<sup>152</sup> A “digital audio transmission” is defined as “a digital transmission . . . that embodies the transmission of a sound recording. This term does not include the transmission of any audiovisual work.”<sup>153</sup> Thus, user-generated clips on YouTube that present visual images in connection with sound recordings do not qualify as digital sound recording performances under the Copyright Act.<sup>154</sup> In theory, audiovisual clips that incorporate protected sound recordings require a master use license that must be privately negotiated directly with sound recording copyright owners.<sup>155</sup> But individually licensing user-generated clips on the web presents insurmountably high transaction costs. Because of this difficulty, along with the audiovisual exception to the sound recording performance right, Performance-Based Site users have been allowed to create and post audiovisual works that incorporate sound recordings in

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150. See, e.g., Brian Stelter, *Warner Music Removes Its Videos From YouTube as Licensing Talks Stall*, N.Y. TIMES, Dec. 21, 2008, at B5, <http://www.nytimes.com/2008/12/22/business/media/22warner.html>; Jessica E. Vascellaro, *YouTube, Universal Music Discuss Alliance*, WALL ST. J., Mar. 5, 2009, at B4, <http://online.wsj.com/article/SB123620507812933263.html>; see also Sandoval, *supra* note 145.

151. See Stelter, *supra* note 150; Vascellaro, *supra* note 150.

152. 17 U.S.C. § 106(6) (2009).

153. 17 U.S.C. § 114(j)(5).

154. See 17 U.S.C. § 101 (defining an audiovisual work as “works that consist of a series of related images which are intrinsically intended to be shown . . . together with accompanying sounds”). Additionally, a synchronization license is required from the musical work copyright owner. KOHN & KOHN, *supra* note 5, at 446.

155. KRASILOVSKY, *supra* note 11, at 69–70.

their entirety, placing an onerous burden on copyright holders to patrol the web and submit takedown requests in compliance with the DMCA.<sup>156</sup>

Although the scope the performance right poses an obstacle, legislative reform is clearly not an option sound recording copyright holders have shied away from. Instead of (or in addition to) seeking to alter the Copyright Act via the PRA to collect from a group with a decades-old performance exemption, sound recording copyright owners should continue to lobby for an expanded performance right online. Such a strategy would likely be met with far less opposition than the PRA, and would better connect to emerging (and growing) market trends online. By seeking compensation from a source with deep pockets, labels may find temporary reprieve, but they may do so at the cost of sustainable licensing revenues.

As an alternative to the copyright overhaul currently being sought by the labels, section 114(j)(5) could be amended to provide that “a ‘digital audio transmission’ is a digital transmission as defined in section 101, that embodies the transmission of a sound recording. This term does not include any *commercially distributed* audiovisual work.” The obvious target of the revised statute is user-generated audiovisual works, like those on Performance-Based Sites. By securing the right to collect from sites that allow users to combine full-length performances of sound recordings with visual images, copyright holders can ensure that digital performances won’t escape copyright protection simply because they are combined with on-screen lyrics or images. Commercially produced and distributed audiovisual works that have already obtained the requisite licenses to reproduce sound recordings in connections with visual images (e.g., music videos and audiovisual advertisements) would be unaffected by the statutory amendment.<sup>157</sup>

Moreover, the definition of a sound recording in section 101 would need to be updated to reflect this change. As currently defined, a sound recording does not include “the sounds accompanying a motion picture

