

The Music Industry in Flux: Reconsidering the Performance Right

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Introduction

A songwriter writes a song for a music publisher. A singer records the song. Subsequently, a record company releases it for sale to the public and then a radio station plays the song for thousands of listeners who like it and buy the record. In this process, everyone involved benefits: the songwriter, the music publisher, the record company and the radio station profit, and the public gains a new song and a new recording of that song.

For much of the twentieth century, this commercial paradigm was reenacted over and over again, and for the most part the various players in the business were reasonably content with their slice of the pie, as determined through copyright law by Congress and the courts. As a result, the American music industry became a thriving, multibillion-dollar business.

After years of relatively peaceful coexistence, the careful balance among the various stakeholders was upset in the 1990s with the large-scale convergence of personal computing, digital music, and the Internet. Recording artists and record companies in particular viewed digital audio transmissions (both legal transmissions and pirated downloads) as free substitutes for traditional record sales—which threatened their livelihood. Songwriters and music publishers, however, were less concerned; they felt reasonably assured that they would be fairly compensated in the new digital environment. Why? The difference in the two reactions goes to the heart of U.S. copyright law and the concept of the performance right.

Songwriters and music publishers felt comfortable with digital audio transmissions of their songs, because U.S. copyright law traditionally draws a distinction between “musical works” (songs) and “sound recordings” (CDs, digital audio files). As a result, songwriters and music publishers are compensated differently from recording artists and record companies. Traditionally, songs receive two kinds of revenue streams from copyright, whereas recordings receive only one. Copyright law specifies that songwriters and music publishers are to be paid in two ways: in mechanical royalties paid out when sound recordings are retailed to the public and in performance royalties paid for public performances of songs on radio, television, in concert, and on the Internet or any digital transmission mechanism. Performance royalties are mandated by the performance right embedded in U.S. copyright. Because the performance right encompasses commercial digital audio transmissions to the public, songwriters and music publishers felt well insulated and protected by U.S. copyright law.

In marked contrast, recording artists and record companies felt threatened by digital audio transmissions of their recordings because, unlike songwriters and music publishers, they made money only when their recordings were retailed to the public.

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Under U.S. copyright law, artists were not eligible for performance royalties, regardless of where their recordings were performed and who profited.

Faced with a looming new digital divide, Congress responded twice in the 1990s with legislation modifying the U.S. Copyright Act in order to create a new stream of royalty revenue for recording artists and record companies: a public performance right in sound recordings. However, the performance right was narrowly applied only to the emerging technology of digital audio transmissions.

We explored whether, in light of current technologies and copyright law, performance right should be extended beyond the digital realm to cover all performances of sound recordings.

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What Is the Performing Right—and What Should It Be?

Because U.S. copyright law has evolved over time to accommodate new technologies as they have emerged (player pianos; sound recordings on phonographs; radio; analog and digital tape recording devices for the home; personal computers and the Internet), copyright's mechanisms for protecting and compensating those who create music are sometimes relics of a bygone era that make more sense when viewed in historical context than in terms of today's business realities. The concept of the public performance right is a case in point.

Since 1897, U.S. copyright law has recognized what is known as the public performance right. The U.S. Copyright Act currently states, in Section 106, that “the owner of copyright under this title has the exclusive rights to do and to authorize any of the following: (4) in the case of literary, musical, dramatic, and choreographic works, pantomimes, and motion pictures and other audiovisual works, to perform the copyrighted work publicly.”

With regard to music, the performance right entitles the holder of a “musical work” (i.e., a song—as opposed to a “sound recording”) to receive payment for the public performance of that composition. Songwriters, who create the musical works (songs), and music publishers, who administer copyrights on behalf of songwriters, are entitled to public performance royalties.

For almost as long as the performance right has been recognized in U.S. copyright, performing rights organizations (PROs) have been responsible for policing musical performance rights and collecting licensing royalties related to those rights. In the U.S., the PROs are the American Society of Composers, Authors, and Publishers (ASCAP, founded 1914), Broadcast Music Inc. (BMI, founded 1940), and the Society of European Stage Authors and Composers (SESAC, founded 1930).

ASCAP has some 240,000 writer and publisher members, with more than 8 million musical works.¹ BMI represents more than 300,000 writers and publishers with about 6.5 million works.² A distant third, SESAC (the only for-profit PRO) represents about 4,000 songwriters and 3,000 publishers, although it does include among its writers such famous names as Bob Dylan and Neil Diamond.³ ASCAP reported revenue of \$749 million for the fiscal year 2005 (an increase of 6.7% over the previous year)⁴; BMI reported \$728 million for that same year (an increase of 8.3% over the previous year)⁵. SESAC's revenues currently amount to about 5% of all performing rights revenues, or about \$70 million annually.⁶

On behalf of songwriters and music publishers, the performing rights organizations collect licensing fees from anyone who plays music in public for profit—radio stations and networks; television stations, networks, and cable systems; concert presenters; symphony orchestras; colleges; wireless telephone companies (ring tones); Internet webcasters; hotels and restaurants (live and recorded background music).

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These performance royalties collected by PROs are different from *mechanical royalties*. While performance royalties are payable to songwriters and music publishers when their works are performed publicly, mechanical royalties are payable when the musical work (the song) is reproduced for public distribution and sold—such as on a CD or cassette, or as an Internet download. A song’s mechanical royalties are also payable to the songwriter and music publishers, and a compulsory rate for mechanical royalties is determined every 2 years by the U.S. Copyright Royalty Board, an independent agency created by Congress. As of 2006, the rate is 9.1¢ for songs of 5 minutes or less or 1.75¢ per minute.

For almost 100 years, the public performance right in the United States was limited strictly to musical compositions and not extended to sound recordings. Congress revised this distinction for the first time with two key pieces of legislation: the 1995 Digital Performance Right in Sound Recordings Act (DPRA) and the 1998 Digital Millennium Copyright Act (DMCA). The DPRA created, for the first time in U.S. copyright law, a performance right for sound recordings that enabled recording artists and copyright owners (usually record companies) to collect performance royalties, limited to digital audio transmissions. The DPRA also created a compulsory license mechanism for “noninteractive” digital audio transmissions. This allowed digital broadcasters to use music without needing to seek explicit permissions from recording artists and record companies, provided the digital broadcaster paid the license fees. (An “interactive” service is one that allows a listener to choose the songs being played, such as in a downloading service, e.g., Apple’s iTunes.) With regard to performance rights, the 1998 DMCA then slightly modified the DPRA’s provisions to take into account the emergence of streaming webcasts as a new source of digital audio transmissions. It also extended the compulsory license to those that remained noninteractive.

