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# Eight Million Performances Later, Still Not a Dime: Why It Is Time to Comprehensively Protect Sound Recording Public Performances

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# EIGHT MILLION PERFORMANCES LATER, STILL NOT A DIME: WHY IT IS TIME TO COMPREHENSIVELY PROTECT SOUND RECORDING PUBLIC PERFORMANCES

*Jonathan S. Lawson\**

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## INTRODUCTION

In the early 1960s, Barry Mann, Cynthia Weil, and Phil Spector composed the lyrics and music for the song *You've Lost That Lovin'*

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*Feelin'*, which the Righteous Brothers originally recorded in 1964.<sup>1</sup> Forty years and over eight million public performances<sup>2</sup> of the sound recording later, *You've Lost That Lovin' Feelin'* became the most played song of all time on American radio and television.<sup>3</sup> Despite the Righteous Brothers' signature sound largely driving the long-term popularity of *Lovin' Feelin'*, the duo has never received a single royalty check for any of the eight million nondigital<sup>4</sup> transmissions.<sup>5</sup> Mann, Weil, and Spector, however, have earned royalties for each of the eight million radio, television, and motion picture public performances.<sup>6</sup>

In a variation of the Righteous Brothers' situation, members of the same musical group may also earn different royalties from public performances of sound recordings. Paul Simon and Art Garfunkel comprised one of the 1960s' most popular folk-rock duos, culminating in their ten-week chart-topping album *Bridge over Troubled Water*.<sup>7</sup> While Simon solely wrote the vast majority of the duo's material,<sup>8</sup> undoubtedly each member's distinctive voice and personality also con-

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1 Dan Daley, The Righteous Brothers' *You've Lost That Lovin' Feelin'* (Mar. 1, 2002), [http://mixonline.com/recording/interviews/audio\\_righteous\\_brothers\\_youve/index.html](http://mixonline.com/recording/interviews/audio_righteous_brothers_youve/index.html).

2 The Copyright Act of 1976 (Copyright Act) defines "perform" to include playing the work. 17 U.S.C. § 101 (2000). Also, the Act defines performing a work publicly as performing the work at a place open to the public or by transmitting or otherwise communicating the work to the public. *Id.*

3 Broadcast Music Inc., BMI Announces Top 100 Songs of the Century (Dec. 14, 1999), <http://www.bmi.com/news/199912/1999121488.asp> ("The 8 million performances of 'You've Lost that Lovin' Feeling' [sic] equals more than 45 years of back-to-back play.").

4 As will be discussed in greater detail in Part II.A.3, Congress has recently granted a public performance right for sound recordings that are transmitted digitally (e.g., satellite radio). Digital Performance Right in Sound Recordings Act of 1995, Pub. L. No. 104-39, sec. 2, § 106(6), 109 Stat. 336, 336 (codified at 17 U.S.C. § 106(6)).

5 While *You've Lost That Lovin' Feelin'* was copyrighted prior to 1978 and is governed by the Copyright Act of 1909, the 1909 Act does not recognize public performance rights in sound recordings. See Michael B. Landau, "Publication," *Musical Compositions, and the Copyright Act of 1909: Still Crazy After All These Years*, 2 VAND. J. ENT. L. & PRAC. 29, 36-37 (2000). Likewise, § 114(a) of the Copyright Act of 1976 also does not recognize public performance rights in sound recordings, stating that performers' rights "do not include any right of performance under section 106(4)." 17 U.S.C. § 114(a).

6 See 17 U.S.C. § 106(4) (stating that musical works are protected if performed publicly).

7 Richie Unterberger, Simon and Garfunkel Biography, <http://launch.yahoo.com/ar-263991-bio-Simon-Garfunkel> (last visited Jan. 30, 2006).

8 *Id.*; Greg Nesteroff et al., The Paul Simon & Art Garfunkel FAQ § 4.1, <http://www.ckk.chalmers.se/guitar/sg-faq/4.html#1> (last modified Sept. 1, 1997).

tributed to Simon and Garfunkel's success, with most in the music industry agreeing that Garfunkel's high tenor was integral for recording their most popular songs.<sup>9</sup> Despite Garfunkel's significant contribution to the duo's long-term success, he has no copyright protection (thus no right to demand royalties) in the public performances of Simon and Garfunkel sound recordings.<sup>10</sup> Simon, on the other hand, composed most of the duo's songs,<sup>11</sup> entitling him to copyright protection (thus possibly receiving royalties) for all public performances of those musical works.<sup>12</sup>

Why do Mann, Weil, Spector, and Simon have the right to receive royalties for the public performances of their musical compositions while the Righteous Brothers and Garfunkel, despite their undeniable contributions to the success of the sound recordings, largely earn nothing for their performance of the sound recording? The U.S. copyright regime holds the answer.

Sound recordings are comprised of two distinct copyrightable works: the musical composition (i.e., the notes and lyrics written by Simon), and the sound recording (i.e., the recorded performance of the song by Simon and Garfunkel).<sup>13</sup> While Congress has chosen to protect public performances of the underlying written music,<sup>14</sup> it has consistently refused to extend comprehensive protection to public performances of sound recordings.<sup>15</sup>

Accordingly, Mann, Weil, Spector, and Simon, as composers of the underlying music and lyrics, have the right to earn royalties for public performances of the musical compositions. The performers (the Righteous Brothers and Garfunkel), on the other hand, receive no general protection for their work in creating the sound recording. However, this Note argues that, in light of the policies supporting the United States copyright regime and other equitable and practical con-

9 Unterberger, *supra* note 7.

10 See 17 U.S.C. § 114 (stating that owners of sound recording copyrights have no rights of public performance protection).

11 Unterberger, *supra* note 7.

12 See 17 U.S.C. § 201(a); *id.* § 106(4).

13 Jonathan Franklin, *Pay To Play: Enacting a Performance Right in Sound Recordings in the Age of Digital Audio Broadcasting*, 10 U. MIAMI ENT. & SPORTS L. REV. 83, 83-84 (1993); Ronald Mark Wells, Comment, *You Can't Always Get What You Want but Digital Sampling Can Get What You Need!*, 22 AKRON L. REV. 691, 696-97 (1989).

14 17 U.S.C. § 106(4).

15 *Id.* § 114 (stating that the exclusive rights of copyright owners in sound recordings "do not include any right of performance under section 106(4)"); see also *id.* § 106(6) (granting protection only for public performances of sound recordings that are digitally transmitted).

cerns, Congress should amend the Copyright Act of 1976, extending protection to sound recording public performances.

In Part I, this Note analyzes the historical underpinnings and availability of protection for sound recordings. In Part II, this Note focuses on policy arguments for, and against, a congressional amendment protecting a public performance right in sound recordings. Ultimately, this Note concludes that because the policies in favor of adopting an amendment outweigh the policies against, Congress should amend the Copyright Act to extend public performance protection to sound recordings. First, however, this Note turns to the scope of congressional power to protect sound recordings.