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156. First Amended Complaint for Declaratory and Injunctive Relief and Damages and Demand for Jury Trial, at 44, *Viacom Int’l Inc. v. YouTube, Inc.*, 540 F. Supp. 2d 461 (S.D.N.Y. 2008)(No. 07-2103)(“YouTube is deliberately interfering with copyright owners’ ability to find infringing videos even after they are added to YouTube’s library . . . . For all these reasons, no matter how much effort and money copyright owners expend to protect their rights, there will always be a vast collection of infringing videos available on YouTube to draw users to its site.”); *see also* Linda Rosencrance, *Prince Fights YouTube, eBay over Copyrighted Content*, PC WORLD, Sept. 19, 2007, [http://www.pcworld.com/article/137386/prince\\_fights\\_youtube\\_ebay\\_over\\_copyrighted\\_content.html](http://www.pcworld.com/article/137386/prince_fights_youtube_ebay_over_copyrighted_content.html) (“We [copyright owners] notify YouTube of infringements and they remove the files, but it goes on ad infinitum . . . . Now the onus is on artists and rights’ creators to police YouTube at their expense.”).

157. The wholesale upload of commercial videos by a user would not be exempted under the revised provision. A music video posted by a user, for instance, would not be considered “commercially distributed” for purposes of the statute.

or other audiovisual work.”<sup>158</sup> Because the definition in § 114(j)(5) alters the scope of the digital performance right granted to sound recordings, the broader definition of a sound recording must be amended to reflect the new audiovisual addition. Thus, a supplement to the sound recording definition might read, “‘Sound recordings’ are works that result from the fixation of a series of musical, spoken, or other sounds, but not including the sounds accompanying a motion picture or other audiovisual work, regardless of the nature of the material objects, such as disks, tapes, or other phonorecords, in which they are embodied, *except as defined in Section 114(j)(5).*”

### B. *The Legality of Creating a Sound Recording “PRO”*

Once the right to collect is statutorily established, the issue of how to collect royalties becomes relevant. As with musical works, the collection of performance royalties would be nearly impossible without the help of a collective agency. Unfortunately, establishing a sound recording collective poses several complications of its own.

Under § 114 of the Copyright Act, SoundExchange is authorized to collectively manage and distribute digital performance royalties on behalf of all sound recording copyright owners who join the organization.<sup>159</sup> Over the years, SoundExchange has developed an impressive administrative framework to handle the licensing of digital sound recording performance rights for its membership base of sound recording copyright holders.<sup>160</sup> But SoundExchange’s collective authority extends only to those digital music performances that qualify for statutory licensing under § 114(f) of the Copyright Act.<sup>161</sup> As discussed above, interactive music providers (those which allow users to select which sound recordings they wish to hear) do not qualify for statutory licensing.<sup>162</sup> Because sites like YouTube, MySpace, and Facebook would likely qualify as interactive services,<sup>163</sup> SoundExchange would not have authority under § 114(g) to negotiate or collect performance royalties on behalf of interactive services, even if the statute was amended as described above.

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158. 17 U.S.C. § 101.

159. 17 U.S.C. § 114(g) (2–3).

160. See SoundExchange, *The Law*, <http://soundexchange.com/about/the-law/> (last visited Dec. 23, 2009).

161. 17 U.S.C. § 114(f), (g)(3).

162. See KOHN & KOHN, *supra* notes 34–35 and accompanying text. An “interactive service” is a service that, “enables a member of the public to receive . . . on request, a transmission of a particular sound recording, whether or not as part of a program, which is selected by or on behalf of the recipient.” 17 U.S.C. § 114(j)(7).

163. See 17 U.S.C. § 114(j)(7).

Furthermore, § 114(e)(2)(A) significantly restricts the ability of sound recording copyright holders to collectively manage their performance rights with interactive services.<sup>164</sup> While the statute does allow copyright owners to “designate common agents to act on their behalf” for purposes of collecting and remitting interactive license royalties, it goes on to require that “each copyright owner . . . establish the royalty rates and material license terms and conditions unilaterally, that is, not in agreement, combination, or concert with other copyright owners of sound recordings.”<sup>165</sup> Therefore, even if there were a right to collect royalties from Performance-Based Sites, and copyright holders gave a collective agent the authority to collect those royalties, the agent would be required to negotiate rates and terms on behalf of each copyright holder independently. Realistically, this would involve separate agreements on behalf of each of the big four record labels: EMI, Sony Music Entertainment, Warner Music Group, and Universal Music Group, as well as other represented sound recording copyright owners. A collective would thus serve as a central intermediary negotiating the requisite performance licenses between Performance-Based Sites and individual sound recording copyright holders.<sup>166</sup> Unlike the current practice, where Performance-Based Sites like YouTube negotiate only with the largest sound recording copyright owners, a collective agency could license the rights to perform the works of a much larger (and continually increasing) membership base.

