

**It's About Time: Granting a Public Performance Right in Sound  
Recordings Through the Passage of the Performance Rights Act**

Melanie Davis  
J.D. Candidate, December 2009  
Chicago-Kent College of Law

## I. Introduction

In 1942, Bing Crosby had a number one hit “White Christmas” that topped the Billboard charts for eleven weeks.<sup>1</sup> This song was written by Irving Berlin in 1941, and has been covered by over one hundred artists including Bob Marley, Elton John and Barbara Streisand.<sup>2</sup> The Bing Crosby version of “White Christmas” is credited with selling over fifty million copies<sup>3</sup>, and is listed in the Guinness Book of World Records as the best-selling song of all time.<sup>4</sup> The average person might conclude that Bing Crosby and Irving Berlin received large sums of money from the radio airplay of “White Christmas”. In reality, only Irving Berlin and his music publisher received payments from the millions of times Bing Crosby’s “White Christmas” was played on the radio. This outcome was not the result of an unfair recording contract, but was the direct result of the United States copyright law.

It seems fundamentally unfair that recording artists, like Bing Crosby, whose performance brings a song to life, and the record companies who fund and promote the recording do not enjoy the same copyright protection provided to songwriters and publishers. Under the current United States copyright law, every time a song is played on the radio, only the songwriter and music publisher have the right to receive royalties.<sup>5</sup> The right to receive royalties arises from the public performance right in the copyright law.<sup>6</sup> With the narrow exception of digital music

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<sup>1</sup> [http://en.wikipedia.org/wiki/White\\_Christmas\\_\(song\)#Original\\_introduction](http://en.wikipedia.org/wiki/White_Christmas_(song)#Original_introduction)

<sup>2</sup> *Id.*

<sup>3</sup> *Id.*

<sup>4</sup> <http://www.historytoday.com/MainArticle.aspx?m=31158>

<sup>5</sup> H.R. Rep. No. 110-941 (2009) (“Currently, owners of musical works receive royalties for public performances of their works on terrestrial radio broadcasts, whereas copyright owners of sound recordings do not”).

<sup>6</sup> *See* 17 U.S.C.A. § 106(4) (West 2009) (“in the case of literary, musical, dramatic, and choreographic works, pantomimes, and motion pictures and other audiovisual works, to perform the copyrighted work publicly.”). *See also* 17 U.S.C.A. § 101 (West 2009) (“To perform or display a work ‘publicly’ means (1) to perform or display it at a place open to the public or at any place where a substantial number of persons outside of a normal circle of a family and its social acquaintances is gathered; or (2) to transmit or otherwise communicate a performance or display of the work to a place specified by clause (1) or to the public, by means of any device or process, whether the members of

transmissions<sup>7</sup>, the current Copyright Act does not provide the copyright owner of a sound recording with a public performance right, a right that copyright owners of other copyrightable works enjoy.<sup>8</sup>

The disparate treatment to owners of sound recordings under the Copyright Act has been the topic of debate for quite some time.<sup>9</sup> Despite many years of lobbying by record companies and recording artists and their continuous requests for the U.S. to harmonize its copyright laws with the rest of the industrialized world, Congress has decided only to acknowledge the commercial value to performers and record labels for the public performance of sound recordings in digital mediums.<sup>10</sup> This disparity will hopefully be remedied by the Performance Rights Act, which has been approved by both the House and Senate Judiciary Committees.<sup>11</sup>

The first section of this paper delineates the inequality between the copyright protection provided to sound recordings and musical compositions. The second section describes the history of the Copyright Act and why a full performance right for sound recordings has not yet been granted. The third section describes the arguments and competing interests in amending the Copyright Act to grant full public performance rights for sound recordings. The last section explains how the Performance Rights Act amends the Copyright Act.

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the public capable of receiving the performance or display receive it in the same place or in separate places and at the same time or at different times.”).

<sup>7</sup> See 17 U.S.C.A. §101 (West 2009) (“A digital transmission is a transmission in whole or in part in a digital or other non-analog form.”).

<sup>8</sup> See U.S.C.A. §114(a) (West 2009) (“The exclusive rights of the owner of copyright in a sound recording are limited to the rights specified by clauses (1), (2), (3) and (6) of section 106, and do not include any right of performance under 106(4).”); see also *infra* note 12.

<sup>9</sup> See Copyrights Act of September 29, 1976, Pub. L. No. 94-1733, 1976 U.S.C.C.A.N. (94 Stat. 5809) 5817-5818.

<sup>10</sup> See *supra* note 7.

<sup>11</sup> Performance Rights Act of 2009, H.R. 848, 111th Cong. (Comm. consideration and markup held and ordered to be amended by the Yeas and Nays : 21-9 on 5/13/2009). <http://thomas.loc.gov/cgi-bin/bdquery/D?d111:1:/temp/~bdKinN:@@L&summ2=m&/bss/111search.html>, S. 379 111th Cong. (Comm. on the Judiciary reported by Sen. Leahy with amendments without written report and placed on legislative calendar under General Orders on 10/15/2009). <http://thomas.loc.gov/cgi-bin/bdquery/D?d111:2:/temp/~bdKinN:@@L&summ2=m&/bss/111search.html>

## II. The Disparate Treatment of Sound Recordings Under the Current Copyright Act

The Copyright Act divides a song into two separate copyrights; one for the musical work, and one for the sound recording.<sup>12</sup> The musical work is owned by the songwriter and publisher, and includes the notes and words of a song.<sup>13</sup> The sound recording is the recorded performance of a musical work, and it is owned by the artist and the record company.<sup>14</sup> Under the current Act, copyright owners are provided a full performance right for their literary works, musical works, dramatic works, choreographic works and motion pictures.<sup>15</sup> The right to perform copyrighted works publicly is significant since it entitles the copyright owner to receive a royalty.<sup>16</sup> The owners of sound recordings currently only have public performance rights for the digital transmissions of music.<sup>17</sup> Thus, when artists' songs are played on terrestrial AM/FM radio, they do not receive a royalty as the songwriter does.