## I. HISTORICAL AND CURRENT "PROTECTION" OF A SOUND RECORDING PERFORMANCE RIGHT

### A. *May vs. Should*—Congress's Ability To Protect

Before this Note sketches a brief history outlining the past and present extent of sound recording protection (if any), this Note will first address the scope of Congress's ability to protect sound recordings. As this Part will conclude, the question this Note must address is not whether Congress *may* protect public performance rights in sound recordings, but rather *should* Congress protect public performances of sound recordings.

Congress has long had the ability to protect sound recordings. This ability flows directly from Article I, Section 8 of the Constitution, which states that Congress has the general power to grant "Authors" for a limited time the "exclusive Right to their respective writings" in order "[t]o promote the Progress of Science and useful Arts."<sup>16</sup>

Courts have historically interpreted Congress's Section 8 power broadly, concluding that Congress may extend protection to sound recordings.<sup>17</sup> In *Goldstein v. California*, the Supreme Court found that, though the Federal Copyright Act of 1909 did not preempt state laws outlawing music piracy, Congress could "[a]t any time . . . determine that a particular [type of work] is worthy of national protection and . . . federal copyright protection may be authorized."<sup>18</sup>

In addition to Congress having the general power to protect sound recordings as a type of work, Congress has historically also had

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16 U.S. CONST. art. I, § 8, cl. 8.

17 See, e.g., *Goldstein v. California*, 412 U.S. 546, 559 (1973).

18 *Id.*; see also Lawrence B. Solum, *Congress's Power To Promote the Progress of Science: Eldred v. Ashcroft*, 36 LOY. L.A. L. REV. 1, 57-58 (2002) (discussing Congress's power to enact overinclusive copyright protections).

the ability to protect authors' rights to *perform* works. While this Note will address the Copyright Act of 1976 in more detail in Part I.C, § 106 of the Act outlines the general rights of copyright holders.<sup>19</sup> In § 106(4), Congress protects authors' rights to publicly *perform* certain types of works.<sup>20</sup> However, Congress did not include sound recordings as a type of work that enjoys a § 106(4) right to perform.<sup>21</sup>

Section 106(4), though, is not the only section protecting public performances; Congress recently adopted § 106(6), which protects certain sound recording performances based on their type of transmission.<sup>22</sup> In adding § 106(6), Congress extended copyright protection to sound recording performances involving digital transmissions.<sup>23</sup> Therefore, because Congress has the ability to protect sound recordings as a type of work and public performances as a type of right, it is not a question of whether Congress *may* protect public performances of sound recordings; Congress has the authority to do so. Rather, the issue this Note must address is whether Congress *should* protect sound recording public performances.

This Note will next outline how Congress, despite having the ability to protect sound recording public performances, has never protected such rights.

### B. *Pre-1976 Sound Recording Protection*

In granting composers of the music and lyrics (but not those responsible for the sound recording) protection, Congress and the courts have drawn a distinction between the musical composition and the sound recording.<sup>24</sup> The origin of this distinction can be traced to the 1908 Supreme Court case of *White-Smith Music Publishing Co. v. Apollo Co.*<sup>25</sup> In *White-Smith*, the defendant sold player pianos and perforated rolls of music that the pianos "read," and the plaintiff was a music composer who owned copyrights in certain musical compositions. The plaintiff brought an action claiming the defendant's manufacturing of perforated rolls for its player piano that allowed the piano

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19 See 17 U.S.C. § 106 (outlining the authors' "[e]xclusive rights in [their] copyrighted works").

20 *Id.* § 106(4).

21 *Id.* (enumerating only "literary, musical [i.e., the written musical composition], dramatic, and choreographic works, pantomimes, and motion pictures and other audiovisual works" for public performance protection).

22 *Id.* § 106(6).

23 The 1976 Act, as amended, defines a digital transmission as "a transmission in whole or in part in a digital or other non-analog format." *Id.*

24 Franklin, *supra* note 13, at 88.

25 209 U.S. 1 (1908).

to perform the plaintiff's copyrighted songs infringed the plaintiff's copyright in the musical compositions.<sup>26</sup> The defendant won at trial, and the Supreme Court affirmed, holding that the perforated rolls were not copies of the musical compositions because it was the sheet music that was protected from copying in a like form, not the underlying song in general.<sup>27</sup> Unlike sheet music, the Court found that because player piano rolls could not be read by the naked eye, the defendant did not infringe upon the plaintiff's copyrights in the underlying musical compositions.<sup>28</sup>

In formulating this holding, the *White-Smith* Court developed a "direct perception" test, which drew firm distinctions between copying the underlying sheet music, on one hand, and sound recordings on the other. The Court stated that such distinctions were appropriate because a person could not "read" and reproduce the musical composition from the phonograph or perforated piano roll,<sup>29</sup> and thus one could not "'regard the reproduction [of a phonograph] as the copy or publication'" of the sheet music<sup>30</sup> (later known as the direct perception test<sup>31</sup>). Therefore, by finding that phonorecords (the physical embodiments of sound recordings, such as compact discs) were not copies or publications, the Supreme Court in *White-Smith* prevented subsequent courts from extending copyright protection to duplications or public performances of sound recordings.<sup>32</sup>

One year later, Congress incorporated similar elements to that of *White-Smith*'s direct perception test into the Copyright Act of 1909<sup>33</sup> when Congress required that a musical composition be set in a form that humans can see and read.<sup>34</sup> Ultimately, Congress codified protection for the musical composition's public performance but not for the sound recording,<sup>35</sup> thus "preventing the possibility of finding a copyright infringement in cases where the sound recording itself was duplicated or performed publicly."<sup>36</sup> However, due to the increasing

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26 *Id.* at 8-9.

27 *Id.* at 17-18.

28 *Id.*

29 *Id.* at 17.

30 *Id.* at 17-18 (quoting *Stearn v. Rosey*, 17 App. D.C. 562 (1901)).

31 Franklin, *supra* note 13, at 88.

32 *Id.*

33 Pub. L. No. 60-349, 35 Stat. 1075 (repealed 1976); *see also* Franklin, *supra* note 13, at 88.

34 § 1(e), 35 Stat. at 1075-76.

35 *Id.* (stating that the copyright holder has the exclusive right to "perform the copyrighted work publicly for profit if it be a musical *composition*" (emphasis added)).

36 Franklin, *supra* note 13, at 88.

threat of music piracy, Congress could not withhold sound recording protection forever.

Congress enacted the Sound Recording Act of 1971<sup>37</sup> in an attempt to combat the growing threat of record piracy, which became more economically attractive due to advances in copying technologies.<sup>38</sup> Congress drafted the 1971 Act almost exclusively to eliminate record piracy's economic incentive, but it did not extend the "full 'bundle' of rights" to sound recording copyright holders.<sup>39</sup> Specifically, the 1971 Act protected sound recording creators by prohibiting exact duplicates of sound recordings but did "not grant[ ] the right of public performance."<sup>40</sup> However, this was not the final time Congress considered protecting sound recording performances.

