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NOTE: HARMONIC PROGRESSIONS TO A FULL PUBLIC PERFORMANCE RIGHT IN SOUND RECORDINGS: EXAMINING RECENT LEGISLATIVE ATTEMPTS THAT COULD RECTIFY UNITED STATES NON-COMPLIANCE WITH TRIPS AND A POSSIBLE MODULATION OF THE ISSUE TO REACH A FINALE

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I. INTRODUCTION

One of the most popular songs ever written is Irving Berlin's "White Christmas."[1] Since its inception in 1942, there have been hundreds of renditions by various artists, including Bing Crosby, Frank Sinatra, and Elvis Presley to name a few.[2] The song can be broken into two components. The first is the sounds heard, which are composed of the voices and instruments, and are a part of the sound recording.[3] The second component is the musical composition underlying that sound recording, which includes the actual lyrics and composed music, and remains a legally separate work.[4]

The "White Christmas" example highlights the difference between the songwriter and recording artist. While various other artists have performed "White Christmas", the most famous version is still Bing Crosby's rendition. His version sold over fifty million copies[5] and is listed in the Guinness Book of World Records as the best-selling recording of all time.[6] One may think that Irving Berlin and Bing Crosby, as well as others who have performed "White Christmas," benefited economically from the amount of airtime the song received over the years. However, the reality is that only Irving Berlin and his publisher received payments each time the song was played over the radio.[7] This is not due to a contract detrimental to the artist, but rather to United States copyright law.

Another example of this seemingly unfair result in copyright law is the musical career of the duo Simon and Garfunkel. While many believe that the two collaborated on writing their songs based on how perfectly they harmonized together, that was not the case. Paul Simon wrote most of the duo's songs including their top hits: "Mrs. Robinson," "Sound of Silence," and "Bridge Over Troubled Water."[8]

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[1] *The Story of "White Christmas"*, CBS: SUNDAY MORNING (Dec. 24, 2006, 9:13 AM), http://www.cbsnews.com/news/the-story-of-white-christmas.

[2] *See id.*; *see also 'White Christmas'*, NPR (Dec. 25, 2000, 12:00 AM), http://www.npr.org/2000/12/25/1116021/white-christmas.

[3] *See* 6 MELVILLE B. NIMMER & DAVID NIMMER, NIMMER ON COPYRIGHT § 30.02 (2017) (Matthew Bender, rev. ed.) (distinguishing between two different elements of a musical composition; the music and lyrics).

[4] *See* 17 U.S.C. § 102 (2012) (providing copyright protection for musical works and accompanying words).

[5] *White Christmas*, CHRISTMAS SONGS, http://www.christmassongs.net/white-christmas (last visited Sept. 28, 2017).

[6] *Best Selling Single*, GUINNESS WORLD RECORDS, http://www.guinnessworldrecords.com/world-records/59721-best-selling-single (last visited Sept. 25, 2017).

[7] W. Jonathan Cardi, *Uber-Middlemen: Reshaping the Broken Landscape of Music Copyright*, 92 IOWA L. REV. 835, 839–40 (2007).

[8] *See Art Garfunkel vs. Paul Simon*, DIFFEN,

continued . . .

While Paul Simon wrote most of the songs, that is not to say that Art Garfunkel did not contribute anything. Garfunkel decided on the harmonies in a song and assigned parts.[9] For example, consider "Bridge Over Troubled Water," one of the songs in the last album the duo recorded together before splitting, as it applies to the unfair result in copyright law.[10] In this example, the original composition was still written by Paul Simon.[11] Although Art Garfunkel created the famous harmonies in the song and designated who would sing which parts, only Paul Simon received royalties from the song when played over the radio because he was the sole writer of the original composition.[12] This shows how even where artists are identified as collaborative partners, copyright law still creates inequity between a duo based on the songwriter and recording artist roles.

Under Section 106(6) of the Copyright Act, the exclusive right that musicians have in their sound recordings is limited to the right to "perform the copyrighted work publicly by means of a digital audio transmission" (sound recording right).[13] This exempts radio stations from being required to pay for the right to use the sound recordings that make up all of their music programming.[14] In 1994, one of the biggest changes in the world's trading system was the signing of the Uruguay Round Agreement.[15] Under that umbrella agreement came the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS), which set minimum standards for many forms of intellectual property protection.[16] In particular, the standard under Article 14 allows creators of sound recordings the possibility of preventing unauthorized broadcasting of their live performances by wireless means to the public.[17]

The 1996 World Intellectual Property Organization Performances and Phonograms Treaty mandates a sound recording right, but not a

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http://www.diffen.com/difference/Art_Garfunkel_vs_Paul_Simon (last visited Oct. 1, 2017).

[9] *See id.*

[10] *Id.*

[11] *See id.*

[12] *See id.*

[13] 17 U.S.C. § 106 (2012).

[14] *Id.* § 106 note Rights of Reproduction, Adaptation, and Publication.

[15] *See The Uruguay Round*, WORLD TRADE ORG., https://www.wto.org/english/thewto_e/whatis_e/tif_e/fact5_e.htm (last visited Sept. 28, 2017); *see also* Agreement on Trade-Related Aspects of Intellectual Property Rights, Apr. 15, 1994, 1869 U.N.T.S. 299, 33 I.L.M. 1197, https://www.wto.org/english/docs_e/legal_e/27-trips_01_e.htm (last visited Sept. 28, 2017) [hereinafter TRIPS].

[16] TRIPS, *supra* 15, at 323.

[17] *Id.* at 325.

public performance right for sound recordings.[18] While most signatory countries provide a full sound recording performance right, one country that does not is the United States.[19] Based on the concept of national treatment, also known as reciprocity, found in Article 4, foreign jurisdictions only have to provide American artists with the rights those artists receive in the United States.[20] Therefore, the United States is not in full compliance with TRIPS because sound recordings do not receive a full performance right.[21] Only digital transmissions, and not terrestrial broadcasts, are covered under Section 106(6) of the Copyright Act.[22] Recent bills have attempted to rectify this error,[23] but the question remains whether their efforts will be sufficient.

The public performance right in sound recordings embodied in Section 106(6) should not just be extended to include terrestrial broadcasts, as would be the case under the recently proposed Fair Play Fair Pay Act of 2015 (the Act).[24] The Act and prior legislative attempts have all focused on establishing platform parity.[25] The Act's apparent goal is to achieve a general public performance right in sound recordings.[26] This note argues that the public performance right in

[18] WIPO Performance and Phonograms Treaty, art. 5–10, Dec. 20, 1996, 2186 U.N.T.S. 245, 36 I.L.M. 76 [hereinafter WPPT].

[19] John R. Kettle III, *Dancing to the Beat of a Different Drummer: Global Harmonization–And the Need for Congress to Get in Step with a Full Public Performance Right for Sound Recordings*, 12 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 1041, 1075 (2002).

[20] WPPT, *supra* note 18, at art. 4; *see generally* WORLD INTELLECTUAL PROP. ORG., UNDERSTANDING COPYRIGHT AND RELATED RIGHTS 1, 9 (2016), http://www.wipo.int/edocs/pubdocs/en/wipo_pub_909_2016.pdf (describing the rights protected by copyright).

[21] Mary LaFrance, *From Whether to How: The Challenge of Implementing a Full Public Performance Right in Sound Recordings*, 2 HARV. J. OF SPORTS & ENT L. 221, 230 (2011).

[22] *Digital Performance Right in Sound Recordings Act of 1995: Hearing on H.R. 1506 Before the Subcommittee on Courts and Intellectual Property Committee on the Judiciary*, 104th Cong. 1 (1995) (statement of Marybeth Peters, Register of Copyrights).

[23] *See infra* Part IV.

[24] *See* FAIR PLAY FAIR PAY ACT OF 2015, H.R. 1733, 114th Cong. § 2(b) (2015).

[25] BRIAN T. YEH, CONG. RESEARCH SERV., RL33631, COPYRIGHT LICENSING IN MUSIC DISTRIBUTION, REPRODUCTION, AND PUBLIC PERFORMANCE 28 (2015); Loren E. Mulraine, *Fair Play Fair Pay: The Need for a Terrestrial Public Performance Right and General Copyright Reform*, 3 BELMONT L. REV. 71, 97–98 (2016).

[26] *See* Amanda Alasauskas, *Save Rock and Roll: A Look at Rights Afforded to Pre-1972 Sound Recordings and Why Federalization Should Be Granted*, 66 DEPAUL L. REV. 265, 267 (2016); Stasha Loeza, *Out of Tune: How Public Performance Rights Are Failing to Hit the Right Notes*, 31 BERKELEY TECH. L.J. 725, 756 (2016).

sound recordings should be incorporated within Section 106(4), thereby repealing Section 106(6). This incorporation would finally place America in compliance with TRIPS and the Uruguay Round Agreement. The American copyright system would then provide uniform public performance rights in musical works and sound recordings.

Several reasons support the incorporation of public performance rights in sound recordings into Section 106(4). The first and most important reason, in this author's opinion, is that this change would remove the apparent class system the current legal scheme creates amongst songwriters, composers, and lyricists on the one hand, and recording artists, performers, and sound mixers on the other.[27] This change would both foster and reward creativity equally amongst those within the artistic realm of making music. Though the creator of the musical work and the creator of the sound recording may be the same at times, songwriters often create the music, while a recording artist is hired to play it.[28] Music by its very nature is not confined to a stanza of notes, a particular key, or a pattern of accidentals, as they appear written on a sheet; music also incorporates the recording artist or performers' choice of cadence, embellishment, and dynamics, among other elements.[29] The type of creativity in a sound recording should be rewarded to the same extent as the musical work itself. Eliminating the distinction between the public performance right in a musical work and a sound recording by giving both equal rights under the same section of the Copyright Act can achieve this. The goal of fostering creativity goes to the very heart of copyright law and its benefit to the public.[30] Incorporating sound recordings into Section 106(4) incentivizes creative new ways of expression, regardless of whether it is a musical work or a sound recording, thereby providing the public with new musical creations.