A nonprofit agency, SoundExchange, was created in 1996 to handle collection and disbursement of these new digital performance royalties, which are split three ways: 45% to featured artists, 5% to backing musicians and vocalists, and 50% to copyright holders (usually the record companies). SoundExchange distributes performance royalties collected from several forms of digital audio transmission, including satellite radio services (XM and Sirius), webcasters and webcasters of radio simulcasts, and subscription cable and satellite television services delivering music (Music Choice, Muzak). Thus far, recording artists and record companies have been limited to these avenues alone in receiving public performance compensation.

As of early 2006, after 10 years of existence, SoundExchange had distributed nearly \$32 million to recording artists, musicians, and copyright owners (record companies).⁷ It was a tidy sum, and recording artists and record companies hailed their new digital performance royalty as a good start. By way of comparison, however, in 2005 alone, ASCAP and BMI distributed \$1.27 billion to its songwriters and music publishers.⁸

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Is this significant disparity in revenue fair?

Many have argued that it is not. Numerous recording artists, the Recording Industry Association of America (RIAA, the trade association that represents record companies), the American Federation of Musicians (AFM, the musicians' union), and SoundExchange have all argued that the public performance right in sound recordings for artists and copyright holders should be extended beyond streaming webcasts, digital music subscription services, and satellite radio transmissions to include standard terrestrial FM and AM radio and television broadcasts.

In a 2006 press release celebrating the tenth anniversary of the DPRA, SoundExchange voiced the need for a broader performance right: "While the DPRA was a major step forward for artists and record companies in the United States, U.S. copyright owners and performers are still not paid when their recordings are used by radio and television stations, stadiums, and other commercial establishments that use music, unlike their counterparts in the rest of the world. The digital performance right in the U.S. was a good beginning, but the next step is to secure a full performance right that will correct this international imbalance and allow performers and copyright owners to collect their foreign royalties. A full performance right will also ensure a level playing field for music services in the U.S., where certain digital services, such as XM and SIRIUS satellite radio, and webcasters, such as Live 365, AOL and MSN, must currently pay royalties, while other broadcasters, such as traditional radio and television stations, are allowed to earn huge profits from playing recordings without compensating artists and labels."⁹

This expansion of a performance right in sound recordings would be a boon, of course, to recording artists and record companies - in a sense, "found money." But what would that mean for songwriters and music publishers? Would the gain for sound recordings amount to a loss of income for songs? If the total of aggregate payments from broadcasters for the use of music is close to its maximum level, paying artists and record companies might force a reduction in present or future payments to songwriters and publishers. For this reason, there has been persistent speculation that ASCAP, BMI, and SESAC tacitly oppose extending the performance right for sound recordings.

Finally, what is the public interest in a potential expansion of the performance right for sound recordings? How would such a copyright revision benefit—or harm—the music audience?

To understand the arguments for and against such a significant change in copyright law, it is useful to briefly review the evolution of musical copyright in America.

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Playing Catch-Up with Technology: Musical Copyright and the Performance Right

In 1790, when the U.S. Congress passed America's first copyright act, its provisions were limited to protecting the written word. Musical expression was not protected by copyright until 1831, with the first general revision of U.S. copyright law, in which musical compositions in traditional notated form (such as printed sheet music) first came under copyright protection.¹⁰ The protection was limited, however, to prohibiting unauthorized printing and vending of music.¹¹

The need for a "public performance right" in copyright did not become evident until the late 1800s, when musical theater emerged as a popular form of entertainment in America. As it turned out, absent copyright protection for public performances, pirate theater owners could "steal" the songs from a popular theatrical production and stage competing musicals, performing compositions free of any payments to the authors and publishers.¹²

To combat this injustice, with its 1897 revision of the Copyright Act, Congress created a "performance right"—the first protection for American composers against unauthorized public performances of music. With this revision, composers gained the exclusive right to perform their compositions—or to assign that right to a music publisher or to license that right to other performers.¹³ However, at that time, the only way music publishers and composers could enforce this right was by insisting that anyone who publicly performed copyrighted music had to have a purchased copy of sheet music.¹⁴ As a practical matter, then, the new public performance was difficult to enforce.

In 1909, the next general revision of the Copyright Act took into account two innovative musical technologies—player piano rolls and phonograph recordings—which provided, for the first time, mechanical reproductions of music. The new act created a copyright against unauthorized mechanical reproduction of musical compositions. The new Copyright Act also added, in Section 115, a compulsory license for recording musical compositions. This compulsory license went into effect as soon as a copyright holder authorized its first mechanical reproduction and allowed all subsequent music users to record the song simply by paying a statutory rate set by Congress (and its U.S. Copyright Royalty Board)—originally 2¢ per song.

Significantly, though, the 1909 copyright revision protected only songwriters and music publishers—not recording artists or record companies. In other words, Congress chose to create neither a copyright in sound recordings (this did not come until 1972) nor a performance right in sound recordings.

Surely one reason for this omission is that the recording industry was still in its infancy at the turn of the century. Musicians were not sufficiently organized to effectively advocate for their own copyright protection and many viewed the phonograph as little more than a toy.

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Thus, despite the significant sales success of some pioneering recording artists in the early 1900s (for example, Enrico Caruso with the Victor label beginning in 1904), Congress apparently did not see a need to protect the recorded work and income of the artists or the record companies at this time.

Although a public performance right was created for songwriters and music publishers in the 1909 Act, it was nearly impossible for them to police and enforce it. The key development that led to true enforcement of public performance rights was the 1914 creation of the American Society for Composers, Authors, and Publishers. Composers and music publishers could appoint ASCAP as the guardian of their public performance rights, and ASCAP would collect money on their behalf and distribute it among them. In theory, ASCAP could negotiate performance licenses on behalf of all ASCAP's members with hotels, restaurants, and cabarets where music was played or performed. In return for paying an annual license fee, the establishment would be allowed to perform ASCAP-represented music.

That was the theory. Initially, however, hotels and restaurants rebuffed ASCAP's attempts to license music and collect royalty money for public performance. It took a key lawsuit to confirm that ASCAP had the right to collect from establishments that used music as atmospheric background. The 1909 Copyright Act stated that a performance right existed only in compositions that were performed "for profit." In *Victor Herbert v. Shanley's Restaurant* (1917), the Supreme Court ruled that hotels and restaurants did indeed use music "for profit." In his opinion, Justice Oliver Wendell Holmes wrote: "It is true that the music is not the sole object, but neither is the food, which probably could be got cheaper elsewhere..... If music did not pay, it would be given up. If it pays, it pays out of the public's pocket. Whether it pays or not the purpose of employing it is for profit, and that is enough."¹⁵

(It is interesting to note that copyright protects other kinds of artists from unauthorized use of their work in public places, although few artists benefit from public exposure as handily and lucratively as songwriters. Literary authors, for instance, also have a right of public performance, covering, for example, the recitation of a poem or the reading of a book chapter in front of a paying audience. Painters and sculptors are protected by a right of display. However, both these classes of artists are much more constrained than songwriters in their abilities to collect revenue streams from public use of their works. Literary authors lack an ASCAP-style organization to police public performance of their works; instead, authors or their literary publishers must police these infringements themselves. Because the right of display is conveyed when a painting or sculpture is sold, visual artists are even more limited in their ability to collect when their work is seen by the public. The purchaser of visual art can display the work at will, with no need for a license—provided the artwork is only physically displayed and not captured in a television broadcast or film.