### C. *The Copyright Act of 1976 and Current "Protection"*

Congress again considered adopting a sound recording performance right when drafting the Copyright Act of 1976 (the current copyright regime).<sup>41</sup> Before drafting the 1976 Act, Congress heard extensive testimony from the Register of Copyrights (the Register) in favor of a performance right, while a collection of broadcasters testified against expanding protection.<sup>42</sup> While the Senate's version of the 1976 Act flatly denied performance rights in sound recordings, the House's version, which Congress ultimately enacted through the 1976 Act, withheld judgment on the matter, requesting from the Register's office an in-depth report detailing the issues surrounding sound recording performance rights.<sup>43</sup>

In 1978, the Register submitted its recommendation to Congress regarding a public performance right in sound recordings,<sup>44</sup> ardently supporting such a right.<sup>45</sup> In support of this position, the Register relied on economic and public policy arguments,<sup>46</sup> particularly that

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37 Pub. L. No. 92-140, 85 Stat. 391.

38 S. REP. NO. 104-128, at 10 (1995), as reprinted in 1995 U.S.C.C.A.N. 356, 357.

39 *Id.*

40 *Id.*

41 *Id.*

42 *Id.*

43 *Id.*

44 Statement of the Register of Copyrights, 43 Fed. Reg. 12,763, 12,764 (Mar. 27, 1978).

45 *Id.* at 12,765 ("The Fundamental Public Policy Issue: Should performers, or record producers, or both, enjoy any rights under Federal law with respect to public performances of sound recordings to which the [sic] have contributed? Conclusion: Yes.").

46 *Id.* at 12,764-66 (arguing that artists should have a sound recording public performance right because "sound recordings [are] the 'writings of an author,'" free airplay of sound recordings does not constitute adequate compensation, imposing



the 1976 Act preempted state copyright protection, and therefore the 1976 Act became performers' only avenue of protection.<sup>47</sup> However, despite the Register's strong endorsement, Congress has yet to amend the 1976 Act to include a comprehensive sound recording performance right.<sup>48</sup>

An examination of the 1976 Act shows clear congressional intent to withhold a sound recording performance right. Section 106(4), which grants certain works a right of public performance, does not include "sound recordings" as a type of work protected.<sup>49</sup> In addition to omitting sound recordings from § 106(4), Congress expressly enacted § 114, which states that "[t]he exclusive rights of the owner of copyright in a sound recording . . . do not include any right of performance."<sup>50</sup> Since the codification of the 1976 Act, several Congressional representatives have attempted, but failed, to amend the 1976 Act to include such a right.<sup>51</sup>

Next, this Note turns from analyzing the current state of sound recording performance protection to arguments for and against congressional adoption of such protection.

## II. POLICIES FOR AND AGAINST ADOPTION OF A SOUND RECORDING PUBLIC PERFORMANCE RIGHT

Congress may provide a public performance right in sound recordings<sup>52</sup> but has yet to provide such a right.<sup>53</sup> When considering the extension of copyright protection, Congress either implicitly or explicitly balances policy issues in a classic cost-benefit analysis.<sup>54</sup> That is, on one hand, the artists' monopoly from copyright results in higher-priced copyrighted goods, which is society's "cost" of copyright protection. On the other hand, this monopoly generally spurs crea-

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performance royalties would not curtail certain types of programming, a performance right would not be an "unwarranted windfall for performers," and preemption of state law left performers worse off than they were before the 1976 Act—among other reasons).

47 *Id.* at 12,765.

48 S. REP. NO. 104-128, at 11, *as reprinted in* 1995 U.S.C.C.A.N. 356, 357-58.

49 17 U.S.C. § 106(4) (2000).

50 *Id.* § 114(a) (emphasis added).

51 Franklin, *supra* note 13, at 84 n.10, 92.

52 *See supra* Part I.A.

53 *See supra* Part I.C.

54 *See Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417, 429 (1984) (finding that extension of copyright protection to additional works "involves a difficult balance between the interests of authors and inventors in the control and exploitation of their writings and discoveries on the one hand, and society's competing interest in the free flow of ideas, information, and commerce on the other").

tion of copyrighted materials, resulting in a wider selection of copyrighted goods—society’s “benefit” from copyright protection.

Next, this Note analyzes the costs and benefits of extending copyright protection to sound recording performances, ultimately concluding that the benefits of increased public welfare and the artists’ natural rights to enjoy the fruit of their labors outweigh the costs of protection. Therefore, Congress should amend the Copyright Act of 1976 to protect sound recording performances.

#### A. *Arguments for Congressional Adoption of a Performance Right*

##### 1. Increased Amount of Sound Recordings

Congressional extension of copyright protection to types of works and rights effectively confers a limited monopoly right upon authors, which often motivates authors to create more works, thus benefiting society through diversity of choice. The Founding Fathers envisioned this benefit to society and granted Congress, through Article I, Section 8, the ability to provide an author a temporary monopoly over his work, which would increase the total number of works and thus promote the “Progress of Science and useful Arts.”<sup>55</sup>

The Supreme Court has interpreted two portions of Article I, Section 8’s intellectual property language in conformity with the notion that Article I, Section 8 was intended as a means of increasing the total number of works. First, the Court has interpreted the “[t]o promote the Progress of Science and useful Arts” language as akin to promoting additional creation of works. In *United States v. Paramount Pictures, Inc.*,<sup>56</sup> the Court stated that copyright protection’s practical “reward to the author or artist serves to induce release to the public of the products of his creative genius,”<sup>57</sup> which would ultimately increase the total amount of works publicly available.

Second, in addition to the Constitution’s “promote the progress” language, the Court has also interpreted Article I, Section 8’s grant of protection for “limited [t]imes” language as further motivation to increase the amount of copyrighted works. In *Sony Corp. of America v. Universal City Studios, Inc.*,<sup>58</sup> the Court found that

[this] limited grant [was] a means by which an important public purpose may be achieved. It is intended to *motivate the creative activity of authors . . .* by the provision of a special reward, and to allow

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55 U.S. CONST. art. I, § 8, cl. 8.

56 334 U.S. 131 (1948).

57 *Id.* at 158.

58 464 U.S. 417.

the public access to the products of their genius after the limited period of exclusive control has expired.<sup>59</sup>

The Court found, at least in part, that the motivation created by limited-time monopolies spurs the creation of works.<sup>60</sup> Therefore, as reflected by *Paramount* and *Sony*, the effect on the total amount of works should be a significant policy consideration when debating whether to extend copyright protection.