Alternatively, the anti-collusion restrictions of section 114(e)(2)(A) could be relaxed so as to permit collective management of interactive sound recording transmissions. Several factors might alleviate antitrust concerns to sufficiently justify limited collusive behavior among sound recording copyright holders. First, and most importantly, a sound recording collective would offer non-exclusive licenses, ensuring that licenses can be obtained directly with the sound recording copyright owner if the licensee so chooses. This practice is analogous to the performance licenses offered by PROs, which permit licensees to negotiate directly with publishers and songwriters for individual licenses in lieu of obtaining the traditional PRO blanket license.<sup>167</sup> Furthermore, in *Broadcast Music, Inc. v. Columbia Broadcast Systems, Inc.*, the Supreme Court approved the collective licensing practices of PROs, recognizing that individual musical work copyright owners are “inherently unable to fully

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164. See § 114(e)(2)(A).

165. *Id.*

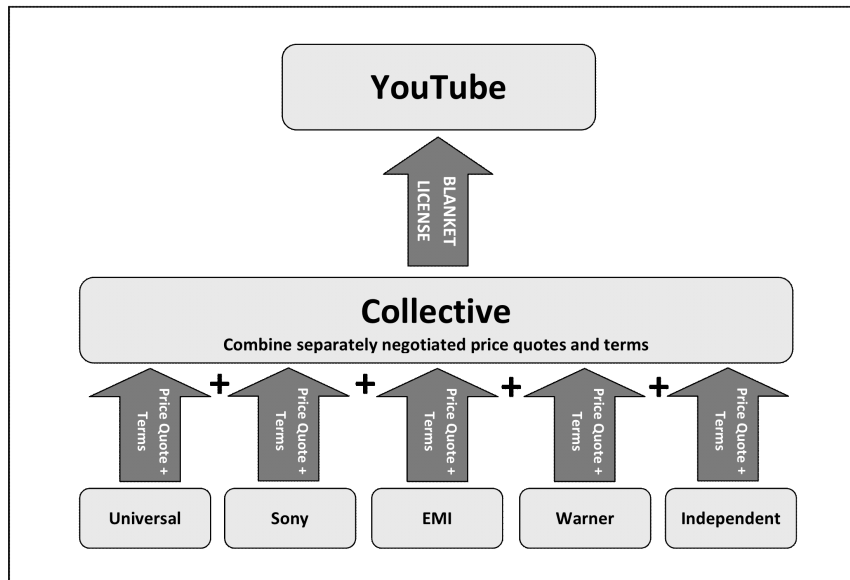
166. The collective organization might elicit standardized rates and terms from each licensor on the basis of the size, number of works, or other criterion.

167. KOHN & KOHN, *supra* note 5, at 916–17.

effectively compete” in the music licensing market.<sup>168</sup> The Court found that ASCAP and BMI did not violate the Sherman Act even though the blanket licenses issued by the PROs substantially reduced interseller price competition.<sup>169</sup> Thus, while it is true that a sound recording performance collective might similarly affect the value of interactive performance royalties, such concern is mitigated by the non-exclusive nature of the licenses and the inherent inability of individual sound recording copyright owners to otherwise negotiate such licenses.

In sum, in order for sound recording copyright holders to collect performance royalties from Performance-Based Sites they must: (1) establish a statutory right to collect performance royalties for user-generated audiovisual works which incorporate protected sound recordings by amending § 114(j)(5) of the Copyright Act, (2) establish a collective agent to represent them, and (3) ensure that royalty negotiations between that collective agent and Performance-Based sites comply with the anti-collusion provisions of § 114(e)(2)(A) or lobby for elimination of the anti-collusion barriers altogether.