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artwork is only physically displayed and not captured in a television broadcast or film. Songwriters have benefited enormously from music publishers' aggressive stance on public uses of their creative work, whereas literary authors and visual artists—represented only by book publishers and gallery owners—have not.)

Following the landmark decision in the case of *Victor Herbert v. Shanley's Restaurant*, ASCAP quickly became a well-entrenched part of the music business, collecting from hotels, restaurants, and bars for the songwriters and music publishers it represented. Once the Supreme Court established that music played in restaurants and bars was for profit and subject to performance rights, it was not a very big stretch for ASCAP to extend itself to the new technology of radio.

Commercial radio emerged in the U.S. in 1920. In 1922, ASCAP began pressing the major radio owners to pay for a license to play ASCAP-represented songs on the air. After all, ASCAP argued, it represented 90% of all music available for airplay.¹⁶ Radio owners balked, suggesting that radio promoted songs and helped to sell records and sheet music (an argument that radio would apply again in the future toward those seeking a performance right in sound recordings).¹⁷ However, the argument against ASCAP did not prevail. In a key case (*M. Witmark & Sons v. L. Bamberger & Co.*), the New York music publisher Witmark sued the Bamberger department store of New Jersey for violation of Witmark's performance rights in radio broadcasts operated and sponsored by Bamberger. In its 1923 decision, the federal district court of New Jersey ruled that radio performances are indeed made publicly for profit.¹⁸

ASCAP did its job well. By 1939 (just 25 years since its founding), it could claim some 1,100 songwriters and 140 publishers as members¹⁹ and \$6.9 million in overall revenue²⁰—of which more than 60% was revenue from radio licenses.²¹ However, ASCAP functioned as a virtual monopoly, and not surprisingly—because it could—the Society indulged in high-handed treatment toward both songwriters aspiring to be members and radio stations and radio networks from which it extracted licensing fees. (Although SESAC was established in the U.S. in 1930, in its early years it concentrated almost exclusively on representing European classical music and operettas; SESAC's presence did not offset ASCAP's dominance as a licensor of music.)

During the 1930s, ASCAP's membership policies were extremely restrictive. To be admitted as a member, a writer had to first have written a minimum of five published songs. Because publishers only accepted songs written in mainstream popular style, the published-song requirement presented an insurmountable hurdle to composers working in vernacular traditions. Country, western, and blues music—earthy, working-class musical styles—were mostly ignored by music publishers and almost completely excluded from ASCAP.

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Regional styles of music were likewise ignored. Indeed, ASCAP's member publishers were located in only nine states,²² and the membership of ASCAP was so concentrated in New York and Hollywood that just thirteen music publishers (all of which were closely linked with Hollywood studios²³) received 60% of the performance money ASCAP paid to publishers.

As the sole performance rights organization, ASCAP also played a strong hand when negotiating license fees with broadcasters. In 1936, it was charging radio 5% of advertising receipts as a licensing fee.²⁴ With renewal of licenses looming as of December 31, 1940, ASCAP took advantage of its monopoly status and threatened to triple these fees.²⁵ Rather than accept such stiff terms, the radio networks and station owners, represented by their trade association, the National Association of Broadcasters (NAB), launched their own performance rights licensing agency and song catalogue to counter ASCAP's monopoly. In September 1939, broadcasters announced the formation of Broadcast Music Incorporated (BMI), which was officially declared operational in February 1940. Throughout that year, BMI signed new songwriters and music publishers in an effort to offer alternative music to ASCAP's catalogue. By the December 31 deadline of that year, BMI had licensed 36,000 copyrights held by 52 music publishers; clearly, songwriters and music publishers had not been fully served by ASCAP.²⁶

In April 1940, ASCAP presented its new terms to broadcasters. Although the rates were not tripled, as first suggested, proposed new licensing fees did increase by more than 60%.²⁷ The NAB rejected these terms, and ASCAP's contract with radio broadcasters expired at midnight December 31, 1940; the year 1941 opened with no ASCAP compositions being played on network radio and their affiliate stations. The only exceptions were about 200 independent stations that individually came to terms with ASCAP. Yet, despite dire predictions of dead air from ASCAP and its publishers, radio soldiered on airing new songs from BMI as well as works in the public domain (such as Stephen Foster's "I Dream of Jeannie with the Light Brown Hair").

By November 1941, after foregoing nearly \$300,000 a month in potential licensing revenue, ASCAP surrendered in the great radio war, signing agreements with the NBC and CBS radio networks and their affiliates.²⁸ New, more acceptable licensing terms were extended to radio. In place of its previous demands, ASCAP's new contract contained fees little more than one-third of what had been proposed in 1939.²⁹

In BMI, the radio broadcasters had created an alternative to ASCAP. But the U.S. government wanted assurances that neither licensing organization would indulge in unfair business practices toward either songwriters or broadcasters.

Therefore, at the same time that the ASCAP versus BMI radio war was being waged, the U.S. Justice Department filed antitrust actions against both BMI and

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ASCAP, alleging eight violations of the Sherman Antitrust Act,³⁰ including price-fixing, restraints of trade, and discrimination against songwriters.³¹ BMI quickly settled with the Justice Department in January 1941, agreeing to a consent decree that governed its operations. ASCAP signed its consent decree in March 1941.

The consent decrees were intended by the Justice Department to curb the PROs' excesses in relation to both radio broadcasters and the songwriters and music publishers. Provisions of the consent decrees affected ASCAP more than BMI. In ASCAP's case, the decree abolished what had been a self-perpetuating board of directors and ended the songwriters' membership requirement of five published songs (replacing it with one).³² In the case of both PROs, two key rules were established. First, the consent decree allowed ASCAP- and BMI-member publishers to negotiate licenses directly with broadcasters or other licensees if they chose.³³ Second, the consent decrees designated federal "rate courts" to settle disputes between broadcasters and PROs over license fees.³⁴ The rate court would determine a reasonable fee if the broadcaster and the PRO could not agree. In this way, the Justice Department ensured that neither ASCAP nor BMI could ever again withhold its musical catalogue from a broadcaster who was willing to pay a license.

Despite the restrictions of the new consent decree and fresh competition from BMI, ASCAP members thrived; the PRO's distributions to members nearly tripled in the war years—from \$2.8 million in 1941 to \$7.3 million in 1945.³⁵ Though for many years it lagged behind ASCAP, BMI saw its income from broadcasters double between 1941 and 1949—from \$1.8 million to \$3.5 million.³⁶ Over time, BMI grew to become a virtual equal to ASCAP. By 2005, ASCAP brought in \$749 million in licensing revenue, and BMI was a close second with \$728 million.³⁷ Despite being a distant third in membership and revenues, SESAC offered an alternative model for the distribution of performance royalties that appealed to some American songwriters and music publishers.