A second reason, though more ancillary, is that incorporating

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[27] *See, e.g.*, Miranda Bullard, *An International Perspective: Why the United States Should Provide a Public Performance Right for Non-Digital Audio Transmissions*, 30 TEMP. INT'L & COMP. L.J. 225, 249 (2016) (explaining the disparity that impacts a recording artist when a songwriter is paid for radio plays while the artist is not).

[28] Beth B. Moore, *Songwriter vs. Recording Artist: Understanding the Difference*, BETH B. MOORE (Apr. 22, 2014), http://www.bethbmoore.com/songwriter-vs-recording-artist-understanding-the-difference/.

[29] Vinny Ribas, *The Difference Between an Artist and a Singer*, INDIE CONNECT, http://indieconnect.com/the-difference-between-an-artist-and-a-singer/ (last visited Oct. 2, 2017).

[30] *See* U.S. CONST. art. I, § 8, cl. 8.

Section 106(6) into Section 106(4) helps to eliminate the separate and distinct revenue systems available. Creators of musical works and sound recordings would then be able to take advantage of the same streamlined revenue system.[31] This goal of unifying the revenue stream systems of different performing rights societies (ASCAP, BMI, SESAC, and SoundExchange) furthers the goal of removing the apparent class system created by separating the systems available to musical works and sound recordings. Finally, a third reason for incorporating Section 106(6) into Section 106(4) is that it will further the principle of fairness. Creators of musical works and sound recordings would be treated equal as to the public performance right, which would remove the unfair treatment of creators of sound recordings compared to that of creators of musical works.

II. PUBLIC PERFORMANCE RIGHT IN THE U.S. COPYRIGHT ACT

A. The Current Law

United States copyright law protects two separate elements of music: the musical composition, "including any accompanying words,"[32] and the sound recording "that result[s] from the fixation of a series of musical, spoken, or other sounds . . . regardless of the nature of the material objects, such as disks, tapes, or other phonorecords, in which they are embodied."[33] The copyright owner of a musical work and the copyright owner of a sound recording each possess the right to reproduce, distribute, and prepare derivative versions of the respective work, or to authorize others to do so.[34] Further, the statute defines to perform "publicly" under Section 101 as:

> (1) to perform or display it at a place open to the public

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[31] Josh P. Binder, *Current Developments of Public Performance Rights for Sound Recordings Transmitted Online*, 22 LOY. L.A. ENT. L. REV. 1, 6–7 (2001).

[32] 17 U.S.C. § 102(a)(2) (2012).

[33] 17 U.S.C. § 101 (2012) (alteration in original).

[34] *See* 17 U.S.C. § 106 (2012) ("[T]he owner of copyright under this title has the exclusive right to do and to authorize any of the following: (1) to reproduce the copyrighted work in copies or phonorecords; (2) to prepare derivative works based upon the copyrighted work; (3) to distribute copies or phonorecords of the copyrighted work to the public by sale or other transfer of ownership, or by rental, lease, or lending; (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; (5) in the case of literary, musical, dramatic, and choreographic works, pantomimes, and pictorial, graphic, or sculptural works, including the individual images of a motion picture or other audiovisual works, to display the copyrighted work publicly; and (6) in the case of sound recordings, to perform the copyrighted work publicly by means of a digital audio transmission.").

> 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 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.[35]

For the purposes of sound recordings, a digital audio transmission is defined as "a transmission in whole or in part in a digital or other non-analog format."[36]

The Copyright Act does not provide the copyright owner of the sound recording a public performance right.[37] The only exception is for particular digital transmissions of music.[38] This is a right that copyright owners enjoy in other performing arts works.[39] The importance of the public performance right is that it gives the copyright owner the right to receive royalties when their work is publicly performed.[40] However, under the current Copyright Act, only the copyright owner of a musical composition is entitled to a full public performance right, whereas the copyright owner of the sound recording does not receive rights.[41]

B. History of Public Performance Right in the Copyright Act

An understanding of the origins and history of the public performance right in copyright law is essential to an understanding of

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[35] § 101.

[36] *Id.*

[37] *See* 17 U.S.C. § 114(a) (2012) ("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 section 106(4).").

[38] *See* 17 U.S.C. § 114(d) (2012) (enumerating certain exempt transmissions and retransmissions under the limitation on exclusive rights in sound recordings).

[39] *See* § 106(4) ("[I]n the case of literary, musical, dramatic, and choreographic works, pantomimes, and motion pictures and other audiovisual works, to perform the copyrighted work publicly . . . .").

[40] *See* 141 CONG. REC. 948 (1995).

[41] *Id.* at 947 ("[W]hen only the audio recording is played on the radio or delivered by means of a satellite or other subscription service, only the composer and publisher have performance rights that must be respected . . . The producer's and performer's interests are ignored.").

the statute. In *Herbert v. Shanley Co.*, a 1917 copyright case on public performance, Justice Oliver Wendell Holmes stated: "[i]f music did not pay, it would be given up. If it pays, it pays out of the public's pocket. Whether it pays or not, the purpose of employing it is profit and that is enough."[42] Justice Holmes recognized that when musicians play music, they do so as their profession.[43] Though musicians still create music for the purpose of artistic expression, the Copyright Act is designed to incentivize the creation of music through attractive artistic and financial controls over the works created.[44] By incentivizing the creation of music, the Copyright Act furthers the public interest. Therefore, artists ought to be compensated for their works so they will continue to create.[45]

The Copyright Clause of the United States Constitution provides that Congress has the power "to promote the Progress of Science and useful Arts, by securing for limited Times to Authors . . . the exclusive Right to their respective Writings . . . ."[46] The first Copyright Act was passed in 1790, which granted the rights of reproduction and distribution to copyright holders.[47] Congress did not pass a law granting a public performance right until 1856, and that law applied to dramatic compositions specifically.[48] In creating a public performance right, Congress declared that copyright owners of dramatic compositions had the exclusive right "to act, perform, or represent the same, or cause it to be acted, performed, or represented, on any stage

[42] Herbert v. Shanley Co., 242 U.S. 591, 595 (1917) (noting that this case was one of the earliest to focus on the public performance right and gave it some power). This case dealt with restaurateurs who played music in the background of their restaurant for patrons to listen to while they ate. *Id.* at 593–94. The Shanley Company did not charge admission at the door, so it claimed it was not performing Herbert's work publicly for profit. *Id.* at 594. The issue was "whether the performance of a copyrighted musical composition in a restaurant or hotel without charge for admission to hear it infringes the exclusive right of the owner of the copyright to perform the work publicly for profit." *Id.* at 593. The Court found that, despite not charging admission, the performances were indeed public performances, with Justice Holmes explaining, "[t]he defendants' performances are not eleemosynary. They are part of a total for which the public pays, and the fact that the price of the whole is attributed to a particular item which those present are expected to order is not important." *Id.* at 594–95.

[43] *Id.* at 595.

[44] Harper & Row, Publishers, Inc. v. Nation Enters., 471 U.S. 539, 555 (1986) (noting the general worth of artistic and financial control to an artist).

[45] *Id.* at 546 ("The rights conferred by copyright are designed to assure contributors to the store of knowledge a fair return for their labors.").

[46] U.S. CONST. art. I, § 8, cl. 8.

[47] Copyright Act of 1790, ch. 15, § 1 (1790).

[48] Act of Aug. 18, 1856, ch. 169, 11 Stat. 138 (1856) (current version codified at 17 U.S.C. § 106 (2012)).

or public place during the whole period for which the copyright is obtained."[49] This public performance right would later be extended to musical compositions in 1897.[50] Before the law was extended, however, composers' primary source of income was the sale of sheet music.[51] Composers would often perform works in public with the goal of selling their sheet music, to make it easier for the average person to play.[52] Due to the 1897 public performance right extension, musicians could make money from public performances of their work, as well as create more innovative work; musicians were not restrained by a need to sell sheet music to make a living.[53]

In 1909, Congress passed a new copyright act (1909 Act), which codified the public performance right of authors and copyright holders of dramatic works and musical compositions.[54] This time, however, Congress limited the right in musical composition to a "public performance for profit."[55] Interestingly, the 1909 Act did not contain any definitions for the terms "public," "performance," or "for profit."[56] These omissions led to several decades of litigation over the scope of the ill-defined right.[57] According to the Copyright Office, "[w]hile the 1909 Act provided protection for copyright holders of musical compositions whose works were reproduced in sound recordings, it included no explicit protection for sound recordings *per se*."[58] Without such protection, both the Copyright Office and the federal courts refused to acknowledge copyright protection for sound recordings for decades.[59]

Change occurred largely from new ways of recording music and the development of radio. When the 1909 Act was originally passed,

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[49] *Id.*

[50] Act of Jan. 6, 1897, ch. 4, 29 Stat. 481 (1897) (current version codified at 17 U.S.C. § 106 (2012)).

[51] Aaron Cook, Note, *Music Publishers Slay Musicianship*, 8 TEX. REV. ENT. & SPORTS L. 102, 107 (2007).

[52] *See Tin Pan Alley: 1880–1953,* SONGWRITERS HALL OF FAME, https://web.archive.org/web/20170114040112/http://songwritershalloffame.org:80/exhibits/eras/C1002 (last visited Oct. 2, 2017).

[53] *Id.*

[54] *See* Copyright Act of 1909, Pub. L. No. 60-349, § 1(c)–(e), 35 Stat. 1075 (1909) (repealed by Copyright Act of 1976).