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<sup>12</sup> See 17 U.S.C.A. § 102(a) (West 2009) ("Copyright protection subsists, in accordance with this title, in original works of authorship fixed in any tangible medium of expression, now known or later developed, from which they can be perceived, reproduced, or otherwise communicated, either directly or with the aid of a machine or device. Works of authorship include the following categories: (1) literary works; (2) musical works, including any accompanying words; (3) dramatic works, including any accompanying music; (4) pantomimes and choreographic works; (5) pictorial, graphic, and sculptural works; (6) motion pictures and other audiovisual works; (7) sound recordings; and (8) architectural works.").

<sup>13</sup> See 17 U.S.C.A. § 101 (West 2009) ("A work is 'fixed' in a tangible medium of expression when its embodiment in a copy or phonorecord, by or under the authority of the author, is sufficiently permanent or stable to permit it to be perceived, reproduced, or otherwise communicated for a period of more than transitory duration. A work consisting of sounds, images, or both, that are being transmitted, is "fixed" for purposes of this title if a fixation of the work is being made simultaneously with its transmission."). See also 139 Cong. Rec. E1724 (daily ed. July 1, 1993) (Material in Extension of Remarks, Digital Performance Right in Sound Recordings Act of 1993, Statement of Rep. Hughes) ("The author of a musical composition is the songwriter, who often transfers his rights to a music publisher in exchange for a percentage of royalties derived from the use of that work.").

<sup>14</sup> See 17 U.S.C.A. § 101 (West 2009) ("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.") See also 139 Cong. Rec. E1724 (daily ed. July 1, 1993) (Material in Extension of Remarks, Digital Performance Right in Sound Recordings Act of 1993, Statement of Rep. Hughes) ("There is another copyright interest in a record, though, that of the producer of the sound recording, typically the record company.")

<sup>15</sup> See 17 U.S.C.A. § 106(4) (West 2009) ("In the case of literary, musical, dramatic, and choreographic works, pantomimes, and motion pictures and other audiovisual works, to perform the copyrighted work publicly.").

<sup>16</sup> Id.

<sup>17</sup> See 17 U.S.C.A. § 106(6) (West 2009) ("In the case of sound recordings, to perform the copyrighted work publicly by means of a digital audio transmission.").

Royalty payments from musical works are a significant source of income for songwriters and publishers. In 2007, the American Society of Composers, Authors and Publishers (hereinafter “ASCAP”) reported paying \$741 million in royalty payments to its members.<sup>18</sup> Performing rights societies collect public performance royalties for the non-dramatic use of musical works.<sup>19</sup> Each of the performing rights societies offers radio stations, bars, and restaurants, the usual licensees of musical works, a license to publicly perform any of the musical compositions in its repertoire.<sup>20</sup> The money that is collected from these blanket licenses is distributed between the music publisher and songwriter.<sup>21</sup> Unless artists are also songwriters, they do not receive public performance license fees when they perform songs live or their songs are played over sound systems in restaurants, bars, clubs, and the radio.<sup>22</sup> This is economically unjust, especially since without the public performance of sound recordings, songwriters would not receive royalty payments when their songs are played in a club or on the radio.<sup>23</sup> Royalties for the public performance of sound recordings are not an issue in most developed foreign

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<sup>18</sup> <http://nashville.bizjournals.com/nashville/stories/2008/02/11/daily15.html>

<sup>19</sup> See 17 U.S.C.A. §101 (West 2009) (“A ‘performing rights society’ is an association, corporation or other entity that licenses the public performance of nondramatic musical works on behalf of copyright owners of such works, such as the American Society of Composers, Authors and Publishers (ASCAP), Broadcast Music, Inc. (BMI) and SESAC, Inc.”).

<sup>20</sup> <http://www.sesac.com/Licensing/FAQsBroadcast.aspx>

<sup>21</sup> Id.

<sup>22</sup> *Performance Rights Act: Hearing on H.R. 848 Before the Comm. on H. Judiciary*, 111th Cong. (2009) (Statement of Billy Corgan, Founder, Smashing Pumpkins) (“As it stands currently, if you have written a song and you have the good fortune of being played on terrestrial radio, then you, as the author, are entitled to a fixed form of compensation as established by Congress. This compensation, of course, recognizes the unique contribution that the author has made to the creation of the song. Conversely, if you also happen to be a performer on that very same song, by law, terrestrial radio owes you no form of compensation at all.”).

<sup>23</sup> 153 Cong. Rec. E 2606, 2607 (daily ed. December 19, 2007) (statement of Rep. Berman). (“One of America’s greatest treasures is its intellectual property. In cities and towns across the Nation and in countries around the world, American music is heard throughout the streets. People are consuming more music than ever.”).

countries because recording artists are paid a portion of public performance license fees when their songs are heard in public.<sup>24</sup>

### III. History of the Copyright Act

The power of Congress to enact copyright laws arises from the Copyright Clause of Constitution.<sup>25</sup> Under this clause, Congress is authorized “to promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries.”<sup>26</sup> Absent copyright law, authors might eventually lose their motivation to create new expressive works once they recognize the possibility of free riders who can copy those works and sell them at the marginal cost of copying.<sup>27</sup> The author, who must also recoup the cost of production, cannot compete with the copyists and so decides not to create at all.<sup>28</sup> The founding fathers knew copyright protection could improve society by preserving the economic incentive for people to come up with brilliant ideas and inventions.<sup>29</sup> The policy justification of copyright law is that the development of new works is desirable and should be promoted by granting exclusive rights to authors of new works for a limited time period.

When Congress adopted the Copyright Act of 1790, it provided protection for books, charts, and maps, but not musical compositions.<sup>30</sup> Musical compositions, which consisted of

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<sup>24</sup> *Performance Rights Act: Hearing on H.R. 848 Before the Comm. on H. Judiciary*, 111th Cong. (2009) (Statement of Mitch Bainwol, CEO of Recording Industry Association of American). “And the lack of a performance right in the U.S. is not just about a loss of compensation domestically. Our music gets more airplay around the world than any other country, yet because our own laws prevent payment for radio performances, other countries won't compensate us when they play our music even though they compensate their own and other countries' artists.”)