Another significant change was experienced in 1972 with the creation of a copyright in sound recordings. Congress made this change in the U.S. Copyright Act for the purpose of protecting sound recording copyright owners (usually record companies) from record piracy—the unauthorized duplication of legal recordings, which was seen at that time as an emerging threat to labels. Although recordings had grown to be a major U.S. cultural industry, no available federal remedy existed until as late as the early 1970s to stop unauthorized reproduction of musical recordings. With this change in 1972, copyright owners (again, usually record companies) gained the exclusive right of reproduction in sound recordings under the U.S. Copyright Act.³⁸

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In summary, the successive developments of musical copyright, the performance right, and the organizations that police the performance right can all largely be characterized as arising from a pursuit (and protection) of revenue streams from emerging technologies. Those organizations or industries that wielded sufficient clout at key moments in history were able to prevail upon Congress and the courts to view their pursuit of revenue as fair and for the greater good.

Thus, music publishers were able to gain both the performance right and a mechanism—ASCAP—to collect and distribute performance royalties. ASCAP was able to successfully collect revenue from radio broadcasters, but when ASCAP overreached, radio broadcasters were able to fight back by creating an alternative to ASCAP, BMI. Similarly, when record companies saw their revenues threatened by piracy, they acquired a right of reproduction in sound recordings secured by the federal government.

A Seismic Shift

For decades, the performing rights picture in America remained essentially unchanged, but the advent of the Internet and digital transmission of music triggered a seismic shift in the policing of copyright for the music industry. Through most of the twentieth century, a two-sided “backstop” prevented unauthorized copying from getting out of hand. Copyright holders could feel reasonably assured that, even if musical recordings could be duplicated, the limitations of analog recording meant that serial recording (mass duplication of one copy upon another) would cause a noticeable degradation in sound quality—third or fourth-generation copies were inferior to commercially released originals. Similarly, large-scale serial duplication (i.e., pirated LPs and tapes) of musical recordings required a significant investment in manufacturing capability as well as the creation of some means of distributing unauthorized product to the public. Because of the technical limitations of home-made tape copies and the cost of large-scale disc or tape piracy, the U.S. recording industry found it relatively easy to protect legal releases.

Unlike analog tape copies of a musical recording, however, digital copies are identical and perfect reproductions of the original. With home computer software, digital copies are also quick and easy to make for virtually anyone who can use a personal computer. Simultaneously, the Internet has made digital transmission of copies almost cost-free. As one attorney has put it, “the Internet is a copy and distribution machine of unimaginable power. Once a work is posted on the Internet, it may be serially copied a million times over, with each copy a perfect reproduction of the last.”³⁹

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Recording artists and record companies quickly realized that digital audio tracks (both legal transmissions and pirated downloads) were eroding hard sales of CDs, tapes, and records—and could eventually come to supplant those hard sales completely. Advocates quickly called for licensing protections in this brave new digital world. Congress reacted swiftly, passing the 1995 Digital Performance Right in Sound Recordings Act to create a new limited performance right for digitally transmitted sound recordings for recording artists and record companies. The stated legislative intent behind the DPRA was to “protect the livelihoods of the recording artists, songwriters, record companies, music publishers, and others who depend upon revenues from traditional record sales, without hampering the arrival of new technologies, and without imposing new and unreasonable burdens on radio and television broadcasters, which often promote, and appear to pose no threat to, the distribution of sound recordings.”⁴⁰ In essence, Congress was compensating recording artists and record companies for CD sales lost to new digital recordings distributed over the Internet. Significantly, however, Congress did not see fit to extend the sound-recording performance right beyond the realm of digital transmission, perpetuating the license fee advantage that analog radio and television broadcasters had long enjoyed.

Technology marches ahead swiftly and inexorably, however, often quickly outpacing both legislation and judicial findings. By 1998, new legislation was needed to address emerging digital music services. When Congress had passed the DPRA, it anticipated that Internet subscription services would be the most likely form of digital audio transmissions.⁴¹ Thus, when streaming webcasts emerged, Congress soon realized the pressing need to take into account these popular new transmissions; consequently, Section 405 of the DMCA was drafted for this purpose.⁴² This section of the DMCA provided webcasters with a compulsory license, granting the automatic right to use sound recordings provided they paid license fees.⁴³

The DMCA’s accommodation of streaming webcasting was a good stopgap measure by Congress; in order for webcasting businesses to move forward, the industry needed a ready mechanism for licensing music. Unfortunately, the DPRA and DMCA did not settle the issues of copyright and compensation for digital audio transmission. Indeed, those two pieces of copyright legislation now appear to be little more than first steps in a process that Congress will have work with over time to bring America’s copyright system into alignment with rapidly evolving digital technology. Two recent bills introduced in Congress point out some of the challenges involved in determining how songwriters, music publishers, recording artists, record companies, and others in the music business can all be equitably compensated for their creations.

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One new technology that spurred a proposed copyright amendment by Congress is a portable device about the size of a pack of cards that functions as both a satellite radio receiver and a recorder of MP3 digital audio files with a capacity of fifty hours of programming. The receiver/recorder costs about \$400 and is sold under such brand names as the Pioneer Inno, Samsung Helix, and Sirius S50.

For satellite radio broadcasters and consumers, the device represents a delightful innovation—portable, on-the-go listening and storage of satellite radio programming. Recording artists and record companies, however, have expressed concern that because of a quirk in copyright law such devices allow the XM and Sirius digital satellite radio services to offer digital recordings as a digital music transmission rather than a mechanical reproduction and distribution. What is the practical difference? A digital transmission is subject to a compulsory license as a performance of a sound recording, whereas a mechanical distribution (i.e., a recordable track or a download) requires separate negotiations with recording companies and artists for what they view as a recording exactly analogous to a CD track or an iPod download.

In response to this new technology, the Platform Equality and Remedies for Rights Holders in Music Act of 2006 (PERFORM Act, S. 2644), an amendment to Section 114 of the Copyright Act sponsored by Senators Dianne Feinstein (D-CA), Lindsey Graham (R-SC), and Senate Majority Leader Bill Frist (R-TN), has been advanced in an effort to ensure that those digital transmissions that allow recording and sorting of individual digital music tracks are treated as mechanical distributions of recordings (i.e., downloads) rather than performances.⁴⁴ The PERFORM Act calls for: (1) parity of music licensing fees among cable, satellite, and Internet companies; and (2) content protection, requiring mechanical distribution (download) licenses for services that provide recording devices, and also requiring webcasters to stream their transmissions in DRM-protected formats (i.e., encrypted formats) rather than open-standard MP3 files.⁴⁵

Not surprisingly given the financial stakes, in May 2006, just weeks after the PERFORM Act bill was announced, the Recording Industry Association of America (RIAA) filed suit in New York district court against XM Satellite Radio, accusing XM of “massive wholesale infringement” of copyright for the sale of its handheld satellite radio and digital recorder, the Pioneer Inno. The RIAA is seeking \$150,000 in damages for every song recorded by XM customers on the devices.⁴⁶

In his testimony to the Senate judiciary committee on Parity, Platforms, and Protection, Edgar Bronfman, chairman and CEO of the Warner Music Group, gave some insight into the concerns of record companies that have led to this lawsuit: “Satellite services are now offering new devices, which can essentially

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transform a satellite service like XM and Sirius into a distribution service like iTunes. Many of the satellite devices about to be released are not only similar to iPods—but iPods linked to a free iTunes supply feature.....”