In the case of a sound recording public performance right, copyright extension would likely increase the total amount of such works. Measuring the potential impact that a performance royalty would have on the creation of new sound recordings is very difficult, and I have not found any empirical studies addressing the likely impact of a public performance right on the creation of new sound recordings. Despite the absence of such empirical studies, scholars have noted the probable positive impact such a performance right (i.e., royalty to the performer) would have on the many artists that operate at the economic margin of the music industry.<sup>61</sup> For an artist living paycheck-to-paycheck, even the prospect of a small royalty may induce the production of more works or reaffirm the artist's desire to continue his musical career.<sup>62</sup> Should Congress protect public performances of sound recordings, performers will then have an additional economic incentive to record more works, potentially resulting in an increase in sound recordings.

Additionally, because of the dramatic effects of music piracy, the economic incentive argument has become increasingly compelling for noneconomic-margin artists. In 2002, piracy cost the music industry \$4.3 billion, with a significant portion of this loss being artists' lost royalties on album sales.<sup>63</sup> Music piracy accounted for nearly two billion copies of musical works in 2001, meaning that almost forty percent of all music sold worldwide was pirated,<sup>64</sup> with the top selling and most popular radio songs pirated most often.<sup>65</sup> The music industry believes these trends will likely continue as copying equipment be-

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59 *Id.* at 429 (emphasis added).

60 *Id.*

61 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, 505-06 & n.190 (2004).

62 *Id.*

63 INT'L FED'N OF THE PHOTOGRAPHIC INDUS., MUSIC PIRACY REPORT 1 (2002), available at <http://banners.noticiasdot.com/termometro/boletines/docs/consultoras/ifpi/2002/ifpi-piracy2002/ifpi-piracy2002.pdf>.

64 *Id.* at 2.

65 *Id.* at 3.

comes cheaper and easier to use, thus lowering prospective pirates' barriers to entry.<sup>66</sup> Therefore, due to their declining revenues from global music piracy, current performers may potentially be even more receptive (i.e., create more works) to copyright amendments protecting sound recording performances.

A common counterargument to extending a performance right to sound recordings based on an incentive theory is that potential royalties would be a "windfall" to performers who created past works. However, one should not view royalties for a public performance right as a "windfall" to performers for two reasons. First, performers have never had a sound recording performance right, and so music, television, and movie producers have long benefited from the public performances of these sound recordings without compensating the performers. Second, according to the Register's 1978 report, potential sound recording royalties could amount to "less than one-half of one percent of [the music industry's] estimated net sales,"<sup>67</sup> which could hardly be considered a "windfall."<sup>68</sup> Therefore, congressional extension of copyright protection to sound recording performances should not be construed as a "windfall" to performers. Such royalties may be small compared to the music industry's total revenues and broadcasters have benefited, at the performers' expense, from the long-term absence of sound recording performance rights.

Another counterargument to the economic incentive argument is that the artists do not control the amount of sound recording public performances, and therefore congressional action creating an incentive for artists to record more sound recordings may not necessarily lead to a greater number of public performances. That is, even though the artists may be enticed to create more recordings, broadcasters ultimately control the decision of how many sound recordings to air publicly. Because higher costs (paying additional royalties) will act as a disincentive for broadcasters to transmit sound recordings, broadcasters will transmit fewer sound recording performances. In short, the counterargument follows that despite the new economic incentive arguably increasing the total number of sound recordings, the total number of *performances* of those sound recordings would actually

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66 *Id.*

67 Statement of the Register of Copyrights, 43 Fed. Reg. 12,763, 12,764–65 (Mar. 27, 1978).

68 Note the balance that copyright laws must strike between preventing overcompensation of authors yet providing enough incentive for authors to create more works. While lower royalty figures may lessen the incentive impact on creating new works, "even a modest performance royalty could spur the ability and desire to produce new works." DelNero, *supra* note 61, at 505 (emphasis added).

decrease because broadcast companies would incur additional expenses and would likely minimize these expenses by reducing their number of sound recording public performances.

While this counterargument is intuitively appealing, it ultimately fails (or is at least mitigated) when analyzed with respect to the practical competitive marketplace for two reasons. First, broadcast companies, especially companies broadcasting sound recording performances, are under intense competitive pressures, pushing them towards providing more public performances of sound recordings. In any given city, one is likely to find multiple stations broadcasting similar musical genres, and audiences have very low switching costs. In other words, the broadcast stations are in a prisoner's dilemma—if stations reduce the amount of music aired by backing away from their "thirty-minute commercial-free" pledge, another station playing similar music will likely lure listeners by providing its own thirty-minute commercial-free promise. Audiences have very low switching barriers (generally turning the dial) that would prevent them from switching to the station that provided the more commercial-free broadcast. Therefore, the broadcast industry's competitive market pressures will likely dampen the broadcasters' desire to reduce the amount of public performances.

Secondly, this counterargument fails to take into account the intangible benefits created by a greater amount of sound recordings—namely, the likely increased quality<sup>69</sup> of sound recording performances. Arguably, the greater the number of total sound recordings, the more likely public performances, as a whole, will be of a higher quality. In other words, had Congress provided protection for public performances of sound recordings a year ago, and artists, led by the incentive of greater profits, recorded more works, it is arguable that some of those works (that would not have been recorded but for the additional incentive) would supersede what is playing on the radio

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69 By "quality," I do not mean the crispness of reception or clarity of sound, but rather the overall enjoyment the public gains by listening to the sound recordings. The basic argument follows that if a sound recording public performance right does increase the total number of sound recordings, the public may enjoy listening to some of the newly created works more than those works that artists would have created even without a performance right. That is, the songs played on the radio are in competition with one another for airtime, and, as in nature, the strong tend to survive. Thus, the more sound recording creations, the more competition among songs for airtime, and ultimately radio stations will play what listeners want to hear, meaning that radio stations will play the better songs. Therefore, in the aggregate, the quality of the sound recordings performed on the radio can be said to be a higher "quality."

today. This directly benefits consumers through greater diversity of works.

For instance, assume the greater economic incentive enticed Bruce Springsteen to record a song that he otherwise would not have recorded. It is possible that the public would enjoy hearing Springsteen's song more than Britney Spears's song, which is currently playing on the radio but would have been created regardless of whether Congress protected sound recordings. Thus, a sound recording performance right may increase the overall quality of public performances, but the counterargument to economic incentive focuses solely on the amount of performances gained or lost due to royalties and fails to consider possible increases of sound recording quality.

Therefore, because the competitive market forces tend to push broadcast companies towards expanding the total amount of public performances broadcasted and the overall quality of sound recording performances may potentially increase, a greater economic incentive spurring artists' creation of sound recordings will potentially increase the amount and overall quality of works. Next, this Note will employ a more rights-based analysis to the issue of a sound recording performance right.

## 2. Natural Rights Argument

In addition to the incentive rationale, one could also argue for a sound recording public performance right based on a natural rights justification. The ideas of seventeenth century philosopher John Locke provide the intellectual underpinnings of the natural rights justification for protecting intellectual property.<sup>70</sup> The heart of Lockean theories is that by "applying labor to something within the commons, one may remove, or privatize that portion of the commons."<sup>71</sup> That is, by investing one's time and energy into creating or modifying something not yet owned by another, that person has a natural right to profit from the object he has created or modified. As this Note will next discuss, this natural rights argument is equally adaptable to copyright situations.

