



From Whether to How: The Challenge of Implementing a Full Public Performance Right in Sound Recordings

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I. INTRODUCTION

As early as the discussions leading to the Rome Convention,¹ a major objection to the full recognition of public performance rights in sound recordings was the concern that the enforcement efforts of neighboring rights holders (record producers and musical performers) would interfere with the efforts of music composers and publishers to maximize the opportunity to commercially exploit their copyrighted compositions.² This concern remains at the heart of opposition to a full public performance right in the United States. It takes two forms: (1) a concern that neighboring rights holders will act as gatekeepers, potentially vetoing exploitation opportunities for the copyrighted compositions embodied in their sound recordings,³ and (2) a concern that the royalty stream which users must pay to neighboring rights holders will reduce the royalty stream available to the owners of copyrighted compositions.⁴ Because the owners of composition copyrights perceive that there is little to gain, and much to lose, if the U.S. grants full recognition to public performance rights in sound recordings, they have in many cases actively opposed these rights. If sound recordings are to receive full performance right protection in the U.S., it is therefore essential that neighboring rights holders and the owners of musical composition copyrights find ways in which they can work cooperatively. This is difficult in an environment where Congress itself has set them at odds, at first giving everything to one group and nothing to the other, and then only grudgingly beginning to recognize the rights of the second group. In other countries, however, performance rights in sound recordings have managed to coexist with those in compositions; there is no evidence that the recognition of new rights holders has diminished the well-being of those who create musical compositions.⁵

¹ International Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organizations, Oct. 26, 1961, 1961 WL 59331, available at http://www.wipo.int/treaties/en/ip/rome/trtdocs_wo024.html [hereinafter Rome Convention].

² See SAM RICKETSON & JANE C. GINSBURG, INTERNATIONAL COPYRIGHT AND NEIGHBOURING RIGHTS: THE BERNE CONVENTION AND BEYOND 1220 (2nd ed. 2006) (citing C. MASOUEY, GUIDE TO THE BERNE CONVENTION FOR THE PROTECTION OF LITERARY AND ARTISTIC WORKS 16 ff. (1978)).

³ *Id.* at 1221 (citing MASOUEY, *supra* note 2, at 17; STEPHEN M. STEWART, INTERNATIONAL COPYRIGHT AND NEIGHBOURING RIGHTS 226 (2d ed. 1989)).

⁴ *Id.* (citing STEWART, *supra* note 3, at 192, 226).

⁵ *Id.* (citing WORLD INTELLECTUAL PROPERTY ORGANIZATION, REPORT OF THE

The arguments for and against enacting a full public performance right for sound recordings have been made elsewhere at length,⁶ and this article will not revisit them,⁷ except for a brief examination, in Part I, of the likely economic consequences of enacting the expanded right.⁸

Therefore, this article assumes that, in the near future, sound recording performance rights in the U.S. will be expanded to encompass at least terrestrial broadcasts (as proposed in the Performance Rights Act (PRA)), and eventually public venues as well. Spreading the performance right more broadly creates a larger revenue base, which means that the rates applicable to each class of user can be lower, which will reduce the burdens on individual user groups. It will also eliminate — or at least mitigate — the current problem of giving a competitive advantage to one user group (e.g., terrestrial radio) over another (e.g., satellite radio and webcasters).

However, once the sound recording public performance right is expanded beyond its current limits (digital transmissions only), the task of implementing these rights will become more complex. This article examines some of the more significant challenges that will accompany this expansion of the public performance right.

II. COSTS AND BENEFITS

A. *The Goal: Reciprocity*

One of the most significant benefits of expanding the public performance right in sound recordings is that it will enable U.S. record companies and

INTERGOVERNMENTAL COMMITTEE OF THE INTERNATIONAL CONVENTION FOR THE PROTECTION OF PERFORMERS, PRODUCERS OF PHONOGRAMS AND BROADCASTING ORGANIZATIONS, Annexe I, ¶28 (1979).

⁶ See, e.g., Shourin Sen, *The Denial of a General Performance Right in Sound Recordings: A Policy that Facilitates our Democratic Civil Society?*, 21 Harv. J.L. & Tech. 233 (2007); William H. O'Dowd, *The Need for a Public Performance Right in Sound Recordings*, 31 Harv. J. on Legis. 249 (1994); 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, 1045-53 (2002); *Performance Rights Act: Hearing on H.R. 848 Before the H. Comm. on the Judiciary*, 111th Cong. 2d Sess. (2009) (passim).

⁷ Suffice it to say that the arguments in favor of the right are far more persuasive. This conclusion is shared by an overwhelming majority of disinterested experts. For a large collection of scholarly articles, see Thomas D. Sydnor II, *A Performance Right for Recording Artists: Sound Policy at Home and Abroad*, THE PROGRESS AND FREEDOM FOUNDATION, PROGRESS ON POINT (Feb. 2008), <http://www.pff.org/issues-pubs/pops/pop15.2performanceright.pdf>.