<sup>25</sup> U.S. CONST. art. I, § 8, cl. 8

<sup>26</sup> *Id.*

<sup>27</sup> See Raymond Shih Ray Ku, *Does Copyright Law Promote Creativity? An Empirical Analysis of Copyright's Bounty*, 62 Vand. L. Rev. 1669, 1718 (2009).

<sup>28</sup> *Id.*

<sup>29</sup> See *Twentieth Century Music Corp. v. Aiken*, 422 U.S. 151, 156 (1975).

<sup>30</sup> See Copyright Act, 1 Stat. 124 (1790).

musical notes and accompanying lyrics in sheet music form<sup>31</sup> gained copyright protection in 1831.<sup>32</sup> In 1856, the copyright law was amended to provide copyright owners with a public performance right, but the right only covered the performance of dramatic works, not musical compositions.<sup>33</sup> Copyright owners of musical compositions were granted non-dramatic public performance rights in 1897.<sup>34</sup> The 1897 revision of the Copyright Act added the words ‘and musical’ to the statute enacted in 1856, thus extending protection to dramatists against unlicensed public performance of their work.<sup>35</sup> The musical composition copyright owner could now demand a fee for or prevent the public performance of its musical work,<sup>36</sup> but owners of sheet music did not initially enforce this right because they believed that public performance of their musical compositions increased the sales of sheet music.<sup>37</sup>

Technological advances, such as the invention of the phonograph record by Thomas Edison, created uncertainty as to the scope and copyright protection for new works at the turn of the century.<sup>38</sup> As a result of growing concerns from copyright owners and publishers, Congress

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<sup>31</sup> See Jay L. Bergman, *Digital Technology Has the Music Industry Singing the Blues: Creating a Performance Right for the Digital Transmissions of Sound Recordings*, 24 SW. U.L. Rev. 351, 354 (1995)

<sup>32</sup> See Copyright Act, 4 Stat. 436 (1831).

<sup>33</sup> See Allen. E. Molnar, *Performance Royalties and Copyright: A Question “Sound” Policy*, 8 Seton Hall. L. Rev. 678, 684-85 (1978).

<sup>34</sup> Copyright Act of Jan. 6, 1897, ch. 4, 29 Stat. 481 (1897) (current version at 17 U.S.C.A. §101 (West 2009)).

<sup>35</sup> H.R. Rep. No. 54-741 at 1 (1896). “To secure to musical compositions the same measure of protection under the copyright law as is now afforded to productions of a strictly dramatic character. There can be no reason why the same protection should not be extended to one species of literary property of this general character as to the other, and the omission to include protective provisions for musical compositions in the law sought to be amended was doubtless the result of oversight. The committee is of the opinion that the existing law should be so amended as to provide adequate protection to this species of literary production.”

<sup>36</sup> See William H. O’Dowd, *The Need for A Public Performance Right in Sound Recordings*, 31 Harv. J. on Legis. 249, 251 (199).

<sup>37</sup> See 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, 481.

<sup>38</sup> See John Kettle, *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, 1057-58.

initiated a three-year study with the goal of rewriting the Copyright Act.<sup>39</sup> The result was the Copyright Act of 1909 (hereinafter Act of 1909).<sup>40</sup>

### **A. The Copyright Act of 1909**

The Act of 1909 contained two new significant amendments. First, the Act created a compulsory licensing scheme which allowed anyone to make a mechanical reproduction of a musical composition without the consent of the copyright owner, provided that the person adhered to the provisions of the license.<sup>41</sup> In doing so, Congress recognized the need to balance the rights of the public to access creative works against the need to provide economic incentives for the copyright owners of musical works.<sup>42</sup>

The second significant revision limited the control of musical composition copyright owners by allowing them to prohibit the unauthorized use of their work when used by an infringer “for profit”.<sup>43</sup> The “for profit” limitation to public performance rights was meant to preserve a space for the free enjoyment of music by the public.<sup>44</sup> The rationale behind the Act of 1909 was to protect the public performance of live music since performances were the best way to promote the sale of musical compositions.<sup>45</sup> At this point in history, sound recordings were in their early stages as phonorecords and piano rolls, and were thus not granted a performance right.<sup>46</sup> The advent of technology shifted the dominant method music was delivered to the

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<sup>39</sup> Id at 1058.

<sup>40</sup> Copyright Act of 1909, ch. 320, 35 Stat. 1075 (1909) (current version at 17 U.S.C.A. § 102 (West 2009)).

<sup>41</sup> See Act of 1909, §1(e).

<sup>42</sup> See Kettle, *supra* note 38 at 1058.

<sup>43</sup> See Id. See also Act of 1909, §1(e).

<sup>44</sup> *Copyright Bill: Hearing on H.R. 19853 and S. 6330 Before the J. Comm. on Pat., 59th Cong.* 162 (1906) (testimony of Arthur Steuart, Chairman, American Bar Ass’n Copyright Comm.)

<sup>45</sup> See Steven V. Podolsky, *Chasing the Future: Has the Digital Performance in Sound Recordings Act of 1995 Kept Pace with Technological Advances in Musical Performance, or is Copyright Law Lagging Behind?* 21 *Hastings Comm. & Ent. L.J.* 651, 669 (1999).

<sup>46</sup> Emily F. Evitt, *Money, That’s What I Want: The Long and Winding Road to a Public Performance Right in Sound Recordings.* 21 *No. 8 Intell. Prop. & Tech. L.J.* at 10 (2009).

masses from live performances to jukeboxes, phonorecords and radio broadcasts.<sup>47</sup> Despite these technological advances, the Act of 1909 would not be amended until 1971.