As discussed in Part II.A.1, most scholars and judges view the Constitution as providing for an "incentive theory" of intellectual property.<sup>72</sup> That is, Congress may create limited-time monopolies to

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70 Andrew R. Sommer, *Trouble on the Commons: A Lockean Justification for Patent Law Harmonization*, 87 J. PAT. & TRADEMARK OFF. SOC'Y 141, 153-56 (2005).

71 *Id.* at 155.

72 *See, e.g.*, *U.S. Golf Ass'n v. St. Andrews Sys.*, 749 F.2d 1028, 1035 n.12 (3d Cir. 1984) ("The constitutional provision authorizing copyrights and patents, and the stat-

entice artists to create more works. However, it could also be said that Congress is actually balancing the public's right to access and benefit from intellectual property with the author's right to profit from the fruits of his labor, thereby addressing the author's "natural right" to profit from his work.<sup>73</sup>

While courts have historically discussed copyright protection following the incentive theory, some have also approached the copyright issues from a natural rights perspective.<sup>74</sup> In *Sony Corp. of America v. Universal City Studios, Inc.*,<sup>75</sup> the Supreme Court recognized that intellectual property laws confer monopolies because the "*labors of authors*" generally benefit the public<sup>76</sup> and the practical "effect of our copyright law is to secure a fair return for an 'author's' *creative labor*."<sup>77</sup> This language shows the Court's recognition of a connection between the labor of authors and a right to profit from that labor.

Likewise, the Court in the *International News Service v. Associated Press*<sup>78</sup> misappropriation case also relied on natural rights theories. The Associated Press (AP) sued its competitor in the news writing market, International News Service ("News Service"), for misappropriation of the AP's news stories.<sup>79</sup> Specifically, News Service would purchase a copy of the AP's news stories, appropriate the facts from the story, and write a News Service story based on those facts.<sup>80</sup> News Service effectively used the AP's information gathering, labor, and expenditure of money to write News Service's own competing stories. In finding for the AP, the Court relied on natural rights arguments, stating that the "right to *acquire property by honest labor* . . . is as much

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utes implementing it, are based on the 'incentive' theory, in contrast to continental systems that are based on a 'natural rights' theory.").

73 Douglas G. Baird, *Common Law Intellectual Property and the Legacy of International News Service v. Associated Press*, 50 U. CHI. L. REV. 411, 413-15 (1983). Baird concludes that there are no practical differences in relying on an incentive or natural rights based theory. *Id.* at 421.

74 Supreme Court authority here is merely intended to show a general acceptance of the natural rights theory as a reason *underlying copyright protection*. This Note argues for congressional action, which in this case is not required to follow Supreme Court precedent.

75 464 U.S. 417 (1984).

76 *Id.* at 429 (emphasis added) ("The sole interest of the United States and the primary object in conferring the monopoly lie in the general benefits derived by the public from the labors of authors.") (quoting *United States v. Paramount Pictures, Inc.*, 334 U.S. 131, 158 (1948))).

77 *Id.* at 432 (emphasis added) (quoting *Twentieth Century Music Corp. v. Aiken*, 422 U.S. 151, 156 (1975)).

78 248 U.S. 215 (1918).

79 *Id.* at 232.

80 *Id.* at 231.

entitled to protection as the right to guard property already acquired.”<sup>81</sup> The Court continued, holding that one is entitled to the creative work that was wrought by the author’s “expenditure of *labor, skill, and money*.”<sup>82</sup>

Similarly, this natural rights theory is applicable to a sound recording public performance right. It is undeniable that music artists expend labor, skill, and money rehearsing, fine tuning, and recording their songs. Like in the *Sony* and *International News Service* cases, others (the general public and broadcast companies) are benefiting from the performance of artists’ sound recordings, but the artists who labored to create the recordings are not directly benefited by the public performance of their labors and talents. Therefore, artists have invested their time, energy, and creativity in these works, resulting in the natural right to receive compensation for the broadcast of their recordings.

Some may argue that the Supreme Court’s rejection of the “sweat of the brow” argument in *Feist Publications, Inc. v. Rural Telephone Service Co.*<sup>83</sup> signals a shift in the Court away from recognizing that artists have a natural right to the profits from their expenditure of time, energy, and creativity. In *Feist*, the plaintiff telephone company brought a copyright infringement action against the defendant (a publisher of telephone directories), claiming that the defendant’s appropriation of the plaintiff’s white page information (i.e., names, addresses, etc.) amounted to copyright infringement.<sup>84</sup> In arguing that the phone book’s information should be protected, the plaintiff relied on the “sweat of the brow” doctrine. The underlying notion of the plaintiff’s “sweat of the brow” argument was that its work compiling the facts for the phone book should be rewarded even though the facts contained no originality.<sup>85</sup> However, the Court rejected the “sweat of the brow” argument, finding for the defendant. The Court held that originality is a constitutional prerequisite for obtaining copyright protection,<sup>86</sup> and that lack of originality in the plaintiff’s phonebook could not be overcome merely by one’s hard work in compiling the facts.<sup>87</sup>

One could then rely on *Feist*’s rejection of the “sweat of the brow” doctrine as an argument against extending copyright protection based on a natural rights theory. More specifically, the counterargument

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81 *Id.* at 236 (emphasis added).

82 *Id.* at 239 (emphasis added).

83 499 U.S. 340 (1991).

84 *Id.* at 342–44.

85 *Id.* at 352–55, 359–60.

86 *Id.* at 346–47.

87 *Id.* at 353–61.



would follow that because the Supreme Court rejected the “sweat of the brow” argument in *Feist*, an argument that sound recording artists should be compensated for their expenditures of time, energy, and creativity should likewise fail.

Ultimately, because musical artists are not using the “sweat of the brow” doctrine in the same sense as the plaintiff did in *Feist*, the Court’s rejection of the “sweat of the brow” doctrine in *Feist* does not necessarily preclude relying on a natural rights theory to support a sound recording performance right. The plaintiff in *Feist* attempted to use its hard work in compiling the facts as a *substitute for originality*, which the Court found was constitutionally required for protection.<sup>88</sup> In other words, the *Feist* Court held that hard work in crafting the works is not a substitute for the required element of originality. However, the Court did not hold that the “sweat of the brow” or natural rights theories were inappropriate policy rationales for congressional extension of copyright protection.

In the sound recording creator’s situation, there is no absent constitutional prerequisite that is precluding Congress from protecting the public performances of sound recordings. The artists’ use of a natural rights argument is put forth in the sense of weighing fairness (i.e., that it is not fair for broadcasters and the public to benefit from the artists’ expenditures of time and energy in creating the sound recordings) and not as a substitute for some missing, but required, copyright prerequisite. In fact, not only do sound recordings contain the necessary characteristics for copyright protection,<sup>89</sup> but nondigital sound recordings “are the only copyrighted works that are capable of being performed that are not granted a [public performance right].”<sup>90</sup> Because public performances of sound recordings are not lacking a prerequisite for protection, artists are using a natural rights theory to supplement their fairness argument, and not, as the plaintiff in *Feist* unsuccessfully attempted, to substitute natural rights for a constitutionally required element.