“What’s that old saying? ‘When I see a bird that walks like a duck and swims like a duck and quacks like a duck, I call that bird a duck.’ Well, when I see a device that permits consumers to identify the specific tracks they want from a satellite broadcast, record them and library them for future use, I call that device an iPod and I call the satellite service making that device available a download service. What is clear to everyone is that these services no longer resemble and will increasingly stray from our collective understanding of what constitutes a traditional radio service.”⁴⁷

XM’s opposing position on the Inno has been articulated by executive vice president of programming Eric Logan: “Some have mischaracterized them as download radios; they’re not. Unlike download services, XM subscribers never own the programming they record from XM: it cannot be burned to a CD, transferred to other radios, or uploaded to the Internet.”⁴⁸

Thus, a major question to be addressed is one of essence: when is a digital recording a download (a mechanical reproduction) and when is it a performance? Interestingly, the Sirius satellite radio company, which has its own receiver/MP3 recorder (the Sirius S50), chose to agree to a downloading license with the RIAA and the record companies; the terms of that license have not been publicly disclosed. Thus, one satellite service, Sirius, seems to have accepted the concept that its recordable digital transmissions might be equivalent to a download. XM, however, sees its digital broadcasts as similar to terrestrial radio, characterizing broadcast music as “performances” that consumers can record at home under terms of the Copyright Act.

The issues at stake in the PERFORM Act and the RIAA’s lawsuit against XM are likely to be raised yet again as terrestrial radio stations increasingly move into digital broadcasting, also known as HD Radio. As of late 2005, more than 570 stations in the U.S. were broadcasting in the new digital format.⁴⁹ For broadcasters, the new technology provides two to four distinct new digital signals within their existing radio spectrum, allowing a radio station to substantially increase both programming and advertising revenue. For listeners, HD Radio not only offers a cleaner, high-definition signal but, like XM’s Inno, also offers the same opportunity to record, store, and organize digital programming—it is another digital signal to be captured by computer. While broadcasters will be eager to advertise the advantages of such technology, recording artists and record companies will expect to be compensated for what they will continue to view as digital distributions (i.e., downloads). (Interestingly, in yet another quirk of current copyright law, because HD Radio stations are for the most part owned by traditional terrestrial broadcasters,

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they have been grandfathered in as if they were not digital broadcasters. Thus, HD Radio stations are exempt from paying digital performance royalties on sound recordings to artists and record companies, unless the broadcaster creates an HD subscription service or interactive transmission.)⁵⁰

The same basic question—what constitutes a download and what constitutes a performance—also comes to the fore in a recent bill drafted in the House of Representatives, the Section 115 Reform Act (SIRA) of 2006. Overall, the SIRA focuses on three main areas related to digital audio transmissions and compulsory licenses: blanket licensing, creating designated agents to handle licensing and royalties, and appropriate royalty rates.⁵¹ Nearly all the stakeholders involved—songwriters and music publishers, recording artists and record companies, digital music services and broadcasters—want some sort of reform in Section 115 to streamline licensing of digital audio transmissions and ensure that all parties receive compensation for the use of their works. However, a point of contention has emerged between songwriters and music publishers on one hand and digital music services on the other. Songwriters and music publishers contend that streaming webcasts are in fact both a public performance and a distribution (a download) of their musical works; both scenarios require a royalty payment. The digital music services, however, believe that the streaming webcasts should be more fairly characterized as either a performance or a download. That way, the music services would pay one royalty or the other—not both.

In comments submitted at the House subcommittee hearing on the SIRA, the Copyright Office agreed with the digital music services: “The Copyright Office strongly urges the SIRA not characterize streaming as a distribution or as a form of ‘digital phonorecord delivery.’Characterizing streaming as a form of distribution is factually and legally incorrect and can only lead to confusion in an environment where the concept of distribution by means of digital transmission is already the subject of misguided attacks.”⁵²

As Congress moves forward in evaluating the SIRA and the PERFORM Act, it is imperative that issues of public performance and downloads be considered and settled equitably. Naturally, all the stakeholders in sound recordings—songwriters, music publishers, artists, and record companies—want to see maximum control over their works as well as maximum remuneration.

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On Extending a Full Performance Right in Sound Recordings

Congress can continue to address copyright law in piecemeal fashion to deal with new digital audio technologies as they emerge—as Congress did in 1995 with DPRA and in 1998 with DMCA, and as it is contemplating doing with the PERFORM Act and the SIRA. The result will be to create copyright law that is increasingly technology specific and difficult to apply as unanticipated new technologies emerge. An attractive alternative might be to consider a simpler, more straightforward approach, simply extending the performance right in sound recordings beyond digital transmissions to include all performances of sound recordings. Such a rights extension immediately creates parity in licensing between terrestrial broadcasters and the various new media firms (Internet, satellite radio, etc.) as well as parity in performance rights between the song community (songwriters, music publishers) and the recording community (recording artists, record companies).

This issue has come up many times before, but Congress has consistently and repeatedly shied away from conferring a performing right in sound recordings to protect and benefit recording artists and record companies; more than twenty-five bills intended to create a performance right in sound recordings have been voted down in Congress. Given the rapidity with which the American public is embracing new digital audio formats, however, it may be time for Congress to reconsider.⁵³

Arguments For

The principal arguments for extending the performance right in sound recordings beyond digital transmissions for artists and record companies include the following, which will be discussed at length below:

- U.S. copyright law is out of step with international copyright law on this issue and should be harmonized with it.
- Radio and television broadcasters receive essentially a “free ride” in their use of musical recordings, while new digital media, such as webcasters and satellite radio, must pay the new performance royalty for digital transmissions.
- Performance royalties for sound recordings would provide financial incentive for recording artists and record companies to create new works.
- Recordings give life to songs and musical compositions, allowing them to be heard.

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International harmony? Advocates of extending the performance right in sound recordings beyond digital transmissions often point to international law on the subject. Many countries around the world recognize performers' and copyright holders' performance rights in sound recordings.