[55] *See id.* § 1(e).

[56] *See generally id*. (lacking definitions for the aforementioned phrases).

[57] *See, e.g.*, M. Witmark & Sons v. L. Bamberger & Co., 291 F. 776, 780 (D.N.J. 1923); Taylor v. State, 188 P.2d 671, 676 (Wash. 1948); Victor Talking Mach. Co. v. Armstrong, 132 F. 711, 711–12 (S.D.N.Y. 1904).

[58] MARIA A. PALLANTE, FEDERAL COPYRIGHT PROTECTION FOR PRE-1972 SOUND RECORDINGS 1, 8 (2011), https://www.copyright.gov/docs/sound/pre-72-report.pdf.

[59] *See id.* at 8–9.

for example, radio communication had not progressed far beyond applications of Morse code.[60] Therefore, it is easy to see why Congress did not think to include copyright protection for broadcasts of musical recordings at a time when those broadcasts were incapable of broadcasting musical recordings. However, once radio technology established itself in mainstream media, the Supreme Court made clear that "the transmitting of a musical composition by a commercial broadcasting station is a public performance . . . ."[61]

Congress first established copyright protection for sound recordings with the Sound Recording Amendment Act of 1971 (1971 Act).[62] Before the passage of the 1971 Act, protection for sound recordings was only achieved via state common law or criminal statutes.[63] At that time, record companies were concerned with protection from music piracy, which over the last decade had increased substantially.[64] Combating these piracy concerns were the main goal of the 1971 Act.[65] However, the technological advances made since the last copyright law quickly made the 1971 Act antiquated. As a result, Congress incorporated the 1971 Act into the Copyright Act of 1976 (1976 Act), which was a general revision of the 1909 Act and is currently the law today.[66] Interestingly, the initial draft of the 1976 Act included language that provided for a performance right in sound recordings; however, Congress removed

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[60] *See* Buck v. Jewell-La Salle Realty Co., 283 U.S. 191, 197 (1931). *Compare Morse Code & The Telegraph*, HISTORY (2009), http://www.history.com/topics/inventions/telegraph (detailing the history of morse code and the developments which led to its fall), *with* Rowan Wakefield, *A Brief History*, UNION C. (1959), https://web.archive.org/web/20080515103959/http://w2uc.union.edu/RADIO_web.htm (highlighting the advances made in radio communication during the early twentieth century).

[61] *Buck*, 283 U.S. at 197.

[62] *See* Sound Recordings Act of 1971, Pub. L. No. 92-140, 85 Stat. 391 (codified as amended in scattered sections of 17 U.S.C.).

[63] *See Copyright Timeline: A History of Copyright in the United States*, ASS'N RES. LIBR., http://www.arl.org/focus-areas/copyright-ip/2486-copyright-timeline#20C (last visited Sept. 29, 2017).

[64] WILLIAM F. PATRY, COPYRIGHT LAW AND PRACTICE 74 (2000), http://digital-law-online.info/patry/patry7.html.

[65] 17 U.S.C. § 1(f) (1976) (stating that the protection granted by the 1971 Act extends only to the copyright owner's right to "duplicate the sound recording in a tangible form that directly or indirectly recaptures the actual sounds fixed in the recording").

[66] *See United States Copyright Office A Brief Introduction and History*, COPYRIGHT.GOV, http://www.copyright.gov/circs/circ1a.html (last visited Sept. 29, 2017); *see generally* Copyright Act of 1976, 17 U.S.C. §§ 101–810 (2012).

this language before passing the 1976 Act.[67] The goal of record companies with the 1976 Act was to gain at least some form of copyright protection for sound recordings.[68] Even though there were limitations imposed by Section 114(a) of the 1976 Act, they ultimately supported the 1976 Act, even with its limitations, in order to preempt objections from broadcasters, restaurant owners, and club owners, who all opposed such a copyright in sound recordings.[69] Note that both Sections 106(4) and 114(a) exclude a general performance right in sound recordings.[70] However, there was a silver lining for the general performance right discussion, the bill did require that the issue be revisited by the U.S. Copyright Office and any findings be reported to Congress.[71] The Copyright Office reported in a 1978 report:

> Sound recordings fully warrant a right of 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 . . . bringing sound recordings into parity with other categories of copyrightable subject matter.[72]

Under the new law, broadcasters must acquire a license from the songwriter of the musical work in order to play a song over the radio,[73]

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[67] S. 1111, 94th Cong., 121 CONG. REC. 5722 (1975) (statement of Hugh Scott) (noting that performers and record labels are as much entitled to receive compensation for the commercial use of their creative efforts as any other owner of copyright and that payments would be statutorily required for the commercial exploitation of such music).

[68] Abbott Marie Jones, *Get Ready Cause Here They Come: A Look at Problems on the Horizon for Authorship and Termination Rights in Sound Recordings*, 31 HASTINGS COMM. & ENT. L.J. 127, 129–30 (2008).

[69] Steve Gordon & Anjana Puri, *The Current State of Pre-1972 Sound Recordings: Recent Federal Court Decisions in California and New York Against Sirius XM Have Broader Implications than Just Whether Satellite and Internet Radio Stations Must Pay for Pre-1972 Sound Recordings*, 4 J. INTELL. PROP. & ENT. L. 336, 341 (2015).

[70] *See* 17 U.S.C. § 106(4) (2012) (stating that the copyright owner has the exclusive right to do and to authorize "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. § 114(a) (2012) ("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 section 106(4).").

[71] *See* Bonneville Int'l Corp. v. Peters, 153 F. Supp.2d 763, 771 (E.D. Pa. 2001).

[72] STAFF OF H.R. COMM. ON THE JUDICIARY, 95TH CONG., 2D SESS., PERFORMANCE RIGHTS IN SOUND RECORDINGS 177 (Comm. Print 1978).

[73] *See* 17 U.S.C. § 106(4).

and in return, the songwriter receives a royalty payment.[74] Normally, a non-exclusive license agreement is entered into between the songwriter of the musical composition and his publisher, and with a performing rights society, who offers licenses to conduct public performances to broadcasters and other users of the musical compositions.[75] These performing rights societies—ASCAP, BMI, SESAC, and SoundExchange—collect money from the licensees and distribute it to the songwriter and their publisher.[76] However, the law does not require broadcasters to gain a license from the performing artists that may have performed the songs.[77] As a result, the performing artists do not get to be a part of the transactions with the songwriters and publishers, meaning they receive no royalty payments for their contributions to a musical work.[78]

Digital technologies, introduced in the 1980s,[79] made it easier for consumers to obtain sound recordings. Not only was it easier to purchase song recordings, but increasingly high quality copies became an industry standard.[80] In an effort to respond to the record industry and give copyright protection powers back to copyright owners, Congress passed the Audio Home Recording Act.[81] However, the progress of technology marched on and eventually it became possible to broadcast digital signals.[82] Again addressing copyright owners' fears in response to new technological developments,[83] Congress passed two amendments to the Copyright Act: (1) the Digital Performance Right in Sound Recordings Act of 1995 (DPRA);[84] and

[74] Kettle, *supra* note 19, at 1043.

[75] *See All About ASCAP*, ASCAP, https://www.ascap.com/-/media/files/pdf/advocacy-legislation/allaboutascap.pdf (last visited Oct. 13, 2017); *About*, BMI, http://www.bmi.com/about (last visited Oct. 13, 2017); *SESAC Performing Rights*, SESAC, https://www.sesac.com/About/About.aspx (last visited Oct. 13, 2017); *About*, SOUNDEXCHANGE, http://www.soundexchange.com/about/ (last visited Oct. 13, 2017).

[76] Laura E. Johannes, *Hitting the Right Notes: The Need for a General Public Performance Right in Sound Recordings to Create Harmony in American Copyright Law*, 35 WASH. UNIV. J.L. & POL'Y 445, 452–53 (2011).

[77] *See* 17 U.S.C. § 114(a) (2012).

[78] Johannes, *supra* note 76, at 453.

[79] *Id.* at 454.

[80] *See* H.R. REP. NO. 104–274, at 12 (1995).

[81] *See* Audio Home Recording Act of 1992, 17 U.S.C. § 1003 (1992) (imposing a tax on certain technologies, such as blank cassettes, digital audiotape, and CD-Rs, which made it easier to produce copies of sound recordings); H.R. 3204, 102d Cong. (1992); S. 1623, 102d Cong. (1992).

[82] *See* H.R. REP. NO. 104–274, at 12.

[83] *See id.* at 13.

[84] *See* Digital Performance Right in Sound Recordings Act of 1995, Pub. L. No. 104-39, 109 Stat. 336 (1995) (codified as amended at 17 U.S.C. §§ 106, 114–15

continued . . .

(2) the Digital Millennium Copyright Act of 1998 (DMCA).[85]

The DPRA gave sound recordings a performance right for the first time.[86] The DPRA added to Section 106 of the Copyright Act, granting copyright owners the exclusive right "to perform the[ir] copyrighted work publicly by means of a digital audio transmission."[87] When the DPRA was passed, Congress intentionally kept terrestrial radio stations from having to pay for the right to broadcast sound recordings.[88] According to the Senate Report:

> It is . . . [our] intent to provide copyright holders of sound recordings with the ability to control the distribution of their product by digital transmissions, without hampering the arrival of new technologies, and without imposing new and unreasonable burdens on radio and television broadcasters, which often promote, and appear to pose no threat to, the distribution of sound recordings.[89]

The DPRA established a three-tiered system for royalties: "broadcast transmissions [transmissions made by FCC-licensed terrestrial broadcast stations], which were exempted from the performance right; subscription transmissions, which were generally subject to a statutory license; and on-demand transmissions, which were subject to the full exclusive right."[90]

The DMCA addressed areas the DPRA had not,[91] specifically

(2012)).