Therefore, reliance on the *Feist* Court’s rejection of the “sweat of the brow” doctrine is not a compelling counterargument to the artists’ natural rights argument because artists, unlike the *Feist* plaintiff, are

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<sup>88</sup> *Id.* at 346–47.

<sup>89</sup> See 17 U.S.C. § 102 (2000) (stating that, in general, copyright protection extends to “original works of authorship fixed in any tangible medium of expression” and expressly includes “sound recordings” as a type of work Congress may protect); *supra* Part I.A.

<sup>90</sup> WORKING GROUP ON INTELLECTUAL PROP. RIGHTS, INFO. INFRASTRUCTURE TASK FORCE, INTELLECTUAL PROPERTY AND THE NATIONAL INFORMATION INFRASTRUCTURE 222 (1995).

not using natural rights as a substitute for some constitutionally required prerequisite. Thus, because musicians expend labor, skill, and money while creating original sound recordings, Congress should acknowledge that artists have natural rights to profit from the public performance of their recordings and amend the Copyright Act of 1976 to include a sound recording public performance right. By allowing broadcasters and the public to benefit from sound recording performances without compensating those who expended labor, skill, and money creating the sound recording, Congress is violating the artists' natural rights.

### 3. Parallel Protection—The Digital Performance Right in Sound Recordings Act

Congress granted a limited sound recording performance right when it enacted the Digital Performance Right in Sound Recordings Act of 1995 (DPRA).<sup>91</sup> The DPRA amended the Copyright Act of 1976—adding § 106(6)—to provide protection for public performances “by means of a digital audio transmission” of sound recordings.<sup>92</sup> This limited protection does not extend to traditional analog television or radio broadcasts, but rather, § 106(6) protects only sound recording public performances via digital transmissions, such as satellite radio.<sup>93</sup>

After congressional adoption of § 106(6), the question has become: how can Congress recognize a sound recording performance right in public digital transmissions but not extend the same protection to performances in nondigital transmissions? Whether broadcasters transmitted the sound recording digitally or not, there exists the public performance of a work (the sound recording) that is separate and distinct from the underlying musical composition,<sup>94</sup> and this work is being transmitted or broadcast publicly. Simply put, copyright protection in sound recording transmissions hinges on the type of transmission—if the recording is digitally transmitted, then it is protected; but, if the recording is transmitted in an analog format (i.e., nondigitally), then the 1976 Act does not protect it.

91 Pub. L. No. 104-39, 109 Stat. 336 (codified as amended in scattered sections of 17 U.S.C.).

92 *Id.* sec. 2, § 106(6), 109 Stat. at 336.

93 *See id.* (protecting only “digital audio transmission[s]”); XM Radio, Learn About XM, <http://www.xmradio.com/learn/index.jsp> (last visited Oct. 5, 2005) (describing a satellite radio service that offers over 150 digital channels).

94 *See supra* Part I.B.

In stark contrast to sound recordings, every other type of work that enjoys a right of public performance has not been artificially limited to a particular method of transmission.<sup>95</sup> When Congress adopted § 106(4), it protected those works' public performances regardless of the transmission type.<sup>96</sup> For instance, assume the cable television channel TBS and the broadcast network NBC both air Bill Murray's classic, *Caddyshack*.<sup>97</sup> *Caddyshack*'s public performance would be protected under § 106(4)'s right to perform audio visual works publicly.<sup>98</sup> However, TBS may transmit *Caddyshack* digitally (through satellite and digital cable) while NBC's broadcasts are largely transmitted nondigitally. Because *Caddyshack*'s public performance is protected under § 106(4), the method of the public performance's transmission is irrelevant. *Caddyshack*'s copyright owners are thus entitled to royalties for the public performance of the audio visual work whether digitally transmitted by TBS or nondigitally transmitted by NBC because Congress decided that for all protectible public performances (*except sound recordings*) it was the *act of public performance* that resulted in whether owners of copyrights earned compensable royalties, not the method by which the public performance was transmitted.

As for public performances of sound recordings, the sound recording itself is the same whether digitally transmitted or not (i.e., it is the same song), and the act of public performance occurs whether the work is digitally transmitted or not. Therefore, it follows that if artists create sound recordings, those artists should be directly compensated for *public performances* of the sound recordings without regard to the method of public performance transmission.

The Senate, however, argued in its DPRA report that digital transmissions should be treated differently than nondigital transmissions.<sup>99</sup> The Senate concluded that differential treatment was appropriate because digital transmissions are of higher quality, many are commercial free, and some even allow for audio-on-demand.<sup>100</sup> Therefore, be-

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95 See 17 U.S.C. § 106(4) (2000).

96 *Id.* However, note that there are certain limitations on a copyright holder's right of performance, but these limitations are largely dependent upon the particular establishment or circumstances surrounding the performance (e.g., nonprofit recitals or performances in classroom settings), not the transmission method. *Id.* § 110.

97 Arguably, Bill Murray's greatest role has been Carl Spackler, the colorful yet slightly psychotic groundskeeper at Bushwood Country Club. Matt Brighton, *Caddyshack: 20th Anniversary Edition* (movie review), <http://dvdauthority.com/reviews.asp?ReviewID=502> (last visited Oct. 5, 2005).

98 17 U.S.C. § 106(4).

99 S. REP. NO. 104-128, at 4 (1995), as reprinted in 1995 U.S.C.C.A.N. 356, 356.

100 *Id.*

cause of these “unique” attributes, the Senate argued that it is not inconsistent to extend protection to digital transmissions of sound recordings while withholding similar protection from nondigital transmissions.

The Senate’s justification for protecting performance rights of digital transmissions but not nondigital transmissions, however, is unpersuasive. Many examples exist of nondigital public performances that contain similar attributes to those the Senate listed as distinguishing attributes of digital transmissions. For instance, nondigital cable television stations exist that broadcast commercial-free CD-quality music twenty-four hours a day.<sup>101</sup> Further, any cable television station that is broadcasting music, broadcasts static-free, CD-quality sound recordings. As for audio-on-demand, a simple phone call to most radio stations will result in the station playing a requested song; and, for a more direct on-demand example, one need look no further than the local bar’s jukebox, which probably also plays CDs, resulting in CD-quality sound performances available on-demand.

In short, the attributes Congress relied on as reasons to extend protection to digital performances can be found in nondigital transmissions as well. In the end, Congress is distinguishing between those with and without rights of performance based not on the type of work created and performed but on the method of transmission. Therefore, Congress should reconcile this disjunctive outcome by extending protection to public performances of sound recordings generally, whether they are transmitted digitally or not.