### **B. The 1971 Amendment and The Copyright Act of 1976**

In 1971 Congress established a copyright in sound recordings, thereby acknowledging that a performer's rendition of a song as a separate copyrightable expression.<sup>48</sup> This amendment to the Act of 1909 granted copyright owners of sound recordings the exclusive right to reproduce their works.<sup>49</sup> The objective of this amendment was to thwart bootlegging of sound recordings and protect the primary source of income for record companies.<sup>50</sup> The record industry fought long and hard to receive this right, which Congress granted as a result of the rampant piracy that caused an estimated 25% decrease in record sales.<sup>51</sup>

The Copyright Act of 1976 granted the copyright owners of sound recordings two new rights in addition to the exclusive right of reproduction; the right to prepare derivative works based upon the copyrighted work<sup>52</sup> and the right to distribute the phonorecord to the public.<sup>53</sup> These exclusive rights had already been granted for literary works, musical compositions and dramatic works in the Act of 1909.<sup>54</sup> The first draft of the Senate bill for the 1976 Act included a full public performance right for sound recordings, and the proposed royalty structure was similar to the method employed to compensate songwriters and music publishers.<sup>55</sup> Despite the

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<sup>47</sup> See Podolsky supra note 45 at 669.

<sup>48</sup> Sound Recordings Act of 1971, Pub. L. No. 92-140, 85 Stat. 391 (1972) (codified at 17 U.S.C. §102)

<sup>49</sup> Id.

<sup>50</sup> H.R. Rep. No. 92-487, at 1568 (1971) (“There is no Federal remedy currently available to combat the unauthorized reproduction of a recording.”).

<sup>51</sup> See DelNero supra note 37 at 484.

<sup>52</sup> 17 U.S.C.A. §114(b) (West 2009).

<sup>53</sup> 17 U.S.C.A. §106(3) (West 2009).

<sup>54</sup> See supra note 40.

<sup>55</sup> *Performance Royalty: Hearing on S. 111 Before the Subcomm. on Patents, Trademarks, and Copyright of the S. Comm. on the Judiciary*, 94th Cong. (1975) (statement of Sen. Hugh Scott) (“Payments would be statutorily required for the commercial exploitation of music. Radio broadcasters’ royalty payments would be determined by advertising revenue and paid to both the recording artist and their record labels.”).

efforts of recording industry lobbyists from the American Federation of Musicians (AFM) and the American Federation of Television and Radio Artists (AFTRA), the collective lobbying power of the National Association of Broadcasters (NAB) and the performing rights organizations of ASCAP, BMI and SESAC proved more persuasive to Congress.<sup>56</sup> As a compromise, Congress included a provision in the 1976 Act that required the Register of Copyrights to submit a report as to whether a full public performance right should be granted in sound recordings.<sup>57</sup>

The Register of Copyrights' 1978 report concluded that sound recordings should receive full public performance rights, and that there was no longer justification for denying copyright owners of sound recordings the same protections as other works.<sup>58</sup> Despite the recommendations of the Register of Copyrights Marybeth Peters, Congress took no further action toward amending the 1976 Act to create a public performance right in sound recordings. It would again take the loss of record sales from the development of new technology to prompt Congress to enact legislation granting partial public performance rights for sound recordings.

### **C. The Digital Performance Right in Sound Recordings Act of 1995 and the Digital Millennium Copyright Act of 1998**

Digital technology, which made it possible to transmit music into a consumer's home via cable, satellite, and interactive Internet technology, alarmed both copyright owners of sound recordings and songwriters.<sup>59</sup> Both interests expressed concerns that if left without regulation,

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<sup>56</sup> See Kettle *supra* note 38 at 1064.

<sup>57</sup> 17 U.S.C. 114(d) (1976).

<sup>58</sup> Register of Copyrights, House Subcomm. on Courts, Civil Liberties and the Performance Rights in Sound Recordings, 95th Cong., 1062-1063 (Comm. Print 1978). ("Sound recordings fully warrant a right to public performance. Such rights are entirely consonant with the basic principles of copyright law generally, and with the 1976 Copyright Act specifically. Recognition of these rights would eliminate a major gap in this recently enacted general revision legislation by bringing sound recordings into parity with other categories of copyrightable subject matter.").

<sup>59</sup> See Podolsky *supra* note 45 at 657-58.

digital transmissions would irreparably harm the music industry as a whole.<sup>60</sup> As a result of these concerns, Congress proposed adopting the Digital Performance in Sound Recording Act in 1993.<sup>61</sup> While the debates over the bill occurred, the Clinton Administration's Working Group on Intellectual Property Rights prepared a paper that suggested section 106(6) of the 1976 Copyright Act be amended to add a full performance right for sound recordings.<sup>62</sup> The strong lobby of the radio industry prevailed once more, and the proposed bill was defeated.<sup>63</sup>

Supporters of a public performance right in sound recordings secured a small victory when President Clinton signed the Digital Performance Right in Sound Recordings Act of 1995 (hereinafter DPRA) into law.<sup>64</sup> Congress enacted the DPRA to ensure that record companies and performing artists were protected in light of the technological advances that had once again considerably altered the manner in which consumers utilized sound recordings.<sup>65</sup> Congress was concerned that services such as the celestial jukebox, an interactive service which allowed internet users to select music on demand from a sound recording library, would obviate the need for consumers to purchase compact discs.<sup>66</sup>

The DPRA created a right to perform sound recordings publicly by means of a digital audio transmission.<sup>67</sup> It categorizes digital public performances of sound recordings into three

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<sup>60</sup> See *Id.* at 658.

<sup>61</sup> Digital Performance Right in Sound Recordings Act of 1993 (H.R. 2576 and S. 142), 103d Cong. (1993) The Act was brought by Rep. Howard Berman and Rep. William Hughes in the House of Representatives, by Sen. Diane Feinstein and Sen. Orrin Hatch in the Senate. Senator Hughes noted that the advent of digital audio subscription services, which allow home listeners to store and download records in digital form, threatens to displace album sales and undermine economic incentives for performers and producers of sound recordings.

<sup>62</sup> See Kettle *supra* note 38 at 1069-1070.

<sup>63</sup> See *Id.* at 1070.

<sup>64</sup> Digital Performance Right in Sound Recordings Act of 1995, Pub. L. No. 104-39, 109 Stat. 336 (1995)

<sup>65</sup> H.R. Rep. No. 104-274, at 13 (1995).

<sup>66</sup> *Id.* at 12.