[85] *See* Digital Millennium Copyright Act of 1998, Pub. L. No. 105-304, 112 Stat. 2860 (1998) (codified at 17 U.S.C. §§ 512, 1201–05, 1301–32 (2012); 28 U.S.C. § 4001 (2012)).

[86] *See* Allison Kidd, *Mending the Tear in the Internet Radio Community: A Call for A Legislative Band-Aid*, 4 N.C. J.L. & TECH. 339, 347 (2003) ("In 1995, Congress addressed the issue of public performance rights in music for the first, but only for the digital transfer of music.").

[87] 17 U.S.C. § 106(6) (2012) (alteration in original).

[88] *See* S. REP. NO. 104–128, at 2 (1995); *Copyright and the Music Marketplace: A Report of the Register of Copyrights*, COPYRIGHT.GOV 1, 44 (2015), https://www.copyright.gov/policy/musiclicensingstudy/copyright-and-the-music-marketplace.pdf.

[89] S. REP. NO. 104–128, at 14–15 (alteration in original).

[90] *Copyright and the Music Marketplace: A Report of the Register of Copyrights*, *supra* note 88, at 16 (alteration in original).

[91] Melanie Jolson, Note, *Congress Killed the Radio Star: Revisiting the Terrestrial Radio Sound Recording Exemption in 2015*, 2015 COLUM. BUS. L. REV. 764, 780 (2015); Justin Oppelaar, *Music biz grapples with new legislation: Online delivery muddles compensation rights*, VARIETY (Jan. 16, 2001), http://variety.com/2001/biz/news/music-biz-grapples-with-new-legislation-1117792037/ (stating that the DMCA "covered artists and labels for things like radio

continued . . .

those regarding the treatment of digitally streamed music.[92] The DMCA established, both directly and indirectly, how the licensing transmission revenues would be divided.[93] "It also allowed for an independent 'agent designated to distribute receipts from the licensing of transmissions' to collect proceeds for digital performances of sound recordings and specified how this body would distribute those royalties to the artists and the copyright owners."[94] This resulted in the creation of SoundExchange to serve that function.[95] However, the DPRA and DMCA did not extend the performance right to traditional broadcast systems, known as "terrestrial radio."[96] "In the House Report, Congress claimed this was due to 'the mutually beneficial economic relationship between the recording and traditional broadcasting industries.'"[97] However, despite the views of Congress, many recording artists disagreed over the supposed beneficial nature of the current relationship with traditional broadcasting industries.[98]

III. INTERNATIONAL TREATIES AND THE PUBLIC PERFORMANCE RIGHT

Most nations, including nearly all other industrialized nations, recognize performance rights for sound recordings, including terrestrial broadcast performances.[99] The first treaty to include sound recording rights was the Convention for the Protection of Producers of Phonogram Recordings and Broadcasting Organizations (Rome

channels on digital cable and satellite subscription services, but what they were really interested in were the Webcasts. Unfortunately, the Act only covered performances for which listeners paid subscription fees, cutting out most Webcasters, which rely on secondary revenues like ad sales and e-commerce.").

[92] Jolson, *supra* note 91, at 782.

[93] *Id.*; *see* 17 U.S.C. § 114(g) (2012).

[94] Jolson, *supra* note 91, at 780–81; 17 U.S.C. § 114(g)(2).

[95] Jolson, *supra* note 91, at 781.

[96] *Id.* at 782; *see* BRIAN T. YEH, COPYRIGHT LICENSING IN MUSIC DISTRIBUTION, REPRODUCTION, AND PUBLIC PERFORMANCE 1, 22–23 (2015), https://fas.org/sgp/crs/misc/RL33631.pdf.

[97] Jolson, *supra* note 91, at 782 (quoting H.R. REP. NO. 104-274, at 13 (1995)).

[98] *Id.*; *see* Ed Christman, *House Committee Approves Performance Rights Act*, BILLBOARDBIZ (June 26, 2008, 12:00 AM), http://www.billboard.com/biz/articles/news/publishing/1306698/house-committee-approves-performance-rights-act.

[99] *See Ensuring Artists Fair Compensation: Updating the Performance Right and Platform Parity for the 21st Century, Hearing on H.R. 4789 Before the Subcomm. on Courts, the Internet, and Intellectual Prop. of the H. Comm. on the Judiciary,* 110th Cong. 5 (2007) (statement of Marybeth Peters, Register of Copyrights), http://www.copyright.gov/docs/regstat073107.html [hereinafter *Ensuring Artists Fair Compensation*].

Convention).[100] In particular, Rome Convention's Article 12 explains a sound recording performance right.[101] It should be noted, however, that even though the United States was very involved in drafting the Rome Convention, it is not a signatory.[102] This presents a problem for American artists because, under the Rome Convention, neighboring rights are granted only on a reciprocal basis.[103] What this means is that only those recording artists who are nationals of a country participating in the Rome Convention are able enjoy performance rights granted to other participating Rome Convention nations.[104] Due to the United States not being a signatory of the Rome Convention, and regardless of if a country has agreed to a public performance right under the Rome Convention, American artists are not able to collect royalties from radio broadcasts of their songs played in that country.[105]

The United States is party to the Berne Convention for the Protection of Literary and Artistic Works (Berne Convention),[106] which requires copyright protection for literary and artistic works.[107] The United States became a party to the Berne Convention in 1989, even though the Berne Convention has been in existence since 1886.[108] The United States joined due to pressure from domestic authors and publishers who wanted better protection for their works internationally.[109]

The duty to protect the authors of musical works is recognized in the Berne Convention,[110] although there is no mandate for the

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[100] International Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organizations, art. 7, Oct. 26, 1961, 496 U.N.T.S. 43, http://www.wipo.int/treaties/en/ip/rome/trtdocs_wo024.html [hereinafter Rome Convention].

[101] *Id.* at 52 ("If a phonogram published for commercial purposes, or a reproduction of such phonogram, is used directly for broadcasting or for any communication to the public, a single equitable remuneration shall be paid by the user to the performers, or to the producers of the phonograms, or to both. Domestic law may, in the absence of agreement between these parties, lay down the conditions as to the sharing of this remuneration.").

[102] *Ensuring Artists Fair Compensation, supra* note 99.

[103] Rome Convention, *supra* note 100, at 46.

[104] *See id.* at 46, 48.

[105] *Ensuring Artists Fair Compensation, supra* note 99.

[106] *See generally* Berne Convention for the Protection of Literary and Artistic Works, Sept. 9, 1886, 828 U.N.T.S. 221 [hereinafter Berne Convention].

[107] *Id.* at 225.

[108] *See WIPO-Administered Treaties Contracting Parties > Berne Convention (Total Contracting Parties: 175),* WIPO, http://www.wipo.int/treaties/en/ShowResults.jsp?treaty_id=15 (last visited Oct. 13, 2017).

[109] Berne Convention, *supra* note 106, at 227.

[110] *Id.* at 241 ("Authors of dramatic, dramatico-musical and musical works shall

continued . . .

establishment of sound recording rights.[111] Due to its failure to require a right in sound recordings, and in spite of its goal of harmonizing approaches to copyright protection, the Berne Convention adds little direct urgency or pressure to establish a performance right in sound recordings among its participating countries.

The most important discussions about international harmonization of intellectual property rights took place in the Uruguay Round of the Multilateral Trade Negotiations to Amend the General Agreement on Tariffs and Trade (GATT).[112] While the United States had always had internal pressures from domestic recording artists, now it had pressure from the international community regarding reciprocal treatment.[113] In addition, other countries urged the United States to adopt a full performance right in sound recordings, but the United States continued to refuse.[114] As a result, the World Intellectual Property Organization (WIPO) moved to create two new treaties: the WIPO Copyright Treaty (WCT) and the WIPO Performances and Phonograms Treaty (WPPT).[115] Unfortunately, neither treaty achieved its goal of harmonizing the disparate international approaches; this was in large part due to the United States' refusal to grant any additional protection for sound recordings.[116]

The WPPT provides for equitable payment due to the secondary

enjoy the exclusive right of authorizing: (i) the public performance of their works, including such public performance by any means or process.").

[111] Kettle, *supra* note 19, at 1077.

[112] General Agreement on Tariffs and Trade, Oct. 30, 1947, 55 U.N.T.S. 187 [hereinafter GATT]. GATT was "the largest trade negotiation ever." *Understanding the WTO-The Uruguay Round,* WORLD TRADE ORG., https://www.wto.org/english/thewto_e/whatis_e/tif_e/fact5_e.htm (last visited Mar. 8, 2017). Lasting for over seven years, the Uruguay Round consisted of discussions covering almost all aspects of trade from 123 participating countries. *See id.* The discussions concerning intellectual property occurred during hearings for the Agreement on Trade-Related Aspects of Intellectual Property Rights, which took place in Marrakesh on April 15, 1994. *See generally* TRIPS, *supra* note 15. TRIPS concerns itself with regulation of intellectual property and sets down those minimum standards, which, among other things, requires the World Trade Organization members to provide rights to copyright holders including the content producers: performers, producers of sound recordings, and broadcasting organizations. *Overview: The TRIPS Agreement*, WORLD TRADE ORG., https://www.wto.org/english/tratop_e/trips_e/intel2_e.htm (last visited Sept. 29, 2017).

[113] Kettle, *supra* note 19, at 1044.

[114] *Id.* at 1077–78.

[115] *See* WIPO Copyright Treaty, Dec. 20, 1996, 2186 U.N.T.S. 152; WPPT, *supra* note 18.