#### 4. Foreign Regimes and Reciprocity

The final argument for amending the Copyright Act of 1976 to include a performance right for sound recordings centers on foreign sound recording copyright laws and reciprocity. Despite being the worldwide leader in sound recording creations, the United States is one of the only developed countries that has yet to recognize performance rights in sound recordings.<sup>102</sup> Approximately seventy-five nations, including nine European Union countries, recognize such rights.<sup>103</sup>

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101 Music Choice cable channel offers a nondigital array of twenty-four hour, CD-quality music to more than thirty-seven million households daily. Music Choice, About Us, [http://www.musicchoice.com/what\\_we\\_are/what\\_we\\_are.html](http://www.musicchoice.com/what_we_are/what_we_are.html) (last visited Oct. 5, 2005).

102 William H. O’Dowd, *The Need for a Public Performance Right in Sound Recordings*, 31 HARV. J. ON LEGIS. 249, 261 (1994).

103 *Id.*

While the United States has no obligations, by treaty or otherwise, to extend protection to sound recording performances simply because most developed countries extend such protection, Congress's exclusion of a performance right does carry negative economic implications for U.S. performers. The Recording Industry Association of America recently estimated that the U.S. performers' potential foreign public performance royalty share was worth over \$120 million annually.<sup>104</sup> However, most foreign countries recognize performance rights of nonnative citizens only if those citizens' native countries also recognize a public performance right in sound recordings. Without amending the copyright laws to provide for a performance right, lack of reciprocity will prevent U.S. performers from realizing the majority of this \$120 million revenue stream.<sup>105</sup> Because the United States exports more sound recordings than it imports,<sup>106</sup> should Congress amend the 1976 Act to extend protection to public performances of sound recordings, many foreign governments would require royalty payments to U.S. performers, which would outweigh the flow of royalties from U.S. broadcasters to foreign performers. Thus, amending the 1976 Act to include a performance right would unlock the \$120 million revenue pool for U.S. performers, which is larger than the liability U.S. broadcasters would incur in having to pay foreign performers. The result is a net economic gain for the United States.

Therefore, whether one analyzes the performance right issue from an incentive or natural rights theory, from policies guiding protection of digital performances, or from an international economic perspective, each argument points in favor of amending the 1976 Act to include public performance rights for sound recordings. However, as this Note will next address, there are counterarguments to extending protection to public performances.

### *B. Arguments Against Congressional Adoption of a Performance Right*

#### 1. Exposure

A common argument against adopting a performance right in sound recordings is that performances indirectly benefit the artist by increasing the artist's exposure. Because artists profit from the sale of their albums, the argument follows that these performances are merely free advertising. Therefore, according to the exposure argu-

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104 *Id.* at 263.

105 *Id.*

106 *See id.* at 262 (stating that the United States is by far the leader in sound recording creations).

ment, artists are compensated for the public performances of their sound recordings by increased album sales, and thus Congress need not extend protection to sound recording performances.

The exposure argument, however, is unpersuasive for five reasons:

(1) not all music genres benefit from public performances to the same degree (if at all); (2) a direct royalty may supplement the free exposure value; (3) the timing of the exposure is not accounted for; (4) exposure is not taken into account with other types of works; and, (5) the exposure argument views a potential right to public performance only in a narrow economic sense.

First, while the argument that increased radio and television play leads to greater album sales may be persuasive in popular music genres, the same cannot be said for all categories of music. Jazz, opera, and classical music, for example, do not benefit nearly as much from radio exposure as other musical genres, and many of these performers earn the majority of their musical incomes from live shows and other avenues apart from album sales. In particular, the average jazz musician earns about forty-nine percent of his respective income from nonmusician related pursuits, such as music and jazz teaching, and nonmusical occupations.<sup>107</sup> Thus, not all types of performers are adequately compensated from radio exposure.

Second, the indirect value of the advertising (increased album sales) may be taken into account when calculating royalties. This does not have to be an all-or-nothing proposition. That is, it is possible to calculate an artist's benefit from increased exposure and offset the royalties accordingly.<sup>108</sup> Those who benefit more from increased exposure would receive less in the form of direct royalty payments, and thus broadcasters would compensate more directly those artists who do not receive a high level of exposure, such as jazz, opera, and classical musicians.

Third, the exposure argument fails to take into account the timing of the exposure. While a broadcaster transmitting a recently re-

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107 JazzWest.com, New Study Reveals Insight into Jazz Scene, [http://www.jazzwest.com/articles/rcac\\_study.html#Income](http://www.jazzwest.com/articles/rcac_study.html#Income) (last visited Oct. 5, 2005) (reporting findings from study of jazz musicians' work lives).

108 For instance, performers would likely form some type of performing society (such as what BMI provides for performances of musical works). In dividing up the royalty figures, an equation can be used so as to compensate works relative to the amount that each work was performed. However, for those whose songs benefited the most from free exposure (i.e., a number-one song for an extended period of time) the output of this equation can be reduced to reflect the artist's previously-earned exposure benefit.

leased Eminem<sup>109</sup> song may drive Eminem's record sales, the same cannot be said for older albums because the exposure value diminishes over time. For instance, oldies stations continue to play songs that have little, if any, current sales, and thus the artists of older works receive little, if any, exposure value from the public performances of their sound recordings. However, the song is nonetheless valued by the audiences that listen to, and the radio stations that prosper from, the song's performance.

Fourth, Congress has extended the right of public performance to other types of works even though those works also benefit from exposure. Motion pictures, for instance, enjoy a right to perform the work publicly.<sup>110</sup> However, performances of motion pictures may also drive sales of DVDs, movie posters, soundtracks, and other product tie-ins. Despite the motion picture company gaining exposure value from its movies' public performances, Congress has granted motion pictures a right of public performance and denied this right to musical artists.

The final argument for why exposure is inadequate compensation for sound recording performances is that viewing a right to public performance as a right to mere economic compensation too narrowly defines "right" of public performance. A right of public performance could possibly entail more than merely a right to receive royalties. For instance, an artist may wish that his song not be played on certain types of radio stations, in certain geographic areas, or in sleazy strip clubs;<sup>111</sup> and, with a right of public performance, a performer could prevent disgraceful groups, such as the Ku Klux Klan, from adopting the performer's song as rally music. A public performance right could conceivably allow the artist to have more control over who publicly performs his song and when, which may be crucial in sculpting the artist's public image.<sup>112</sup>

Therefore, the exposure argument: (1) does not adequately compensate all types of performers; (2) need not be an all or nothing proposition (royalties may be offset by the exposure value); (3) does

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109 Eminem is the stage name for popular rap artist Marshall Mathers. Jason Ankeny & Bradley Torreano, *Eminem Biography*, <http://www.mp3.com/eminem/artists/315157/biography.html> (last visited Oct. 5, 2005).

110 17 U.S.C. § 106(4) (2000).