<sup>67</sup> See *supra* note 64.

categories; (1) subscription transmissions,<sup>68</sup> (2) non-subscription transmissions<sup>69</sup> and (3) transmissions by interactive services.<sup>70 71</sup> The DPRA grants sound recording copyright owners the exclusive right to control the use of sound recordings via interactive digital services.<sup>72</sup> It also created a right for sound recording owners to collect royalties for digital performances transmitted by non-interactive subscription services like satellite and cable radio, but limited that right by granting broadcasters of these services the right to a new compulsory license.<sup>73</sup> As a result of the proliferation of internet radio, the digital public performance right was expanded to include non-interactive non-subscription services when Congress passed the Digital Millennium Copyright Act (DMCA) in 1998.<sup>74</sup> As a result, performers receive a royalty when their sound recordings are played online, but not when the same sound recording is broadcast on the radio.<sup>75</sup> Absent from both the DPRA and DMCA was the right for sound recordings to be publicly performed on terrestrial radio. It should come as no surprise that this exclusion was a direct result of lobbying efforts by the National Association of Broadcasters (NAB).

#### **D. Recent Developments**

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<sup>68</sup> 17 U.S.C.A. §114(j)(8) (West 2009) (A “subscription transmission” is one that is controlled and limited to particular recipients, and for which consideration is required.) The recipient does not select particular sound recordings to be delivered to him individually. Cable and satellite radio fall into this category.

<sup>69</sup> 17 U.S.C.A. §114(j)(9) (West 2009) (A “non-subscription” transmission is any transmission that is not a subscription transmission.)

<sup>70</sup> 17 U.S.C.A. §114(j)(7) (West 2009) (An “interactive service” is one that enables a member of the public to receive, on request, a transmission of a particular sound recording chosen by or on behalf of the recipient. The ability of individuals to request that particular sound recordings be performed for reception by the public at large does not make the service interactive. If an entity offers both interactive and non-interactive services (either concurrently or at different times), the non-interactive component shall not be treated as part of an interactive service.) Services such as audio-on-demand, pay-per-listen and celestial jukebox transmissions fall into this category.

<sup>71</sup> See S. 227, 104th Cong. (1995).

<sup>72</sup> See 17 U.S.C.A. §114(j)(7) *supra* note 68.

<sup>73</sup> See 17 U.S.C.A. § (g)(2) (West 2009) The DPRA also requires the payment of a statutory royalty which must be shared between the record company, featured artist, background musicians, and background vocalists. (Record companies receive 50%, the featured artists 45%, and the background musicians and background vocalists each receive 2.5% of the statutory royalty).

<sup>74</sup> Digital Millennium Copyright Act, Pub. L. No. 105-304, 112 Stat. 2860 (1998).

<sup>75</sup> See *Evitt* *supra* note 46 at 11.

Nearly ten years after the passage of the DMCA, Representative Howard Berman and Senator Patrick Leahy again attempted to advance the rights of sound recording copyright owners with the introduction of the Performance Rights Act of 2007.<sup>76</sup> The immediate predecessor to the current Performance Rights Act was met with vehement opposition and never made it past the House or Senate Judiciary Committees.<sup>77</sup> The Performance Rights Act was reintroduced in February 2009 by Representative John Conyers and Senator Patrick Leahy.<sup>78</sup> The House version was approved by the House Judiciary Committee on May 13, 2009, and the Senate version was approved by the Senate Judiciary Committee on October 15, 2009.<sup>79</sup> There is no date set for when either chamber will cast a floor vote on this pending legislation.

#### **IV. Competing Interests in Granting Public Performance Rights for Sound Recordings**

The four basic arguments in favor of a full performance right in sound recordings include creating equity between songwriters and performers, providing the incentive to create new works, the loss of potential royalties abroad and the international harmonization of copyright laws.

##### **A. Equity Arguments**

The first prong of the equity argument is comparative in nature. It considers the contribution made to a song by both the performer and songwriter. Proponents of this view advocate that it is fundamentally unfair that the person who composes the song has a full public

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<sup>76</sup> Performance Rights Act of 2007, H.R. 4789, S. 2500, 110th Cong. (2007).

<sup>77</sup> Local Radio Freedom Act of 2007, H.R. Con. Res. 244 (2007), S. Con. Res. 82 (2007). *See also* Evitt *supra* note 46 at 10: “227 members of the House of Representatives and 14 Senators supported congressional resolutions opposing royalties for performers.” The Act declares that a sound recording performance right would function as a burdensome performance tax on radio and would be detrimental to the industry.

<sup>78</sup> Performance Rights Act, H.R. 848, S. 379, 111th Cong. (2009).

<sup>79</sup> Ted Johnson, *Senate Judiciary Approves Performance Rights Act*, Variety, October 15, 2009, <http://www.wilshireandwashington.com/2009/10/senate-judiciary-approves-performance-rights-act.html> (last visited November 10, 2009).

performance right but the performer who brings the song to life does not.<sup>80</sup> Performers and record companies arguably make a creative contribution that is comparable to the songwriter and music publisher.<sup>81</sup> There is no doubt that the recording artist and record company are essential to the success of a musical work. Each one plays a vital role in the popularity of a song, arguably even more than the songwriter or music publisher. For example, teenagers who downloaded Beyonce’s Top 5 hit single “Halo” from I-tunes probably do not know the name of the writers of the song, Ryan Tedder and Evan Bogart.<sup>82</sup> Songwriters and music publishers have been collecting royalties from the public performance of their musical works for over one hundred years. It is fundamentally unfair that recording artists and the record companies who fund them are not being compensated for the contribution that their sound recordings make to society.

The second prong to the equity argument is the moral rights or personhood theory. This theory is premised on the idea that humans have a fundamental need to establish property rights in works in which they have expressed their unique and personal wills or personalities.<sup>83</sup> Particularly, this theory suggests that the government has a moral duty to grant intellectual property rights in order to preserve the personhood or identity of its creators. Under this theory, sound recording owners such as Beyonce’, Taylor Swift or Mariah Carey not only own the notes and words of a song, but also the unique expression of it. The contribution that each artist lends to a performance is deeply personal and in some cases nearly impossible to replicate.<sup>84</sup> As Nancy

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<sup>80</sup> 153 Cong. Rec. E2606-04, E2607 (2007) (statement of Rep. Berman) (“Songwriters and music publishers rightly do get paid when their song is played on the radio, but the artist whose voice or musical talent brings in the ad revenue never receives a penny from the station.”)