[116] Rebecca F. Martin, *The WIPO Performances and Phonograms Treaty: Will the U.S. Whistle to a New Tune?,* 44 J. COPYRIGHT SOC'Y U.S.A. 157, 164, 171, 176 (1997).

uses of phonograms.[117] However, under the WPPT, the applicability of the performance right may be limited to certain uses or even denied at the determination of a signatory.[118] Therefore, even though the United States is a signatory to the WPPT, Article 15 specifies performance by digital means, thereby limiting the scope of the performance right.[119] Due to these limitations on the right under Article 15(3), carved out by the United States, other countries party to the treaty need not provide the same national treatment for American artists as they do for their own nationals, who enjoy a public performance right.[120] Unfortunately, this means that the WPPT is ineffective for American artists seeking equitable payment in other WPPT signatory countries for use of non-digital broadcasts of their sound recordings. Until the United States recognizes a full public performance right, it will continue to be in non-compliance with most international treaties, and consequently American musicians will continue to operate at a disadvantage in the international community.

IV. RECENT LEGISLATIVE ATTEMPTS REGARDING THE PUBLIC PERFORMANCE RIGHT

Though the United States appears to not have made any progress in regards to the full public performance right when viewed from an international perspective, there were attempts, by the United States, to remedy the non-compliance.[121] The music industry and performing artists continue to fight for a full public performance right in sound recordings, and some members of Congress have championed this

[117] WPPT, *supra* note 18, at art. 15(1) ("Performers and producers of phonograms shall enjoy the right to a single equitable remuneration for the direct or indirect use of phonograms published for commercial purposes for broadcasting or for any communication to the public.").

[118] *Id.* at art. 15(3) ("Any Contracting Party may, in a notification deposited with the Director General of WIPO, declare that it will apply the provisions of paragraph (1) only in respect of certain uses, or that it will limit their application in some way, or that it will not apply these provisions at all.").

[119] *See WPPT Notification No. 8: WIPO Performances and Phonograms Treaty: Ratification by the United States of America,* WIPO (Sept. 14, 1999), http://www.wipo.int/treaties/en/notifications/wppt/treaty_wppt_8.html.

[120] *See* WPPT, *supra* note 18, at art. 4 ("(1) Each Contracting Party shall accord to nationals of other Contracting Parties, as defined in Article 3(2), the treatment it accords to its own nationals with regard to the exclusive rights specifically granted in this Treaty, and to the right to equitable remuneration provided for in Article 15 of this Treaty. (2) The obligation provided for in paragraph (1) does not apply to the extent that another Contracting Party makes use of the reservations permitted by Article 15(3) of this Treaty.").

[121] *See id.*; *see also* H.R. 1805, 97th Cong. (1981) (proposing to grant a full public performance right).

cause.[122] Though there have been quite a few legislative attempts to grant a full public performance right, indeed over thirty bills have been introduced since 1926, all attempts have seen little to no success.[123] The most recent attempts have been the most comprehensive to date, though strong opposition from the broadcaster lobby tends to stop any progress.[124]

A. The Performance Rights Act of 2009

One recent promising piece of legislation was the Performance Rights Act (PRA), originally introduced in 2007,[125] and reintroduced in 2009.[126] The promising aspect of the PRA was the amount of support that it garnered from the music industry as a large number of musicians supported the bill.[127] For example, in the hearings held before the Senate Judiciary Committee in 2009, Grammy-nominated artist Sheila E. testified:

> [B]eing paid for one's work is a basic American right. Whether your workplace is an office, a classroom, a factory, or a recording studio, every American worker deserves to be compensated for his or her labor. And any business that profits from another's work should share some of that profit.[128]

The PRA recognized the need to fairly compensate those who create the sound recordings, as its driving purpose.[129] The bill would eventually receive fifty-two House co-sponsors and eight Senate co-

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[122] *See, e.g.*, Flo & Eddie v. Sirius XM Radio, Inc., 821 F.3d 265, 267 (2d Cir. 2016); *see also* H.R. 1805 (proposing to grant a full public performance right).

[123] *See, e.g.*, H.R. 1805; H.R. 997, 96th Cong. (1979); H.R. 6063, 95th Cong. (1977).

[124] Kristelia A. Garcia, *Penalty Default Licenses: A Case For Uncertainty*, 89 N.Y.U. L. REV. 1117, 1135 (2014).

[125] *See* Performance Rights Act, H.R. 4789, 110th Cong. (2007).

[126] *See* Performance Rights Act, H.R. 848, 111th Cong. (2009); *see also* Performance Rights Act, S. 379, 111th Cong. (2009).

[127] Vanessa Van Cleaf, Note, *A Broken Record: The Digital Millennium Copyright Act's Statutory Royalty Rate-Setting Process Does Not Work For Internet Radio*, 40 STETSON L. REV. 341, 376 n.228 (2010).

[128] *The Performance Rights Act and Parity Among Music Delivery Platforms: Hearing on S. 379 Before the S. Comm. on the Judiciary*, 111th Cong. 5 (2009) (testimony of Sheila Escovedo).

[129] *See* Performance Rights Act, H.R. 848 ("To provide parity in radio performance rights under title 17, United States Code, and for other purposes."); *see also* Performance Rights Act, S. 379 ("To provide fair compensation to artists for use of their sound recordings.").

sponsors.[130] In order to expand the performance right, the PRA aimed to remove the word "digital" from the Copyright Act so that Section 106(6) would read: "in the case of sound recordings, to perform the copyrighted work by means of an audio transmission."[131] Though the PRA would have ostensibly created a full public performance right, it did so with some caveats by providing for a royalty cap in certain situations.[132] The PRA was a good, yet incomplete step towards a full public performance right. However, despite the support it garnered amid strong broadcaster opposition, it has not moved from the House Judiciary Committee since 2010, effectively killing the bill.[133]

Most bills proposing a full public performance right face a similar fate—strong opposition from the broadcast lobby.[134] For instance, the National Association of Broadcasters (NAB) categorized the bill as a tax, even though the language of the bill clearly did not establish it as such.[135] Not only was the bill mischaracterized as a tax, but it was also beset by hyperbolic claims that the bill would kill radio stations.[136] NAB reasoned that if the record companies were not paying the stations to promote their music, then the stations should not

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[130] *See H.R. 848 - Performance Rights Act: Cosponsor*, CONGRESS.GOV, http://www.congress.gov/bill/111th-congress/house-bill/848/cosponsors?q=%7B%22search%22%3A%5B%22hr+848%22%5D%7D (last visited Mar. 8, 2017); *see also S. 379 - Performance Rights Act: Cosponsor*, CONGRESS.GOV, https://www.congress.gov/bill/111th-congress/senate-bill/379/cosponsors?q=S.+379 (last visited Mar. 8, 2017).

[131] Performance Rights Act, H.R. 848.

[132] *Id.* § 3(D)(ii) ("As provided in clause (i), each individual terrestrial broadcast station that has gross revenues in any calendar year of—(I) less than $100,000 may elect to pay for its over-the-air nonsubscription broadcast transmissions a royalty fee of $500 per year; (II) at least $100,000 but less than $500,000 may elect to pay for its over-the-air nonsubscription broadcast transmissions a royalty fee of $2,500 per year; and (III) at least $500,000 but less than $1,250,000 may elect to pay for its over-the-air nonsubscription broadcast transmissions a royalty fee of $5,500 per year.").

[133] *See id.*

[134] *See* Ann Marie Cumming, *NAB Launches NoPerformanceTax.org*, NAB NEWSROOM (Apr. 7, 2009), http://nab.org/documents/newsroom/pressRelease.asp?id=1783.

[135] *See id.* (explaining that NoPerformanceTax.org was set up by the National Association of Broadcasters in order to provide opposition information to the Performance Rights Act as well as general information about the organization's position regarding the proposed legislation); *see also Keep Radio Free for Listeners*, NO PERFORMANCE TAX, http://www.noperformancetax.org (last visited Sept. 25, 2017).

[136] *See, e.g.*, Debbie Bush, *Taking A Stand: Protecting Local Radio Stations*, 14 NEWS, http://www.14news.com/global/story.asp?s=11971775 (last visited Sept. 25, 2017).

have to pay for using said music.[137]

The fight for the PRA became quite heated when the artist advocacy group, musicFIRST Coalition,[138] went to the FCC requesting a declaratory ruling against the NAB.[139] In this request for a declaratory judgment, musicFIRST claimed that "instead of providing the best practicable service to the community, certain broadcasters are engaged in a concerted effort to promote their own pecuniary interests by distorting an important public debate."[140]

In the end, misinformation and mischaracterization won the day for the NAB and other opponents who claimed that the bill was of very little benefit to musicians.[141] This type of tactic continues to be used by the NAB whenever legislation is proposed that would provide musicians with a full public performance right.[142] In response to such opposition, the majority in Congress made their early support of the Local Radio Freedom Act known via resolution but without enactment, which opposes "any new performance fee, tax, royalty, or other charge relating to the public performance of sound recordings on a local radio station for broadcasting sound recordings over the air . . . ."[143]

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[137] *See Legislative Priorities: 111th Congress*, NAT'L ASS'N OF BROADCASTERS 15–16, http://perma.cc/YGF5-FMHD (last visited Sept. 25, 2017).

[138] *See The Coalition*, MUSICFIRST, http://musicfirstcoalition.org/the-coalition/ (last visited Oct. 13, 2017).

[139] *See Local Choice Ads*, CABLEFAX (Sept. 9, 2014), http://www.cablefax.com/regulation/local-choice-ads.

[140] Request for Declaratory Ruling at 4, *In re* Request for Declaratory Relief Regarding Actions Contrary to the Public Interest by Certain Radio Broadcasters (2009), https://cdn.arstechnica.net/MusicFirstPetition6-09-009.pdf; *see also id.* (noting that NAB stations were refusing to sell advertising time to the musicFIRST Coalition for their advertisements in favor of the PRA); *Musician Group Alleges Retaliation by Radio Stations Over Performance Rights Act*, WASH. POST (June 11, 2009), http://www.washingtonpost.com/wp-dyn/content/article/2009/06/10/AR2009061004152.html (noting that NAB was allegedly threatening retaliation against recording artists who spoke out in favor of the legislation).