111 For moral, religious, or other reasons, some artists may also prefer that their sound recordings not be publicly performed at bars, brothels, or a political candidate's rally.

112 Instead of signing up with a performing society, artists and music companies could control with whom they license, thereby controlling to some extent who may, and may not, publicly perform the artists' works.

not take timing of the exposure into account; (4) suffers from hypocrisy because other types of work (mainly movies) benefit from exposure and have a right of public performance; and, (5) defines “right” of public performance too narrowly by focusing exclusively on the right to receive royalties. Thus, the exposure argument fails and Congress should amend the Copyright Act of 1976 to protect public performances of sound recordings.

## 2. Double Dip

Another often cited argument against extending a public performance right to sound recordings is the “double dip” argument. That is, broadcasters argue that they pay royalties to composers and, often, composers and performers are one in the same—resulting in a possible double payment to the performer. This argument, however, is without merit because the courts and Congress have historically recognized the musical composition and the sound recording as separate and distinct works.<sup>113</sup> Therefore, it can be argued that there is no “double dipping” taking place, but rather it is “single dipping” twice as the broadcasters would be compensating the creator of two separate and distinct works: the musical work and the sound recording.

Other types of works could also be said to “double dip,” but Congress extends protection nonetheless. For example, let’s examine the rights of Tom Clancy, the author of *Debt of Honor*.<sup>114</sup> *Debt of Honor*, unlike seemingly every other Clancy novel,<sup>115</sup> has yet to be made into a movie. However, assume that Clancy decides to produce a motion picture version of *Debt of Honor*, and that he personally writes the screenplay and finances the production. Conceivably, Clancy could have the rights to three separate and distinct works: the novel, the screenplay, and the motion picture. Thus, with one public performance of the motion picture, Tom Clancy could receive royalties from the public performance of the movie as well as from the performance of the separate and distinct works underlying the movie. Yet Congress would not prevent Tom Clancy from “double (or even triple) dipping” from the performance of his separate and distinct works. Therefore, Congress should not withhold a public performance right

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113 See *supra* Part I.B.

114 TOM CLANCY, *DEBT OF HONOR* (1994).

115 See Internet Movie Database Inc., Tom Clancy Filmography, <http://imdb.com/name/nm0002007/> (last visited Oct. 5, 2005) (listing the many films based on Tom Clancy’s novels, including *Hunt for Red October*, *Sum of All Fears*, *Patriot Games*, and *Clear and Present Danger*, among others).



in sound recordings on a theory that some performers may earn royalties from their creation of separate and distinct works.

### 3. Financial Burden on Broadcasters

Broadcasters often argue that they cannot afford the additional cost accompanying a performance right because the broadcasters are already paying royalties to the composer of the music.<sup>116</sup> This argument is unpersuasive.

The economic reality is that broadcasters will initially have higher costs due to the payment of additional royalty figures to performers, but because of the cost-shifting market dynamics broadcasters will not bear the complete burden of the additional royalty expenses. Because an amendment to the Copyright Act of 1976 would affect all like broadcasters equally (in the sense that all music stations playing similar genres would likely pay similar total royalty fees), the 1976 Act's amendment would likely leave the competitive balance between broadcasters undisturbed. That is, if you have two competing radio stations, neither station would have a competitive advantage over the other because both stations' costs would rise comparatively equally.<sup>117</sup> Because all stations are incurring this additional royalty cost, all the stations can generally increase what they charge advertisers for airtime, thereby shifting (at least partially) the burden of the additional royalty cost to advertisers, leaving profit margins similar to pre-additional royalty levels. In turn, advertisers will likely shift (at least partially) this increased cost to consumers (who have long benefited from a lack of public performance right at the expense of musical artists) in the form of higher-priced goods.<sup>118</sup>

Furthermore, there is a question as to what extent, if at all, a public performance right in sound recordings would disturb the economic balance in the broadcasting industry. According to the Register's report, "[t]here is no hard economic evidence . . . to support arguments that a performance royalty would disrupt the broad-

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116 O'Dowd, *supra* note 102, at 266.

117 Note, this assumes that market forces will not allow stations to reduce the number of performances on their airwaves, as argued in Part II.A.1.

118 While higher-priced consumer goods may seem like a negative aspect, remember that the royalty incentive to create additional sound recordings will likely benefit consumers, and therefore it is not inequitable for the public to bear a portion of the new royalty. Likewise, broadcasters benefit from an increased number of sound recordings to broadcast, resulting in possibly more people tuning in, which will also benefit advertisers. Therefore, all the parties (broadcasters, advertisers, and public) who benefit from public performances of sound recordings would share in the additional royalty cost.

casting industry, adversely affect programming, and drive marginal stations out of business.”<sup>119</sup> In fact, assuming a sound recording performance right does increase the amount and quality<sup>120</sup> of sound recordings, this could possibly result in larger audiences listening for longer time periods, which may equate to larger broadcaster revenues (at least partially offsetting the increase in royalty expenses). Therefore, it is inconclusive whether an additional royalty cost would negatively disrupt the broadcasting market, and it is possible that a performance right may lead to larger revenues for broadcasters.

Thus, whatever the extent of this additional royalty burden (if any), it would not be born solely by broadcasters, but rather the additional royalty will likely be diffused to broadcasters, advertisers, and consumers, all of whom benefit from an increased number of works. Therefore, the broadcasters’ argument that protecting sound recording performance rights will impose too great a cost on broadcasters fails, and Congress should amend the 1976 Act to cover such rights.

#### CONCLUSION

Congress has long had the constitutional power to legislate copyright protection, particularly the power to legislate protection of sound recordings. Despite this long-standing power, Congress has yet to extend comprehensive protection to public performances of sound recordings.

As discussed in Part II, it does not matter whether Congress follows an incentive or natural rights theory of copyrights because following either theory leads to the same conclusion: Congress should amend the Copyright Act of 1976 to protect sound recording performances. Congress, at least partially, acknowledged the need for performance rights with the passage of the DPRA, which extended protection to performances via digital transmissions. However, the DPRA also highlights the arbitrariness of protecting the same type of work based merely on the method of transmission. Finally, once performance rights are accorded in the United States, its performers will gain rights to significant foreign royalty revenue streams.

Counterarguments against adopting an amendment are largely unpersuasive. The exposure argument does not equitably compensate all artists in all genres. The “double dip” argument runs counter to the general principle that an author/artist has a right to be compensated for each separate and distinct work. Likewise, the broadcast-

119 Statement of the Register of Copyrights, 43 Fed. Reg. 12,763, 12,765 (Mar. 27, 1978).

120 See *supra* note 69.

ers' "too costly" argument fails because broadcasters will likely not bear the sole cost of additional royalties, and it is uncertain as to whether these additional royalties would even negatively disrupt the broadcasting market.

Therefore, Congress should amend the Copyright Act and provide for a sound recording performance right. After all, isn't it time that Congress shows the Righteous Brothers, and all sound recording performers, that lovin' feelin'?