<sup>81</sup> Id. at 80: “Songwriters have long been compensated for the songs that are played on the radio-as they should be. However, just as there would be nothing for musicians to play without notes, there would be nothing for the artist to sing without the words”.

<sup>82</sup> [http://en.wikipedia.org/wiki/Halo\\_\(Beyonc%C3%A9\\_Knowles\\_song\)](http://en.wikipedia.org/wiki/Halo_(Beyonc%C3%A9_Knowles_song))

<sup>83</sup> See Justin Hughes, *The Philosophy of Intellectual Property*, 77 Geo. L.J. 287, 330-331 (1988).

<sup>84</sup> See Ludovic Hunter-Tilney, *Mariah Carey’s Superhuman Octaves*, Fin. Times, Apr. 18, 2008 (noting that recording artist Mariah Carey is famous for her eight-octave vocal range and her unique virtually inaudible whistle).

Sinatra testified in front of the House Judiciary Committee, “The job of a recording artist is to take a composition and bring it to life – to infuse it with their own love, sadness, anger, hope and longing and have the listener share in the experience. It takes a lot of talent, hard work, and sheer persistence.”<sup>85</sup> Performing artists should be provided a full public performance right in their sound recordings for these unique contributions.

The third prong of the equity argument is changed circumstances. Recall in Part III of this paper that with almost every amendment or revision to the copyright act, Congress was responding to a technological advance that changed the way consumers received music. For instance, the 1971 amendment to the Copyright Act of 1909, which granted sound recording copyright owners exclusive rights of reproduction, was Congress’ attempt to thwart the losses sustained by the recording industry from the widespread practice of bootlegging. In 1995 Congress recognized the that digital technology that allowed consumers to receive sound recordings via the celestial jukebox, satellite and cable radio could eventually replace sales of compact discs, and enacted the DPRA.<sup>86</sup> Congress enacted the DMCA was enacted three years later to offset the record industry’s loss in sales from the proliferation of Internet radio.

Ever-evolving technology continues to erode record sales, the primary source of revenue for performers and the recording industry. In 2006, a total of 588.2 million albums were sold, a significant drop from the 785.1 millions sold in the year 2000.<sup>87</sup> This rate of decline has not been

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<sup>85</sup> *Radio Performance Rights: Hearing on H.R. 4789 Before the Comm. on H. Judiciary*, 110th Cong. (2008) (Statement of Nancy Sinatra, singer and daughter of Frank Sinatra).

<sup>86</sup> *Ensuring Artists Performing Rights: Hearing on H.R. 4789 Before the Comm. on H. Judiciary*, 110th Cong. 1 (2007) (statement of Marybeth Peters, Register of Copyrights) (“Congress took this step after carefully considering the effect that new digital technologies would have on the sale of records - a primary source of revenue for performers and the record industry. It determined at that time that copyright owners of sound recordings required more protection under the law to guard against unlawful copying and believed that a limited performance right for public performances by means of digital transmission subject to a statutory license was an adequate solution.”).

<sup>87</sup> See Peters supra note 86 at 3.

offset by the increase of download sales, which are mostly single tracks.<sup>88</sup> The rollout of HD radio and related devices poses yet another threat to replace record sales, as these new devices are capable of capturing digital audio from terrestrial radio broadcasts, storing up to thirty hours of audio and sharing capabilities via the internet.<sup>89</sup> Marybeth Peters has remained consistent in her recommendation of a full public performance right for sound recordings for the last twenty years: “I strongly urge Congress to expand the scope of the performance right for sound recordings to cover all analog and digital by broadcasters as a way to enable creators of the sound recordings to adapt to the precipitous decline in revenue due to falling record sales.”<sup>90</sup> Congress should no longer ignore her recommendations, as the development of new technology will continue to deteriorate the recording industry.

### **B. Incentive Arguments**

As described in part III, Article I of the U.S. Constitution grants Congress the power to “promote the progress of science and useful arts.” As the language of this provision suggests, Congress developed copyright law based largely on the utilitarian incentive theory.<sup>91</sup> This theory suggests that copyright laws were established to provide an incentive for the creation of intellectual property, with the access to such works benefitting the greater good of society.<sup>92</sup> This theory also warns that without granting a monopoly right in these works, there will be no incentive to create, because these works would be too easy to copy and freely disseminate.

Allowing analog radio stations to broadcast music to a wide audience without any payment to recording artists goes directly against this theory. Additionally, the fact that

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<sup>88</sup> Id. at 32.

<sup>89</sup> Id. at 12.

<sup>90</sup> Id. at 7.

<sup>91</sup> See Hughes supra note 83 at 299-300.

<sup>92</sup> Mazer v. Stein, 347 U.S. 201, 219 (1984).

songwriters are incentivized while performers are not is clearly inequitable and in opposition of this theory. This sentiment was affirmed by Paul Almeida of the AFL-CIO who testified before Congress in favor of this bill: “Just like other professionals, recording artists, musicians and background singers deserve to be paid fairly for the work they do. In what other profession would you be required to give your work away for free without your permission? I have never encountered such a situation.”<sup>93</sup>

Copyright owners of sound recordings are currently able to seek return on their investment of time, creativity, and money through the licensing of their works to satellite, cable and internet radio. The broadcasting of sound recordings with digital sound quality over terrestrial radio poses a free-rider problem. Record companies and broadcasters are now competitors in the business of distributing sound recordings, since the copyright law does not recognize a public performance right for sound recordings on terrestrial radio. The broadcasters have access to sound recordings at a low cost (the price of one compact disc) and are able to distribute them over the airwaves without compensating sound recording copyright owners. As a result, record companies might not have much incentive to invest in the creation of new sound recordings or to facilitate the creative efforts of their artists because the market for sound recordings is imbalanced. Thus, broadcasters take a free ride at the expense of the record companies because they share in the profits of an investment for which they took no risk.