[141] *See 5 Reasons Why the Performance Rights Act is a Bad Idea*, CREATIVE DECONSTRUCTION (Jun. 17, 2009), http://www.creativedeconstruction.com/2009/06/5-reasons-why-the-performance-rights-act-is-a-bad-idea/ [http://archive.is/Fqxb].

[142] *See* Brandon H. Nemec, *No More Rockin' in the Free World: Removing the Radio Broadcast Exemption*, 9 J. MARSHALL REV. INTELL. PROP. L. 935, 943–44 (2010).

[143] *See* S. Con. Res. 14, 111th Cong., at 3 (2009); *see also* H.R. Con. Res. 49, 111th Cong., at 3 (2009).

B. The Free Market Royalty Act of 2013

Though the PRA failed to move forward, in 2013 the short-lived Free Market Royalty Act was introduced.[144] This bill's approach was similar to the failed PRA because it provided for a full performance right, that did not distinguish between transmissions of sound recordings, and required radio stations to pay royalties for all audio transmissions, both digital and terrestrial.[145] It similarly altered Section 106(6), but unlike the PRA, it did away with the limits to a full public performance right by eliminating statutory licensing royalty rates.[146]

This bill also designated SoundExchange to be the "the sole common agent to negotiate, agree to, pay, and receive payments under [Section 106(6)]."[147] This meant that as far as sound recordings were concerned, even though they would effectively receive the same public performance right as musical works under Section 106(4), a singular public rights organization, SoundExchange, would be responsible for collecting and distributing royalties.[148]

Interestingly, the bill was characterized as pro-free-market legislation since it eliminated statutory licensing rates, which allowed the facilitation of direct negotiations.[149] Even music groups that praised the bill characterized it as pro-free market, as if attempting to characterize the broadcaster lobby as hypocrites.[150] The President of the National Academy of Recording Arts and Sciences, Neil Portnow, portrayed the bill as follows: "[a]fter years of the radio lobby claiming they want the free market to resolve the royalty issue, Mr. Watt has

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[144] *See* H.R. 3219, 113th Cong., at 1 (2013).

[145] *Id.* (striking "a digital audio" and inserting "an audio" to all relevant parts of the existing law the net result being no distinction between types of transmissions).

[146] *See id.* ("[A]ny noninteractive services performing sound recordings publicly by means of an audio transmission may collectively negotiate and agree to royalty rates and license terms and conditions for the performance of such sound recordings.").

[147] *Id.* (alteration in original).

[148] *See id.*

[149] *See* Chris Castle, *Guest Post: Meet the Free Market Royalty Act, an Elegant Solution to Some Complex Issues*, BILLBOARDBIZ (Oct. 1, 2013), http://www.billboard.com/biz/articles/news/legal-and-management/5740706/guest-post-meet-the-free-market-royalty-act-an; *see also* Cara Weiblinger, *Our Take On The Free Market Royalty Act*, RIAA (Sept. 30, 2013), https://www.riaa.com/our-take-on-the-free-market-royalty-act/.

[150] *See* Ben Sisario, *Congressman Proposes New Rules for Music Royalties*, N.Y. TIMES (Sept. 30, 2013) http://www.nytimes.com/2013/10/01/business/media/congressman-proposes-new-rules-for-music-royalties.html?mcubz=1.

granted their wish."[151] The broadcaster lobby continued to employ the same rhetoric, categorizing the bill as a tax despite its language.[152] In the end, the NAB won out once more with this bill effectively dying after being referred to, but going no further than, the Subcommittee on Courts, Intellectual Property, and the Internet.[153]

One of the major arguments against the Free Market Royalty Act was its requirement to pay the public performance royalty for using sound recordings, which the NAB argued would be too costly for local radio stations and would inevitably force them to shut down.[154] Around this time, the NAB urged passage of the Local Radio Freedom Act,[155] which was introduced in February 2013.[156] This bill called on Congress to refrain from imposing "any new performance fee, tax, royalty, or other charge related to the public performance of sound recordings on a local radio station for broadcasting sound recordings over the air, or on any business for such public performance of sound recordings."[157] While it has received significant support from members of Congress, it has yet to be enacted, although it contains the favored "no new tax" language.[158] However, the Local Radio Freedom Act remains the antithesis to any legislation that attempts to create a full public performance right; moreover, it is still in the Subcommittee on Courts, Intellectual Property, and the Internet as of the date the latest public performance bill was introduced.[159]

C. The Fair Play, Fair Pay Act of 2015

The Fair Play, Fair Pay Act of 2015 adopts a number of features that were present in the legislation that preceded it,[160] but attempts to avoid much of the criticism of previous bills by incorporating

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[151] *Id.*

[152] *See id.*

[153] *See id.*

[154] *See NAB Statement on Rep. Watt's Introduction of Radio Performance Tax Legislation*, NAT'L ASS'N OF BROADCASTERS (Sept. 30, 2013), https://www.nab.org/documents/newsroom/pressRelease.asp?id=3236; *see also Performance Tax Bill Introduced to Congress*, VA. ASS'N OF BROADCASTERS, http://www.vabonline.com/news/performance-tax-bill-introduced-in-congress/ (last visited Mar. 8, 2017).

[155] H.R. Con. Res. 16, 113th Cong. (2013); S. Con. Res. 6, 113th Cong. (2013).

[156] H.R. Con. Res. 16.

[157] Josh Peterson, *Lawmakers Spar over Radio Music Royalties*, WATCHDOG (Apr. 29, 2015), http://watchdog.org/214415/radio-music-royalties/.

[158] *See* H.R. Con. Res. 17, 114th Cong. (2015).

[159] *See id.*

[160] H.R. 1733, 114th Cong. (1st Sess. 2015).

additional provisions.[161] If passed, the Act would resolve many of the parity issues that affect the public performance right of sound recordings.[162] In particular, the Act would create parity in the types of transmissions that would receive a public performance right; create a path for pre-1972 sound recordings to receive payment; establish consistent rate setting; and help protect small broadcasters and educational radio stations.[163]

First, like other recent bills, the Act would amend Section 106(6) of the Copyright Act to remove the distinction between different audio transmissions by striking the term "digital."[164] The resulting section would read: "in case of sound recordings, to perform the copyrighted work publicly by means of *an audio transmission*."[165] Therefore, like previous attempts, if passed, broadcast radio stations would be required to pay royalties for audio transmissions of sound recordings regardless of the format, digital or non-digital.[166]

The bill suggests amending Section 7 of the Copyright Act by adding the below language at the end of section 114(f)(3):

> Any person publicly performing sound recordings protected under this title by means of transmissions under a statutory license under this section, or making reproductions of such sound recordings under section 112(e), shall make royalty payments for transmissions that person makes of sound recordings that were fixed before February 15, 1972, and reproductions that person makes of those sound recordings under the circumstances described in section 112(e)(1), in the same manner as such person does for sound recordings that are protected under this title.[167]

As recounted above, the Sound Recordings Act of 1971 first provided sound recordings with copyright protection, but the protection only extended to recordings fixed after February 15, 1972.[168] The Act will

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[161] Jeffrey S. Becker, et. al., *The Fair Play, Fair Pay Act of 2015: What's At Stake and For Whom?*, SMB TRIALS, http://www.smbtrials.com/RC1ACS162/assets/files/Documents/ABA%20Entertainment%20Sports%20Law%20Article_Becker.pdf (last visited Oct. 7, 2017).

[162] *See id.*

[163] *See id.*

[164] *Id.*

[165] H.R. 1733, 144th Cong. § 2(a) (1st Sess. 2015) (emphasis added).

[166] *See, e.g.*, Performance Rights Act, H.R. 4789, 110th Cong. § 2(b) (2007).

[167] H.R. 1733 § 7(a).

[168] *See* Sound Recordings Act of 1971, Pub. L. No. 92–140, 85 Stat. 391 §§ 1, 3 (1971).

remedy this oversight by giving protection to those pre-1972 sound recordings and allow those who own such copyrights to collect much deserved payment for their use.[169]

Another big part of this proposed Act is its attempt to eliminate the disparate standards that the Copyright Royalty Board (CRB) uses when applying royalty rate settings.[170] The CRB determines rates and terms for copyright statutory licenses and makes determinations on distribution of statutory license royalties collected by the Copyright Office.[171] The edits to Section 4 of the Act attempt to level the field by removing the Section 801(b) rate-setting standard, and replacing it with the willing buyer – willing seller standard wherein the CRB would apply a market based standard as if the market value was negotiated at arm's-length.[172] When viewed in conjunction with the section of the Act that creates parity, this provision means that whenever a compulsory rate is established for a public performance of sound recordings, the willing buyer–willing seller standard would apply.[173] Applying and extending the practice of imposing minimum fees for all types of broadcasts, the Act would determine those fees "based on criteria including the quantity and nature of the use of sound recordings and the degree to which use of the service may substitute for or may promote the purchase of phonorecords by consumers."[174]

One final important aspect of the Act is that it sets out to address the criticisms of the Free Market Royalty Act's effects on small, local radio stations.[175] It addresses this issue in Section 5 by placing limits on the royalty rates charged to those stations, incorporating the following language into the Copyright Act's Section 114(f)(1):

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[169] Loren E. Mulraine, *Fair Play Fair Pay: The Need for a Terrestrial Public Performance Right and General Copyright Reform*, 3 BELMONT L. REV. 71, 87–88 (2016).