The international treaty governing the performance right in sound recordings dates from 1961. Officially known as the International Convention for the Protection of Performers, Producers of Phonogram Recordings and Broadcasting Organizations, the treaty is more commonly known as the Rome Convention. Article 12 of the Rome Convention specifies that performers and producers are entitled to be paid for the broadcast of their recordings. As of 2006, 83 countries are signatories to the treaty, including Great Britain and France. However, more than 100 nations are not signatories, the United States most prominent among them.

In countries that are Rome signatories, broadcasters pay broadcasting performance royalties to recording artists and copyright holders (in addition to paying songwriters and music publishers). U.S. recording artists and copyright holders, however, do not receive these foreign performance royalties when their recordings are broadcast in these countries because the international treaty governing the right is reciprocal, and the U.S. is not a signatory to the treaty. One estimate in 1990 suggested that U.S. performers were losing \$27 million a year in potential foreign performance royalties.⁵⁴

Nevertheless, signing the Rome Convention is not necessarily a panacea for artists and copyright holders. It is worth bearing in mind that the U.S. exports far more sound recordings and hit artists than any other country in the world. U.S. pop stars dominate most international markets. Indeed, in some countries it is estimated that 90% of broadcasted recordings are by American artists.⁵⁵ Such cultural dominance does not go unnoticed by other nations. A key element in Article 12 of the Rome Convention is that signatories are allowed to simply “opt out” of Article 12 at their own choosing.

As Mathew DelNero has noted, if the U.S. did become a Rome Convention signatory, many nations—faced with a huge outflow to the United States of performance royalties from their broadcasters (in many cases, broadcasters that are government agencies)—would quickly opt out of Article 12.⁵⁶ Because U.S. recording artists and record companies would then receive no performance royalties from these nations, the “opt out” provision undermines the economic argument for bringing the U.S. in line with the Rome Convention.

A free ride? Proponents for extending a full performance right to sound recordings note that radio and TV broadcasters do not have to pay for the use of sound recordings, only the underlying musical compositions. Thus, the only performance royalties they pay are to ASCAP, BMI, and SESAC for songwriters and music publishers.

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(In addition, terrestrial radio broadcasters don't even pay for the physical CDs they play because record companies provide them to radio stations gratis in hopes of receiving airplay.) In contrast, new digital media such as Internet radio webcasts and digital satellite radio must pay not only standard performance royalties for musical compositions but also new digital performance royalties for sound recordings. Some have argued that this creates an uneven playing field, in which older established entertainment media have been "grandfathered in," while new media must pay double.

Incentive? The U.S. Constitution states that copyright law exists "to promote the Progress of Science and the useful Arts." From this precept, it has long been understood in U.S. copyright law that a major reason for the existence of copyright is to provide financial incentives for the creation of new works.

Undoubtedly, recording artists and record companies would benefit from a new performance royalty in sound recordings. Currently, radio broadcasters pay ASCAP and BMI together more than \$416 million annually in performance royalties for musical compositions.⁵⁷ If a comparable fee were applied to a performance license for sound recordings, that would be a sizable figure to distribute and, at least hypothetically, a significant stimulus to the creation of new work.

It is worth bearing in mind, though, that that any fee would likely be split 50/50 between artists and record companies. Record companies would welcome this new source of revenue, particularly as sales of compact discs have fallen dramatically in recent years. Not surprisingly, they see this new performance income as a replacement for lost sales of CDs because of digital downloading and file sharing.

Mathew DelNero has noted that the possibility of earning performance royalties might stimulate record companies to maintain a broad and diverse artist pool.⁵⁸ Currently, most major record companies still depend on a few multimillion-selling artists for their profits. Because of the costs of promotion, recording, and distribution, there is little current incentive for major record companies to invest in artists who sell only a few thousand copies of a recording. However, with the promise of performance income attached to any and all artists' recordings—no matter how small the individual's record sales—a record company could realize new profits through artist diversification, thus building a larger pool of funds to support new or second-tier artists.⁵⁹

Thanks to online distribution's increasing capability to maintain inventories of staggering size at minimal cost, the notion that there is value in maintaining a broad and diverse inventory (dubbed "The Long Tail" by Wired editor Chris Anderson) appears to be gaining some credibility in music industry circles.⁶⁰

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Also compelling is the argument that full-fledged performance royalties for sound recordings would help sustain recording artists. However, it is worth noting that according to BMI the average songwriter earns less than \$5,000 annually from performance royalties.⁶¹ If new across-the-board performance fees similar to those of ASCAP and BMI were imposed, most recording artists would likely see only similarly small financial gains.

Giving life to songs: For a century now, musical recordings have been widely available to the public. Since the demise of live radio in the 1950s, recordings have been the principal means by which songs are brought to the public's attention. Without recordings, most songs would never reach listeners. Yet, when records are played on radio or television, only songwriters and music publishers are compensated. Historically, recording artists and record companies have depended on hard sales of records and CDs for income—the exception being only the decade-old performance right in digital transmissions. As recently as the 1970s, it seems, opponents of extending the performance right argued that recordings “lacked sufficient creativity to justify copyright protection.”⁶² However, both Congress and the public are now more knowledgeable about the creative efforts that go into recording. Because of the effort, time, and money expended in making recordings and bringing songs to the public, it seems only equitable that recording artists and copyright owners receive their fair share of performance royalties for all the public performances of sound recordings.

Arguments Against

The National Association of Broadcasters has consistently and vigorously opposed granting a blanket performance right in sound recordings for the following reasons (which will be discussed at length below):

- Broadcasters already pay huge sums to songwriters and music publishers via ASCAP, BMI, and SESAC. To add new licensing fees for sound recordings would be unduly burdensome.
- Recording artists and record companies receive ample compensation through the free promotion they receive via broadcasts. Radio has long been the number-one promotional tool for the sale of recordings.

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Burdensome new fees? As of 2006, ASCAP and BMI collected a joint total of more than \$416 million in performance license fees from radio broadcasters. The NAB has argued that adding that figure yet again to compensate recording artists and record companies would be unfairly burdensome and could possibly cripple their business.

It is worth noting, however, that in 2004 the radio industry overall took in more than \$20 billion in revenue, its most successful year to date. Currently, broadcast radio is paying out about 2% of overall revenue in⁶³ performance license fees. To double that amount of licensing in order to compensate recording artists and copyright holders does not seem unduly burdensome.

Is radio promotion ample compensation? The NAB's longstanding argument in opposing a performance license for sound recordings has been that recording artists and record companies receive free promotion on radio, which sells CDs, constituting more than adequate compensation for any lost potential performance royalties. In addition, radio airplay is important, at least in the eyes of the record industry. As Mathew DelNero has argued, the continuing presence of payola (i.e., record companies illegally paying for airplay) in radio strongly suggests that the recording industry does indeed believe that radio is its primary and best avenue for advertising and promoting its recordings.⁶⁴

Legal forms of record promotion constitute a significant, ongoing industry expense. Record companies typically staff in-house promotion departments and, in addition, may pay independent record promoters between \$800 and \$5,000 per record in local markets to promote to radio in hopes of gaining airplay and hits. Nationally, labels often pay hundreds of thousands of dollars to promote a single record to radio.⁶⁵ Clearly, radio airplay does have a significant monetary value for record labels. This significant value should be taken into account if Congress seeks to create a full performance right in sound recordings.