Record companies currently derive the majority their revenue from record sales. As a result, the record companies are hesitant to take a chance on new artists whose records might not sell, and focus most of their efforts on proven artists. If record companies were guaranteed royalties for radio airplay, then they would have another source of revenue and be more apt to

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<sup>93</sup> *Performance Rights Act: Hearing on H.R. 848 Before the Comm. on H. Judiciary*, 111th Cong. (2009) (statement of Paul Almeida, President, Dept. for Prof. Employees, AFL-CIO).

take chances on new artists. The introduction of a public performance royalty for sound recordings could result in a shift in the record company business model, resulting in a larger and more diverse body of music. Congress should uphold the basic tenets of copyright law by providing incentives for copyright owners to of sound recordings to continue to produce works that benefit society.<sup>94</sup>

### **C. Radio's Response**

The main argument that radio broadcasters employ is that sound recording copyright owners benefit from the free promotion that results from radio play in the form of increased album sales. In support of this argument, broadcasters point to the longstanding practice of payola, in which record companies pay radio stations to play their songs on the radio.<sup>95</sup> However, the promotional value of radio diminishes with the passage of time; record companies are not paying radio stations to play classic rock or golden oldies.<sup>96</sup> Additionally, songwriters receive the same free radio promotion for their musical works that performers receive for their sound recordings, but they still receive royalties. There is also evidence that radio play may actually decrease record sales.<sup>97</sup>

Broadcasters also point out that record companies with popular recording artists will receive a significant amount of revenue from record sales. Contrary to popular belief, very few

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<sup>94</sup> See supra note 86 at 32 (“Congress should be aware of the need for strong incentives for creators to continue their artistic endeavors and the equal need for incentives to encourage the continued development of new technological advances that enable legitimate exploitation of and access to musical and other works. In the absence of corrective action, new technologies will pose an unacceptable risk to the survival of what has been a thriving music industry.”).

<sup>95</sup> See DelNero supra note 37 at 507-509.

<sup>96</sup> Id. at 509.

<sup>97</sup> Alex Mindlin, *Radio Listeners Seem to Buy Less Music*, N.Y. Times, (July 23, 2007) (A study found that approximately one additional hour of radio listening per person per day corresponded with a 0.75 drop in the number of albums purchased per capita in a given city over the course of a year) available at [http://www.nytimes.com/2007/07/23/business/media/23drill.html?\\_r=1&ex=%201342843200&en=4f384e3cbebeb984&ei=5090&partner=%20rssuserland&emc=rss](http://www.nytimes.com/2007/07/23/business/media/23drill.html?_r=1&ex=%201342843200&en=4f384e3cbebeb984&ei=5090&partner=%20rssuserland&emc=rss) (last accessed Nov. 2, 2009). See also William H. O’Dowd *The Need for a Public Performance Right in Sound Recordings*, 31 Harv. J. on Legis. 249, 267 (1994) (“The works of several musical styles, including those of old blues artists and performers whose works fall under the major radio formats of “Classic Rock” and “Oldies” continue to be profitable for broadcasters despite slow record sales”).

recording artists sell enough albums for the record company to recoup its investment.<sup>98</sup>

Approximately one out of every ten albums is successful to the record company from an economic standpoint.<sup>99</sup> Additionally, it is very difficult for recording artists to earn money from record sales, even from a platinum selling album.<sup>100</sup> Inevitably at some point in the career of most recording artists, their ability to command a live audience diminishes, record sales dwindle, and merchandising value declines.<sup>101</sup> Allowing the record company and recording artist to be compensated for airplay is well-deserved since radio stations, songwriters, and music publishers will continue to enjoy revenues from the broadcast of their hit recordings for many years to come.

Lastly, broadcasters argue that a requiring them to pay for the use of sound recordings would bankrupt many radio stations, as they already pay songwriters for the use of their musical works. Radio stations received \$16 billion dollars in advertising revenue in the year 2007, of which \$300 million was paid to songwriters and music publishers.<sup>102</sup> Additionally, radio giants such as Clear Channel have purchased many smaller stations, resulting in the consolidation in

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<sup>98</sup> See Donald Passman, *All You Need to Know About the Music Business*, 80 (Hal Leonard Corp. ed., Free Press 2006) (1991). (“Recoupment” basically means pay back. Because labels normally expend a lot of money on artists through studio time, advances, and marketing, they construe all of this money as a loan to the artist which must be paid back. The artist pays back the record label out of their royalties. Obviously this has significant implications. If a major label spends \$100,000 to record an album, the artist must make over \$100,000 in royalties until they receive their first royalty check. It is only after an artist sells enough records to pay back the amount to the record label that the artist has recouped. Approximately 80% of albums never reach this point. Obviously, this means that most artists never receive any royalty checks.”).

<sup>99</sup> Mike Wiser, *The Way the Music Died*, May 27, 2004 (“According to the RIAA, only 10 percent of albums ever achieve profitability”) <http://www.pbs.org/wgbh/pages/frontline/shows/music/inside/faqs.html>. (last accessed December 21, 2009).

<sup>100</sup> See supra note 98 at 80 (“After deductions for packaging, shipment, storage, and production, recording artists make about \$1.00 in royalties from every compact disc sold.”).

<sup>101</sup> *Radio Performance Rights: Hearing on H.R. 4789 Before the Comm. on H. Judiciary*, 110th Cong. (2008) (Statement of Nancy Sinatra). (“Most recording artists are of the middle class variety - they work hard, make a living and expect to be appropriately paid. Some are forced to tour until they die, if they can still sell tickets.”).

<sup>102</sup> See Sinatra supra note 85 (“the radio industry earns \$16 billion dollars a year from advertisers just for playing our music and pays the people who create the recordings absolutely nothing.”).

operations and reduced fixed expenses, thereby creating increased profit potential.<sup>103</sup> Paying an additional \$300 million to copyright owners of sound recordings would not result in the bankruptcy of terrestrial radio.