[170] Amanda M. Whorton, Note, *The Complexities of Music Licensing and the Need for a Revised Legal Regime*, 52 WAKE FOREST L. REV. 267, 287–88 (2017).

[171] *Id.* at 275.

[172] H.R. 1733 § 4(a)(1).

[173] *Id.* at § 4(a)(1)(B).

[174] *Id.*

[175] *See* 114 CONG. REC. E449,465 (daily ed. Apr. 13, 2015) (statement of Hon. Nadler) ("[I]t protects truly small, local, and non-commercial AM/FM radio stations by ensuring that their royalties are affordable, capped at $500 a year for stations with revenue below $1 million a year and at $100 a year for noncommercial broadcasters."); *see also* William W. Shield et al., *The Fair Play, Fair Pay Act of 2015: What's at Stake and for Whom*?, B.C. INTELL. PROP. & TECH F. 1, 13 (2015) ("A primary argument raised in opposition to the Free Market Royalty Act was that requiring terrestrial broadcasters to pay a public performance royalty for use of sound recordings would be cost-prohibitive for local, public radio stations, which would be unable to afford this additional, substantial operating expense, and could be forced to shut down.").

> Notwithstanding the provisions of subparagraphs (A) through (C), the royalty rate for nonsubscription broadcast transmissions by each individual terrestrial broadcast station licensed as such by the Federal Communications Commission that is not a public broadcasting entity as defined in section 118(f) and that has revenues in any calendar year of less than $ 1,000,000 shall be $ 500 per year for any such year. For purposes of such determination, such revenues shall include all revenues from the operation of the station, calculated in accordance with generally accepted accounting principles in the United States. In the case of affiliated broadcast stations, revenues shall be allocated reasonably to individual stations associated with those revenues.[176]

This provision is a step in the right direction of striking a balance between according payment to recording artists and protecting small radio stations.

Similar to past attempts, the supporters of the Fair Play, Fair Pay Act believe that it fairly addresses the equity issue for those currently without a full public performance right.[177] The President of SAG-AFTRA, Ken Howard, standing with his organization's partners at the musicFIRST Coalition, has said that the Act

> brings music licensing for sound recordings into the 21st century. AM/FM stations will finally pay royalties on the sound recordings they broadcast. Right now, performers receive nothing - no royalties at all - for use of their recordings on AM/FM radio. This is something our members, including the late and great "Chairman of the Board" Frank Sinatra have fought for decades to establish.[178]

Neil Portnow, the President and CEO of the Recording Academy, spoke before Congress on the issue, stating that: "terrestrial radio is the only industry in America that is built on using another's intellectual property without permission or compensation."[179] Portnow argues that

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[176] H.R. 1733 § 5(a).

[177] *See SAG-AFTRA President Ken Howard Comments on Fair Play Fair Pay Act of 2015*, BROADWAY WORLD (Apr. 13, 2015), https://www.broadwayworld.com/bwwtv/article/SAG-AFTRA-President-Ken-Howard-Comments-on-Fair-Play-Fair-Pay-Act-of-2015-20150413.

[178] *Id.*

[179] *Music Licensing under Title 17 (Part I and II): Hearing Before the*

continued . . .

the "radio-artist relationship is 'symbiotic,'" even though the NAB's own study shows that the benefit to radio stations is ten times the promotional benefit to artists.[180] The NAB has maintained its opposition to a full public performance right for sound recordings despite the efforts of the Act and other recent bills, which present equitable solutions that include protections for radio stations and public performers alike.[181]

Although the advocates and sponsors of the Act attempted to address the criticisms of past bills by expanding the public performance right for sound recordings, there is still opposition. Opponents continue to take issue with the supposed financial burden of the Act by labeling it a performance fee or tax that would hurt local and public radio stations.[182] According to the Executive Vice President of communications at the NAB, Dennis Wharton, "[p]olicymakers are smart enough to know that assessing hundreds of millions of dollars in new fees against radio stations would kill jobs, hurt local commerce, and force music-playing radio stations to consider switching to all-talk formats."[183] Though the Act attempts to cap the royalties that small and local radio stations would pay, opponents argue that the bill draws an arbitrary line between broadcasters subject to royalties and those exempt from payment.[184] Further, opponents argue that "at $1 million in annual revenues . . . [the cap] would provide a perverse disincentive for these stations to grow and earn annual revenues that would trigger higher performance taxes."[185] The argument basically states that while radio stations would not be at risk of going out of business, they would be inhibited from growing.[186]

Generally speaking, broadcasters argue that a performance royalty payment would force them to subsidize the recording artists because the lion's share of profits, after all expenses have been paid, would still go to the record labels and songwriters.[187] In response, recording

Subcomm. on Courts, Intellectual Prop., and the Internet of the H. Comm. on the Judiciary, 113th Cong. 8 (2014) (statement of Neil Portnow, President/CEO, Recording Academy) [hereinafter *Music Licensing under Title 17*].

[180] *Id.*

[181] *See id.*

[182] Peterson, *supra* note 157.

[183] *Id.*

[184] *See id.*

[185] *Radio Broadcasters Should Stand Together: Oppose Any New Performance Tax,* MD. D.C. DEL. BROADCASTERS ASS'N, http://www.mdcd.com/aws/MDCD/asset_manager/get_file/103821 (last visited Mar. 8, 2017) (alteration in original).

[186] *See id.*

[187] *See A Performance Tax Threatens Local Jobs*, NAT'L ASS'N. OF

continued . . .

artists argue that the reverse is in fact true—that they have been subsidizing the broadcasters for years due to the broadcaster's use of their recordings.[188]

The Act has so far been stalled in the House Judiciary Committee,[189] which is not surprising given the now commonplace government gridlock. Nonetheless, the Act was recently reintroduced on the Hill on March 30, 2017, fortuitously on the eve of the Recording Academy's Grammys.[190] The Act has picked up more bi-partisan sponsors since its reintroduction, and those sponsors believe that it could move forward this time.[191] However, as of publication, the Act is stalled once again within the House Judiciary Committee.[192]

The NAB continues to argue that a full public performance right would be a tax, which is a prejudicial term designed to create opposition in Congress, even though Grover Norquist, as the President of Americans for Tax Reform, said it is not a tax.[193] Nevertheless, it is essential that such bills continue to be advanced so that the issue can eventually be resolved. In addition, it is not surprising that the Act has stalled given the relentless lobbying efforts of the NAB and the broadcasters. According to the Center for Responsive Politics, the year the Act was introduced, the NAB spent $18.4 million in lobbying efforts, compared with less than $500,000 spent by the Recording Academy.[194] Even when considering the combined lobbying efforts of other music industry groups, the NAB alone outspent the pro-bill

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BROADCASTERS, http://nab.org/advocacy/issue.asp?id=1889&issueid=1002 (last visited Oct. 4, 2017) (asserting that recent private deals between radio companies and record labels to compensate copyright owners and performers proves there is no need for government involvement).

[188] *See Performance Rights: The Truth about Performance Rights*, MUSICFIRST, http://musicfirstcoalition.org/performancerights (last visited Oct. 4, 2017).

[189] *See* Stephen E. Demos, *The Fair Pay Fair Play Act of 2015: Does Congress Spot-ify a Solution for the Music Market?*, 12 J. BUS. & TECH. L. 73, 75 (2016).

[190] H.R. 1836, 115th Cong. (2017); Paula Parisi, *'Fair Play, Fair Pay' Radio-Royalty Act Gains Momentum, But Faces Uphill Climb*, VARIETY (June 12, 2017, 6:51 AM), http://variety.com/2017/biz/news/fair-play-fair-pay-radio-royalty-act-gains-momentum-1202462359/.

[191] Parisi, *supra* note 190 ("Supporters are optimistic it can move to a floor vote after summer recess.").

[192] *See* Chris Castle, *Help @RepJerryNadler Beat the Cartels because #irespectmusic,* MUSIC TECH. POL'Y (Sept. 26, 2017), https://musictechpolicy.com/2017/09/26/help-repjerrynadler-beat-the-cartels-because-irespectmusic/.

[193] *See Music Licensing under Title 17, supra* note 179, at 8.

[194] *See* Kent Hoover, *Music Industry Uses Star Power in Radio Royalties Battle*, BUS JS. (Apr. 16, 2015, 1:30 PM), http://www.bizjournals.com/bizjournals/washingtonbureau/2015/04/music-industry-uses-star-power-in-radio-royalties.html.

lobby by a ratio of more than two to one.[195] The Act represents the latest attempt at a full public performance right and though it has stalled, future legislative attempts will likely continue and the bills will improve until the NAB and the broadcasting industry have no more arguments left.

V. ARGUMENTS IN FAVOR OF FULL PUBLIC PERFORMANCE RIGHTS IN SOUND RECORDINGS

Over the years, there have been a number of arguments made to support the creation of a full public performance right in sound recordings. The arguments have included creating equity between recording artists and songwriters, providing incentives to create new musical works, and harmonizing protection internationally.[196] While all three are valid and should be addressed, the strongest arguments are the first two: (1) creating equity between recording artists and songwriters; and (2) providing incentives to create new musical works.

The equity argument goes to the unfair nature of the Copyright Act as it stands, given that songwriters have a full public performance right, while recording artists do not.[197] As noted in Part I, music by its very nature is not confined to the notes, key, accidentals, and so on that are written on the sheet.[198] It also incorporates the recording artist or performer's choice of cadence, embellishment, and dynamics, among other elements.[199] This type of creativity in a sound recording should be rewarded to the same extent as a musical work that has been put to sheet music.[200] Creativity is not the only contribution that

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[195] *See NAB's Lobbying Budget Soars,* INSIDE RADIO (Mar. 23, 2015), http://www.insideradio.com/free/nab-s-lobbying-budget- soars/article_bad10d90-d128-11e4-91c3-7befb9a1c4c4.html.