It seems reasonable for recording artists, musicians, and copyright owners to be compensated for the public performance of their recorded work. Certainly, licensing fees commensurate with ASCAP and BMI fees seem fair. However, the RIAA has at times suggested that performance fees for sound recordings should be set at far higher levels.⁶⁶ If Congress sees fit to create a full performance right in sound recordings, it should recall the lesson of the consent decrees the Justice Department obtained in the 1940s from ASCAP and BMI. These decrees established (among other things) that radio stations would always be able to license songs from those PROs at reasonable rates, set if necessary by government tribunals. They also enabled the enormous

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growth of America's radio industry and surely helped (through radio's power to sell records) to build the recording industry.

Conclusion

It does not take a crystal ball to see that as digital technology continues to advance consumers are increasingly likely to acquire their music outside of traditional retail-store purchase of a CD or cassette tape. After years of uninterrupted growth, CD sales decreased by 6.4% in 2001. By 2005, the drop-off had become dramatic: CD sales had fallen 25% since their peak in 2000.⁶⁷ It is clear that increasing numbers of music consumers are migrating online for their music, and as a result a multibillion-dollar industry is in flux. Recording artists and record companies are justifiably concerned as they see their primary source of revenue—hard record sales—rapidly diminishing. Although Apple's iTunes and other downloading services have seen good sales progress (iTunes logged its one billionth track download in 2006), gains in online sales of individual tracks have not offset the loss of retail CD sales. In fact, according to the RIAA, as recently as 2005, online downloads and subscription music services accounted for just 5.3% of record sales.⁶⁸

How can recording artists and record companies continue to be fairly compensated in this new digital environment? Music appears to be moving from the hard sale of a physical recording to digital audio transmissions; some transmissions are downloads and some—being more evanescent—are more fairly considered performances, as terrestrial radio broadcasts traditionally have been. Because it is not always clear which transmissions will be downloaded and which will merely be listened to, the Future of Music Coalition has suggested that the music business's destiny will not be in “selling recordings in any format, but rather on selling the opportunity to listen to broadcasts, transmissions or streams of music.”⁶⁹

The onrushing advances in computing and Internet technology offer much promise for bringing both a wealth of entertainment options and new business opportunities to Americans in undreamed of ways. Unfortunately, this seismic shift in technology is likely to change the nearly century-old balance of power among the various stakeholders in the music business. In many ways, it already has, as evidenced by the precipitous drop-off in CD sales suffered by record companies.

What is the public interest in extending the performance right? As the rapid rise of file-sharing technologies, such as Napster, clearly indicates, most consumers don't seem to care where they get their music from as long as it is relatively simple to access and is as inexpensive as possible. Record companies and recording artists may well see the need for more types of recordable digital-audio transmissions to be classified as “downloads”

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rather than “performances” as well as the need for a broader performance right in sound recordings, but consumers probably wouldn’t. Consumers have no vested interest in record companies maintaining their profit margins. Indeed, since such copyright reclassifications would likely only raise the cost of consumer access to music, it is unlikely that consumers would support them.

The public’s interest in this matter has to do chiefly with continued access to music and emerging technologies at affordable rates. Extending the performance right to sound recordings would probably not hamper or harm consumers, provided that Congress ensures that new license fees for record companies and recording artists are set at a rate comparable to those currently charged by PROs on behalf of songwriters and music publishers. However, it is true that new licensing costs will inevitably be passed along to consumers; that may just be the cost of doing business.

Although extending a full performance right in sound recordings to artists and record companies has no guarantees of restoring the balance of income and power in the music industry, it is at least an equitable step in the right direction. Doing so would allow the recording community to be compensated for all performances of its recordings and all mechanical distributions (downloads) of recordings. In this way, regardless of how Congress and the courts in future choose to define various digital audio transmissions - as either “performances” or “distributions”- those in the recording community would feel assured that they are receiving compensation for their works every time they are commercially transmitted, just as the song community of songwriters and music publishers has always been. This seems only fair.

Questions for Debate and Further Study:

- 1) Can the terrestrial and digital radio environment absorb an additional licensing payment without “cracking,” producing stiff resistance from broadcasters?
- 2) If performance rights payments to artists and record labels are expanded to include all forms of transmission, will the process simply “rob Peter to pay Paul” by reducing payments to composers and publishers in order to fulfill new licensing obligations?
- 3) If performance royalties are expanded to compensate record companies and artists, it is often assumed that these royalties will be split 50/50, similar to the split between songwriters and publishers. Is this assumption founded?

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- 4) Despite digital downloads substituting CD sales more and more, does the continuing value of radio airplay as a promotional tool for artists and the sale of their CDs (and downloads) obviate the need for any additional payments to performers and labels?
- 5) Does the expansion of performance royalties promote the public interest by offering consumers a wide choice at a fair price?
- 6) Is the long-standing Congressional practice of addressing new technologies through piecemeal, targeted revisions of the copyright law still effective?

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Notes

1. ASCAP, <http://www.ascap.com/about> , David Bernstein, “Music Royalties Rise, Even as CD Sales Fall,” *New York Times*, Jan. 26, 2004.
2. BMI, <http://www.bmi.com/about/backgrounder.asp>
3. David Bernstein, *New York Times*, Jan. 26, 2004.
4. ASCAP News, http://www.ascap.com/press/2006/031306_financial.html
5. BMI News, <http://www.bmi.com/news/200509/20050912a.asp>
6. Statement of Stephen Swid, Chief Executive Officer of SESAC, Inc., Hearing Before the House Subcommittee on Court, the Internet, and Intellectual Property Committee on the Judiciary, May 11, 2005, <http://judiciary.house.gov/OversightTestimony.aspx?ID=391>
7. SoundExchange, Press Release, “Tenth Anniversary Celebration, SoundExchange Celebrates a Decade of Digital Performance Rights,” February 1, 2006, http://www.soundexchange.com/news/2006_02_01.html
8. ASCAP, http://www.ascap.com/press/2006/031306_financial.html ; BMI, <http://www.bmi.com/news/200509/20050912a.asp>
9. SoundExchange, http://www.soundexchange.com/news/2006_02_01.html
10. Paul Goldstein, *Copyright’s Highway: From Gutenberg to the Celestial Jukebox* (Stanford University Press, rev. ed., 2003), 51.
11. United States Copyright Office, A Brief Introduction and History, <http://www.copyright.gov/circs/circ1a.html>
12. Mathew S. DelNero, “Long Overdue? An Exploration of the Status and Merit of a General Public Performance Right in Sound Recordings,” *Vanderbilt Journal of Entertainment and Technology Law*, Vol. 6, No. 2, Spring 2003, 184.
13. Edward Samuels, “Economic Justice: Copyright Owners, Performers, and Users,” Forum on Economic Justice, New York Law School, April 3, 2002, <http://www.edwardsamuels.com/copyright/beyond/articles/economicjustice.htm>
14. Jessica Litman, *War Stories* (Benjamin N. Cardozo School of Law, Yeshiva University, 2002), 12.
15. Paul Goldstein, *Copyright’s Highway*, 56.
16. Russell Sanjek, *American Popular Music and Its Business, Vol. III, From 1900 to 1984* (Oxford University Press, 1988), 79.
17. *Ibid.*
18. Paul Goldstein, *Copyright’s Highway*, 58.
19. Paul Kingsbury, *The Explosion of American Music, 1940–1990* (Country Music Foundation Press, 1990), 9.
20. Russell Sanjek, *American Popular Music and Its Business, Vol. III*, 176.
21. Paul Kingsbury, *The Explosion of American Music*, 11.
22. Paul Kingsbury, *The Explosion of American Music*, 9