Without sound recordings, radio would be silent. Radio cannot exist without sound recordings, because advertisers pay radio broadcasters for the ability to reach consumers during the time slots in between songs. Congress has in effect subsidized terrestrial radio by not requiring broadcasters to pay performers for the use of their sound recordings, and radio has benefitted from this practice for far too long. This inequitable system can no longer be justified, as cable, satellite, and internet radio all pay performers for the use of their sound recordings. Congress has the opportunity to remedy this inequity by granting performers a full public performance right in sound recordings.

## **V. How the Performance Rights Act Amends the Copyright Act**

The Performance Rights Act (the Act) would amend Copyright Act §106(6), which grants limited public performance rights to sound recordings and §114, which establishes statutory licensing schemes to determine rates applicable to public performance of sound recordings.<sup>104</sup> Specifically, the Act would amend section 106(6) by removing the word “digital”, thereby extending the right to perform a sound recording publicly on any audio transmission.<sup>105</sup> Similarly, it would amend section 114(d)(1) of the Act by removing the exemption for “non-subscription broadcast transmissions” from performance rights for sound recordings on any audio transmission.<sup>106</sup> The result of these amendments would allow copyright owners of sound

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<sup>103</sup> See DelNero supra note 37 at 512: (noting Clear Channel Communications owns 1,200 stations and reaches one-third of the American population).

<sup>104</sup> Performance Rights Act, H.R. 848, S. 379, 111th Cong. (2009).

<sup>105</sup> See supra note 104 at §2(a) (Performance Rights Applicable to Radio Transmissions Generally).

<sup>106</sup> See supra note 104 at §2(b)-(c) (Inclusion of Terrestrial Broadcasts in Existing Statutory License System.)

recordings to receive royalty payments when their songs are played on digital, internet, satellite and terrestrial radio.

The Act offers “per program” statutory license rates for broadcast radio stations that make “limited feature uses” of sound recordings.<sup>107</sup> These features are aimed at ensuring that the new royalties do not place an undue burden on small radio stations.<sup>108</sup> Additionally, it contains exemptions for non-subscription transmissions of services at places of worship or other religious assembly, as well as “incidental” use of sound recordings.<sup>109</sup> The Performance Rights Act also provides for an annual \$1,000 blanket statutory license for noncommercial (*i.e.*, public, educational, or religious) radio stations.<sup>110</sup> These provisions are aimed at ensuring that for-profit radio stations shoulder the burden created by the new right.

The Act also includes an annual \$5,000 blanket statutory license for commercial radio stations that generate less than \$1.25 million in annual revenue<sup>111</sup> According to one of the Act’s sponsors Rep. John Conyers, “77 percent of existing broadcasting stations in this country-

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<sup>107</sup> See supra note 104 at §4 “Such rates and terms shall include a per program license option for terrestrial broadcast stations that make limited feature uses of sound recordings.”).

<sup>108</sup> 155 Cong. Rec. S1543-01 (daily ed. Feb. 4, 2009) (statement of Sen. Leahy) (Rather than require all radio stations to pay fair market value to artists for the songs they play, the legislation includes special provisions for noncommercial and all but the largest commercial stations. In addition, every radio station can use a statutory copyright license to transmit sound recordings, instead of negotiating licenses separately in the marketplace.

<sup>109</sup> See supra note 104 at §3 (Special Treatment for Small, Noncommercial, Educational, and Religious Stations and Certain Uses).

<sup>110</sup> See supra note 104 at §3(E) (“Notwithstanding the provisions of subparagraphs (A) through (C), each individual terrestrial broadcast station that is a public broadcasting entity as defined in section 118(f) may elect to pay for its over-the-air non-subscription broadcast transmissions a royalty fee of \$1,000 per year, in lieu of the amount such station would otherwise be required to pay under this paragraph.”).

<sup>111</sup> See supra note 104 at §3(D) (“Notwithstanding the provisions of subparagraphs (A) through (C), each individual terrestrial broadcast station that has gross revenues in any calendar year of less than \$1,250,000 may elect to pay for its over-the-air non-subscription broadcast transmissions a royalty fee of \$5,000 per year, in lieu of the amount such station would otherwise be required to pay under this paragraph. Such royalty fee shall not be taken into account in determining royalty rates in a proceeding under chapter 8, or in any other administrative, judicial, or other Federal Government proceeding.”).

including college stations and public broadcasters-will pay only a nominal flat fee, rather than having to pay a percentage of their revenues as royalties.”<sup>112</sup>

The Performance Rights Act expressly includes provisions to ensure that songwriters and music publishers continue to receive fair compensation for public performances of their works despite the increased costs to broadcasters associated with paying performers.<sup>113</sup> These provisions address their original concerns that the introduction of sound recording royalties for performers and record labels would mean that their royalties for musical works would be divided among the parties.

The most significant provision of the Act contains requires fifty percent of the royalties paid through statutory licensing of sound recordings to go to “featured” performers and “non-featured” musicians and vocalists rather than solely to copyright owners of the sound recordings.<sup>114</sup> The House bill would also require fifty percent of royalties earned through voluntary licensing of sound recordings for public performances on broadcast radio to be paid to “featured” performers and “non-featured” musicians and vocalists, whereas the Senate bill would not. By creating a mechanism to compensate artists, these provisions anticipate the argument that a public performance right in sound recordings would benefit only record labels.

There is no better time than the present for Congress to level the playing field between terrestrial radio broadcasters and sound recording copyright owners. The passage of the Performance Rights Act would finally end the long, arduous battle for equal performance rights that performers and record labels have been fighting for many years.

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<sup>112</sup> 155 Cong. Rec. E202-04 (daily ed. Feb. 4, 2009) (statement of Rep. Conyers).

<sup>113</sup> See supra note 104 at §5 (No Harmful Effects on Songwriters), see also Leahy supra note 111 (“The changes made by this legislation, which will ensure performing artists are compensated, should not have any negative effect on songwriters. I will work closely with the songwriters and we will make sure that is the case.”).

<sup>114</sup> See supra note 104 at §6 (Payment of Certain Royalties).