FIGURE 3  
COLLECTIVE MANAGEMENT OF SOUND RECORDING  
DIGITAL PERFORMANCE LICENSES FOR SITES WITH  
INTERACTIVE AUDIOVISUAL CONTENT



168. 441 U.S. 1, 23 (1979).

169. *Id.*

In consideration for paying an annual blanket fee to a sound recording collective, Performance-Based Sites would be assured that sound recording copyright owners would not invoke any § 512 or copyright infringement proceedings against the service or its users.<sup>170</sup> The effect of such an agreement would be millions of dollars saved in administrative and legal fees by both parties.<sup>171</sup> In the midst of a billion dollar legal battle between YouTube and Viacom for video copyright infringement, an agreement to avoid any analogous sound recording copyright action would likely be welcomed by the both industries.<sup>172</sup>

### C. Consumer Benefits of an Expanded Digital Sound Recording Performance Right

Blanket licenses for interactive sound recording performances are beneficial not only to copyright holders and Performance-Based Sites, but also to those members of the public seeking to post audiovisual content online. Users who post “mashups” or parody clips often integrate sound recordings, raising legitimate fair use concerns.<sup>173</sup> But as part of the mandatory takedown procedures of § 512, sites like YouTube argue that they have neither the time nor legal resources to make nebulous fair use determinations.<sup>174</sup> Rather than consider the fair use merits of individual clips, YouTube simply removes user-posted videos when it receives a valid takedown request, thus securing safe harbor.<sup>175</sup> A blanket license granted by a collective, on the other hand, would grant Performance-Based Site users almost unlimited latitude in posting audiovisual works that include sound recordings. By transposing blanket license to the web, sound recording copyright owners would be compensated for digital performances of their works, Performance-Based Sites would be granted

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170. The extent of this compromise would, of course, be limited to the collective agency's membership.

171. See Digital Millennium Copyright Act, *supra* note 146, and accompanying text.

172. See Anne Broache & Greg Sandoval, *Viacom Sues Google Over YouTube Clips*, CNET NEWS, Mar. 13, 2007, [http://news.cnet.com/Viacom-sues-Google-over-YouTube-clips/2100-1030\\_3-6166668.html](http://news.cnet.com/Viacom-sues-Google-over-YouTube-clips/2100-1030_3-6166668.html).

173. See Lawrence Lessig, *In Defense of Piracy*, WALL ST. J., Oct. 11, 2008, <http://online.wsj.com/article/SB122367645363324303.html> (“The work of these remix creators is valuable in ways that we have forgotten. It returns us to a culture that, ironically, artists a century ago feared the new technology of that day would destroy.”).

174. See Hamilton Falk et al., *John McCain and the Music Makers*, COLUM. SCI. & TECH. L. REV. BLOG, (Oct. 31, 2008), <http://www.stlr.org/2008/10/john-mccain-and-the-music-makers> (“[L]awyers and judges constantly disagree about what does and does not constitute fair use. No number of lawyers could possibly determine with a reasonable level of certainty whether . . . videos for which we receive disputed takedown notices qualify as fair use.”) (quoting YouTube Chief Counsel Zahavah Levine).

175. *Id.*

safe harbor, and users would be allowed to freely and creatively express themselves on the web.

Other websites that contain user-generated content would be largely unaffected by the statutory change. For instance, an individual who posts an audiovisual clip incorporating protected sound recordings on her personal website would clearly violate the amended digital performance right of the copyright holder. But in such instances the response of the copyright owner would likely be the same as it is today; namely, the copyright owner could submit a DMCA takedown notice to the appropriate service provider. Unlike Performance-Based Sites, which derive advertising revenues directly from the unauthorized performances of millions of sound recordings, personal websites and blogs present relatively little risk of sale displacement. In such circumstances, the DMCA provides adequate safeguards to both the copyright owner and website proprietor.