Reconsidering the Performance Right

23. Russell Sanjek, *American Popular Music and Its Business, Vol. III*, 175.
24. Russell Sanjek, *From Print to Plastic: Publishing and Promoting America's Popular Music (1900-1980)* (Institute for Studies in American Music, 1983), 23.
25. Russell Sanjek, *American Popular Music and Its Business, Vol. III*, 207.
26. Paul Kingsbury, *The Explosion of American Music*, 11.
27. Russell Sanjek, *American Popular Music and Its Business, Vol. III*, 178.
28. Paul Kingsbury, *The Explosion of American Music*, 12.
29. Paul Goldstein, *Copyright's Highway*, 59-60.
30. Ibid.
31. Russell Sanjek, *From Print to Plastic*, 26.
32. Russell Sanjek, *From Print to Plastic*, 30.
33. Paul Goldstein, *Copyright's Highway*, 60.
34. Mathew S. DelNero, "Long Overdue?" 185.
35. Russell Sanjek, *American Popular Music and Its Business, Vol. III*, 253.
36. Russell Sanjek, *American Popular Music and Its Business, Vol. III*, 287.
37. ASCAP News, http://www.ascap.com/press/2006/031306_financial.html; BMI News, <http://www.bmi.com/news/200509/20050912a.asp>
38. Mathew S. DelNero, "Long Overdue?" 286.
39. Cooley Godward LLP, "White Paper—Copyright and the Internet: An Introduction to the Digital Millennium Copyright Act and Related Issues," <http://www.cooley.com/news/inthenews.aspx?id=37922820>
40. S. Rep. No. 104-128, at 14-15 (1995); also found at David O. Carson, General Counsel, United States Copyright Office, Statement before the Subcommittee on Courts, the Internet, and Intellectual Property of the House Committee on the Judiciary, July 15, 2004, 8-9, <http://www.copyright.gov/docs/carson071504.pdf>
41. David O. Carson, General Counsel, United States Copyright Office, Statement before the Subcommittee on Courts, the Internet, and Intellectual Property of the House Committee on the Judiciary, July 15, 2004, 10, <http://www.copyright.gov/docs/carson071504.pdf>
42. Ibid.
43. Recording Industry Association of America, "Issues: Webcasting," <http://www.riaa.com/issues/music/webcasting.asp>
44. Press release, "Senator Feinstein Calls for Changes to Require Cable, Internet, Satellite Music Broadcasters to Protect Digital Music, Allow Consumers to Record, Replay Programming," April 26, 2006, <http://feinstein.senate.gov/06releases/r-dig-music426.htm>
45. Ibid.; also Electronic Frontier Foundation, "The Season of Bad Laws, Part 3: Banning MP3 Streaming," April 26, 2006,

Reconsidering the Performance Right

46. Ted Bridis, Associated Press, “XM faces lawsuit about handheld ‘Inno,’” USA Today, May 16, 2006, http://www.usatoday.com/tech/news/2006-05-16-xm-satellite-lawsuit_x.htm
47. Edgar Bronfman, statement before the United States Senate Committee on the Judiciary, “Parity, Platforms and Protection: The Future of the Music Industry in the Digital Radio Revolution,” April 26, 2006, http://judiciary.senate.gov/testimony.cfm?id=1853&wit_id=5267
48. “XM Satellite Manages Artist Relations Ahead of Inno Battle,” Digital Music News, June 22, 2006, <http://www.digitalmusicnews.com/#062206xm>
49. John Borland, “Digital radio still hard to hear,” CNET News, Nov. 9, 2005, http://news.com.com/Digital+radio+still+hard+to+hear/2100-1025_3-5940548.html
50. Future of Music Coalition, Letter to Senate Commerce Committee in Support of a Public Performance Right for Sound Recordings, October 19, 2005, <http://www.futureofmusic.org/news/PPRSRletter.cfm>
51. Statement of the United States Copyright Office to the Subcommittee on Courts, the Internet, and Intellectual Property, Committee on the Judiciary, U.S. House of Representatives, May 16, 2006, <http://www.copyright.gov/docs/regstat051606.html>
52. Ibid.
53. Mathew S. DelNero, “Long Overdue?” 181.
54. Ibid., p. 191.
55. Ibid., p. 193.
56. Ibid., p. 191.
57. Radio Music License Committee, BMI—Frequently Asked Questions, <http://www.radiomlc.com/faq.html>, ASCAP—Frequently Asked Questions, http://www.radiomlc.com/ascap_faq.html
58. Mathew S. DelNero, “Long Overdue?,” p. 195.
59. Ibid., p. 195.
60. Chris Anderson, “The Long Tail,” Wired, Vol. 12, No. 10, 2004, http://www.wired.com/wired/archive/12.10/tail_pr.html
61. BMI, <http://www.bmi.com/licensing/business/generalfaq.asp>
62. David O. Carson, Statement before the Subcommittee on Courts, 7, <http://www.copyright.gov/docs/carson071504.pdf>
63. Future of Music Coalition, Letter to Senate Commerce Committee.
64. Mathew S. DelNero, “Long Overdue?” 196.
65. Mathew S. DelNero, “Long Overdue?” 200.
66. Ibid.
67. Recording Industry Association of America 2005 Year-End Statistics, <http://www.riaa.com/news/newsletter/pdf/2005yrEndStats.pdf>

Reconsidering the Performance Right

68. Cary Sherman, President of the Recording Industry Association of America, Statement before the Subcommittee on Courts, the Internet, and Intellectual Property, Committee on the Judiciary, U.S. House of Representatives, May 16, 2006, 4, <http://judiciary.house.gov/OversightTestimony.aspx?ID=629>
69. Future of Music Coalition, Letter to Senate Commerce Committee.