[196] *Public Performance Right for Sound Recordings*, FUTURE MUSIC COALITION (Nov. 5, 2013), https://www.futureofmusic.org/article/fact-sheet/public-performance-right-sound-recordings.

[197] *See* 153 CONG. REC. E2606-04 (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.").

[198] *See id.*

[199] *The Performance Rights Act: Hearing on H.R. 4789 Before the Subcomm. on Courts, the Internet, and Intellectual Prop. of the H. Comm. on the Judiciary*, 110th Cong. 3 (2008) (written testimony of Nancy Sinatra) ("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.").

[200] 153 CONG. REC. E2606-04 ("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

continued . . .

recording artists make to sound recordings. Recording artists also invest their time and money in order to produce the best sound they can, and they should receive the same treatment as the songwriters.

Another aspect of the equity argument is that the current conditions and the music market are in flux primarily due to the introduction of new technologies.[201] The medium has come a long way from the piano man selling his sheet music on Tin Pan Alley, which gave way to the piano roll, which gave way to the album, which gave way to the cassette, which gave way to the CD, which gave way to the MP3, which gave way to streaming music directly from the Internet. Much of Congress' actions in the early days of the Copyright Act, as noted in Part II, were reactions to changes in technology.[202] For sound recordings, until a full public performance right exists, the primary source of funds is record sales, which tend to drop when faced with competition from a new technology.[203] Therefore, the record industry will continue to erode until Congress becomes more proactive and expands the rights of recording artists.

The incentive argument is financial in nature. This argument is based on the words in Article I of the Constitution, which states that Congress has the power to "promote the Progress of Science and useful Arts . . . ."[204] Copyright laws granted a monopoly right in new works, incentivizing the creation of such works.[205] Allowing a group to broadcast music free of charge without compensating all the artists involved contravenes such a purpose. This sentiment was explained by Paul Almeida of the AFL-CIO in support of the late PRA in 2009: "[J]ust 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."[206]

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artist to sing without the words . . . .").

[201] *See id.*

[202] *See supra* Part II.

[203] *See Ensuring Artists Fair Compensation*, *supra* note 99 ("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.").

[204] U.S. CONST. art. 1, § 8.

[205] *See* U.S. COPYRIGHT OFFICE, CIRCULAR 1A: A BRIEF INTRODUCTION AND HISTORY, https://copyright.gov/circs/circ1a.html.

[206] *Performance Rights Act of 2009: Hearing on H.R. 848 Before the H. Comm. on the Judiciary*, 111th Cong. 2 (2009) (statement of Paul Almeida, President,

continued . . .

The current reality is that radio stations have low cost access to sound recordings in the form of a single CD, the sale of which recording artists received a royalty, albeit a small one, that is then played over and over again on the airwaves without the need to further compensate the recording artists.[207] The result of this free-rider problem is that incentives to create are reduced and record labels are more reluctant to take a chance on new sounds and new musicians when there is a risk of low monetary yield.[208] Of course, the main argument that broadcasters and the NAB make, as discussed in Part IV, is that recording artists are compensated by the free promotion they receive when their sound is played on the radio.[209]

It is that argument in particular from the NAB that can be quite vexing for a musician. Consider the following illustrative hypothetical. There is a musician that has performed in a number of professional music groups, the most recent of which is an eighteen member swing band, and now it has come time to find a gig. When landing a gig, the negotiation of compensation will inevitably arise. Frequently, the owner of an establishment, such as a bar or club, will try to get the musicians to play for free, the compensation being "exposure" and "free publicity." What people do not understand is that musicians should be compensated for more than the two, two-hour sets for a single gig because that does not encompass everything involved. Each musician puts in many unpaid hours practicing and spending money on maintaining the instruments in order to sound their best. The culmination of that effort is the two, two-hour set gig. This is a very real situation that many recording artists face when the NAB suggests that free publicity is enough. It further reduces the incentive for recording artists to create.[210] The result is that competent musicians and recording artists will steadily go extinct.[211]

The final argument for a full public performance right in sound

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Department for Professional Employees, AFL-CIO).

[207] *See* Ken Consor, *What You Didn't Know About Radio Royalties,* SONGTRUST (Aug. 6, 2014), http://blog.songtrust.com/publishing-tips-2/what-you-didnt-know-about-radio-royalties/.

[208] *See Ensuring Artists Fair Compensation*, *supra* note 99 ("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.").

[209] *See supra* note 136 and accompanying text.

[210] *See* Ellen McSweeney, *What's a Musician Worth?*, NEWMUSICBOX (Oct. 10, 2012), http://www.newmusicbox.org/articles/whats-a-musician-worth/.

[211] *See id.*

recordings is international harmonization. As discussed in Part III, the United States is not in compliance with most international treaties concerning copyright protections, most notably the GATT.[212] Because of the principle of national treatment, other countries that are party to the treaty do not need to provide the same national treatment for United States artists as they do for their own nationals, who enjoy a public performance right.[213] The international harmonization argument focuses on the lost revenue and disparate treatment that American recording artists face due to the lack of a full public performance right for sound recordings.[214] If such a right did exist, then American recording artists' rights would be protected abroad, and the United States would finally be on equal footing with regard to copyright law with other signatories of TRIPS.

VI. RECOMMENDATION IN MOVING FORWARD AND CONCLUSION

Despite the failure of recent legislative attempts, the continuing efforts in Congress is promising. It is important, however, to keep pressure on Congress for copyright reform so that it does not fade into obscurity. This pressure must remind current leaders of the need for a full public performance right in sound recordings.[215] The recommendation moving forward is to continue to synthesize what has been proposed in recent legislative attempts, with a few alterations, and to reframe the argument in favor of a full public performance right in sound recordings.

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[212] *See supra* text accompanying notes 112–16.

[213] WPPT, *supra* note 18, at art. 4 ("(1) Each Contracting Party shall accord to nationals of other Contracting Parties, as defined in Article 3(2), the treatment it accords to its own nationals with regard to the exclusive rights specifically granted in this Treaty, and to the right to equitable remuneration provided for in Article 15 of this Treaty. (2) The obligation provided for in paragraph (1) does not apply to the extent that another Contracting Party makes use of the reservations permitted by Article 15(3) of this Treaty.").

[214] *See supra* Part III.

[215] *See Recording Academy Calls on Trump to Support Copyright Reform in New Letter*, BILLBOARD (Dec. 2, 2016), http://www.billboard.com/articles/business/7597201/recording-academy-letter-donald-trump-copyright-reform ("[O]utdated [copyright] laws, stemming from the turn of the last century, have weakened the value of American intellectual property in foreign markets to the tune of tens of millions of dollars in unpaid royalties. The Recording Academy and our members across the country are working with Congress to fix the broken copyright system. We hope that the 115th Congress, with support from your administration, will conclude its review of copyright and act to support creators." (alteration in original)); *see also* Andy, *President Trump Told That Strong Copyright Laws Are in His Interest,* TORRENTFREAK (Jan. 24, 2017), https://torrentfreak.com/president-trump-told-that-strong-copyright-laws-are-in-his-interests-170124/.

It would be best to simply forego the focus on platform parity. The public performance right in sound recordings should be incorporated within Section 106(4), thereby removing Section 106(6) from the Copyright Act entirely. Updating Section 106(4) to include sound recordings will provide the same full public performance rights as the other works listed in that section, such as literary, musical, and dramatic work.[216] This would then put the United States in compliance with TRIPS and other international agreements, thereby fully protecting recording artists abroad.[217] Other elements that should be incorporated are the rate-setting language of the Fair Play, Fair Pay Act and the language that extends protection to pre-1972 sound recordings. Finally, with the removal of Section 106(6) and the digital transmission language, the disparate revenue streams available from ASCAP, BMI, SESAC, and SoundExchange should be harmonized so that recording artists have the choice to sign with any of them, regardless of whether the transmission is digital or terrestrial.

In order to facilitate such recommendations, it is necessary to reframe the issue. First, the equity, incentive, and international harmonization arguments should be combined to address the reframed issue. The reframed issue should be that the current and past reality of denying a full public performance right to recording artists in sound recordings creates an apparent class system between those who have the full right and those who do not. Though both put in the work, they are treated unequally. Further, the Copyright Act currently treats one group as inferior for outdated reasons.[218] This is not just a legal wrong, but it should be framed as a moral wrong. It is a moral wrong that recording artists are not treated equally; it is a moral wrong that complete incentives are not provided to recording artists; it is a moral wrong that their rights are not fully protected abroad. Only when the two groups are incorporated in the same section of the Copyright Act, will equity be achieved. Equitable treatment creates equivalent incentives as contemplated by Article I of the Constitution[219] and the music industry will be capable of flourishing and innovating. Finally, if in full compliance with international treaties, the United States will have done its duty by protecting its recording artists to the same extent as songwriters abroad.

Hopefully, this approach can better frame the issue so that members of Congress and current leaders will see the urgency in

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[216] *See* 17 U.S.C. § 106(4) (2012).

[217] *See supra* notes 15–22 and accompanying text.

[218] *See Recording Academy Calls on Trump to Support Copyright Reform in New Letter, supra* note 215.

[219] *See* U.S. CONST. art. I, § 8.

correcting a decades-old wrong. Recent legislation was promising, but it is an error to continue in the same manner against the broadcasting industry's lobby when they employ the "no new tax argument" time and again.[220] New approaches are necessary to combat the broadcasting industry's lobby. Hence the need for a change to the framing of the issue and the need for a simplified solution of doing away with Section 106(6) in its entirety, and incorporating it in the other works that receive a full public performance right.

[220] *See Keep Radio Free for Listeners, supra* note 135; *see also* Peterson, *supra* note 157; Sisario, *supra* note 150.