#### D. *Fulfilling the Constitution's Promise*

The Constitution explains that copyright protection exists “[t]o promote the Progress of Science and useful Arts.”<sup>176</sup> Thus, copyright owners must demonstrate that sound recording performance rights, both online and off, fulfill the constitutional mandate and “foster the growth of learning and culture for the public welfare.”<sup>177</sup> In this evaluation, Congress should consider “how much the monopoly granted be detrimental to the public,” and whether granting the exclusive right “confers a benefit upon the public that outweighs the evils of the temporary monopoly.”<sup>178</sup>

As digital performances of sound recordings become increasingly prevalent, technology has propelled performances “into the sphere of distribution.”<sup>179</sup> Digital performances are now directly competing against, and substituting for, reproduction royalties, which are historically the greatest source of revenue for sound recording copyright holders. Thus, in order to ensure that copyright owners are sufficiently encouraged to create or invest in new works, they must be compensated, in some new way, for the use of their sound recordings. As one commentator has noted, without sustainable royalties, “record companies will no longer have an incentive to invest in the creation of new sound recordings or to facilitate the creative efforts of their artists because there will be no

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176. U.S. CONST. art. I, § 8, cl. 8.

177. REGISTER OF COPYRIGHTS, 87TH CONG., REPORT ON THE GENERAL REVISION OF THE U.S. COPYRIGHT LAW, at 5 (Comm. Print 1961).

178. *Id.*

179. O’Dowd, *supra* note 137, at 260.

market for their prerecorded music.”<sup>180</sup> Moreover, studies indicate that record labels remain highly relevant to creative expression in the era of digital music distribution.<sup>181</sup> Far from the egalitarian recording industry some hoped the Internet would engender, music purchases are still highly concentrated around hit songs backed by major record labels.<sup>182</sup> The fundamental question that remains is how to encourage sound recording copyright holders to invest in the next generation of creativity in a digital music marketplace.

As far back as 1978, the Copyright Office recognized the need for a public performance right in sound recordings, noting: “Sound recordings are creative and their unauthorized performance results in both damage and profits. To leave the creators of sound recordings without any protection or compensation for their widespread commercial use can no longer be justified.”<sup>183</sup> Moreover, history has demonstrated that compensating creators financially fulfills a Constitutional command. The Supreme Court has recognized the relevance of economic incentives, holding that “the economic philosophy behind the clause empowering Congress to grant patents and copyrights is the conviction that encouragement of individual efforts by personal gain is the best way to advance public welfare through the talents of authors and inventors in ‘Science and useful Arts.’”<sup>184</sup>

Ultimately, the Constitution does not mandate that sound recordings be granted parity to any other artistic or literary works, or that any one copyright owner receive the same compensation as any other. Rather it requires sufficient incentive for authors to continue to create new works for the betterment of the public welfare. What is increasingly clear is that

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180. *Id.*; see also Melinda Newman, *A&R: Squeezed by Costs. Scouts Increasingly Scour the Net*, BILLBOARD MAG., Apr. 10, 2004, at 1, 60 (discussing the new approaches to finding talent and to nurturing talent by a record company faced with increased budget cuts).

181. See Glenn Peoples, *The Long Tail: Don't Bury the Blockbuster Yet. The Most Popular Digital Tracks Account for More Sales Every Year*, BILLBOARD MAG., Nov. 14, 2009, [http://www.billboard.biz/bbbiz/content\\_display/magazine/features/e3i35ed869fd929ccdcca52ed7fd9262d3](http://www.billboard.biz/bbbiz/content_display/magazine/features/e3i35ed869fd929ccdcca52ed7fd9262d3).

182. *Id.* (“The great hope for digital music was that it would make the recording industry more egalitarian . . . [s]o far, at least according to Nielsen SoundScan data on U.S. music sales . . . that revolution hasn't arrived.”); see also Chris Keall, *The 'Long Tail' Myth*, NAT'L BUS. REV., Feb. 9, 2009, <http://www.nbr.co.nz/opinion/chris-keall/the-long-tail-myth> (“Will Page and Gary Eggleton at the MCPS-PRS Alliance—a UK body that collects royalties for musicians . . . have analysed a year's worth of downloads from a well-known Internet music store. They found that of the 13 million tracks available, 52,000—just 0.4 per cent—accounted for 80 per cent of downloads.”) (quoting Richard Webb, *Online Shopping and the Harry Potter Effect*, 2687 NEW SCIENTIST 52 (Dec. 20, 2008)).

183. *Performance Rights In Sound Recordings: Hearings Before the Subcomm. on Courts, Civil Liberties and the Admin. of Justice of the H. Comm. on the Judiciary*, 95th Cong. 117 (1978).

184. *Mazer v. Stein*, 347 U.S. 201, 219 (1954).



digital technologies have drastically undermined the ability of sound recording copyright holders to recoup investments and provide a robust variety of music to the public.<sup>185</sup> To right this imbalance, Congress is constitutionally encouraged to act. Sound recording performance royalties provide artists and copyright owners with enhanced incentives to create, the benefits of which have already been recognized by Congress.<sup>186</sup> In our increasingly digital society, the assumption that sound recording copyright owners are adequately compensated by balances struck decades ago does not pass reasonably scrutiny. This Note has attempted to propose a method by which Congress can better ensure that sound recording copyright holders are compensated in the long-term, thereby facilitating the dissemination of artistic creations that benefit artists and consumers alike. While the PRA may fulfill Congress' duty today, it is questionable whether such royalties are sufficient to sustain the creativity that Congress is entrusted to promote. For it is not terrestrial performances that threaten the viability of the industry, but rather, those performances which exist online, exploit sound recordings, and fail to compensate the copyright holder. It is incumbent upon Congress to ensure that those who host performances that increasingly substitute for sound recording reproduction royalties compensate the copyright holders in an equitable and sustainable manner.

#### CONCLUSION

Until such a solution is considered, the PRA represents the latest in a long series of contentious proposals advocated by sound recording copyright owners who are continually fighting for a right that musical work copyright owners have enjoyed for decades. History has proven that while Congress has been receptive to these concerns, their response has led to entirely new debates over the scope of music copyright law in the United States. Both record labels and terrestrial broadcasters fear that the proverbial sky is falling, and that the PRA represents either the panacea or Pandora's Box for the music industry.

The fighters in this brawl are sophisticated heavyweights. In one corner of the ring are record labels—an industry in distress, which has consistently struggled to adapt to the digital music market. In the other are the broadcasters—a media behemoth whose cries of “promotional

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185. Bill Holland, *Big Publishing Advances Dry Up for Most New Acts*, BILLBOARD MAG., Apr. 5, 2003, at 1, 66 (quoting Sony/ATV Music Publishing chairman Paul Russell as saying that his company is becoming “increasingly circumspect” as “record labels are signing fewer new artists and making fewer new recordings.”).

186. See *supra* note 29 and accompanying text.

compensation” seem increasingly unconvincing in our digital world. Standing on the sidelines are music fans that rely more and more on digital performances, unknowingly thinning record label wallets, and perhaps stalling creativity, in the process.

Fighting their own battles are the webcasters, small and large, continuously opposing the royalty determinations of the CRB. For over ten years, sound recording copyright owners and webcasters have faced off in appellate proceedings and Congressionally-mandated negotiations, with webcasters continuously threatening to shut their doors for good. And yet despite these difficulties, the PRA seeks to add terrestrial broadcasters to the growing list of media outlets which must submit to the judgment of the Copyright Royalty Board. If the messy battles waged between record labels and webcasters over statutory royalties provide any precedent, terrestrial stations may face an altogether new brawl if the PRA passes.