⁸ See *infra* notes 10–34 and accompanying text.

recording artists to collect foreign performance royalties that are currently being withheld by foreign collecting societies. Broadcasters and public performance venues in other countries that play American musical recordings are typically required to pay performance royalties for those recordings,⁹ but the societies that collect those royalties simply retain them, due to the absence of material reciprocity.¹⁰

Enacting an expanded public performance right will enable the United States to join the Rome Convention, which will trigger the requirement of national treatment¹¹ in most signatory countries,¹² enabling U.S. record

⁹ Some countries, such as Canada, do not even bother to collect royalties on U.S. recordings. See *infra* notes 124–30 and accompanying text.

¹⁰ *Ensuring Artists Fair Compensation: Updating the Performance Right and Platform Parity for the 21st Century: Hearing Before the Subcomm. on Courts, the Internet, and Intellectual Prop. of the H. Comm. on the Judiciary*, 110th Cong. 16–30 (2007) (statement of Marybeth Peters, Register of Copyright); *Performers and Performance Rights in Sound Recordings: Hearing Before the Subcomm. on Intellectual Prop. and Judicial Admin. of the H. Comm. on the Judiciary*, 103d Cong. 39 (1993) (statement of Jason S. Berman, President, RIAA).

¹¹ Article 4 of the Rome Convention provides that signatory countries are obligated to provide national treatment to *foreign performers* if (1) the performance takes place in another contracting state, (2) the performance is incorporated in a phonogram that is protected under Article 5 of the Convention, or (3) the performance is carried by a broadcast protected by Art. 6 of the Convention. If the U.S. becomes a contracting state, then a musician that performs on a recording made in the U.S. would qualify under both (1) and (2). See Rome Convention, *supra* note 2, art. 4. Under Article 5(1), Rome Convention countries must extend national treatment to *foreign record producers* if (1) the producer is a national of another contracting state, (2) the first fixation of the record was made in another contracting state, or (3) the phonogram was first published in another contracting state. (National treatment also applies if the record was first published in a non-contracting state, but was then published in a contracting state within 30 days.) However, signatories may opt out of the publication criterion or the fixation criterion. See Rome Convention, *supra* note 1, art. 5.

¹² The Rome Convention currently has 91 signatories, including most of the major markets for U.S. music (except China). See WIPO, *Contracting Parties, Rome Convention*, available at http://www.wipo.int/treaties/en/ShowResults.jsp?lang=en&treaty_id=17. However, because of several options available to signatory countries, see *supra* note 12, adherence to the Rome Convention does not guarantee full reciprocity in every case. For example, France requires distribution of public performance royalties only in the case of recordings made in France or another EU country. See Nathalie Piaskowski, *Collective Management in France*, COLLECTIVE MANAGEMENT OF COPYRIGHT AND RELATED RIGHTS 192 & n.59 (Daniel Gervais ed., 2010); Law No. 92-597 on the Intellectual Property Code, as amended by Laws Nos. 94-361 and 95-4, art. L. 214–1, L. 214–2, (1995) (Fr.), available at www.wipo.int/wipolex/en/text.jsp?file_id=127148. For this reason, American recording companies, and most American recording artists, are unlikely to receive French public performance royalties even if the U.S. recognizes a full public performance right and joins the Rome Convention.

companies and performers to claim their share of performance royalties under the domestic laws of those countries. In practice, many foreign collecting societies (frequently referred to as Collective Management Organizations, or CMOs) have been willing to reciprocate even before being legally required to do so. For example, even under the limited public performance right created by §§ 106(6) and 114,¹³ SoundExchange has already obtained reciprocal agreements for the exchange of digital performance royalties with collecting societies in the United Kingdom (PPL), the Netherlands (SENA), Brazil (UBC) (covering artists only), Spain (AIE) (artists only), and Mexico (SOMEXON). Some other foreign CMOs allow individual artists and record labels to register with them directly.¹⁴ Even among the Rome Convention countries, the laws and collecting society practices pertaining to public performance royalties are not identical. Because of these differences, individual collecting societies in each country negotiate reciprocal arrangements with foreign societies on a case-by-case basis.¹⁵

Although the rule of national treatment also applies to signatories of the WIPO Performances and Phonograms Treaty (WPPT)¹⁶—a treaty which the U.S. has joined—countries are permitted to “opt out” of specific provisions through the reservations process, and the U.S. has opted out of the public performance right under Art. 15(3), except with respect to certain digital transmissions.¹⁷ Accordingly, to this extent national treatment does not

¹³ 17 U.S.C. § 106(6) (2002); 17 U.S.C. § 114 (2009).

¹⁴ *Collect Foreign Territory Non-Terrestrial Performance Royalties*, <http://a2im.org/2010/02/09/collect-foreign-territory-non-terrestrial-performance-royalties/> (last visited Mar. 4, 2011); M. WILLIAM KRASILOVSKY & SYDNEY SHEMEL, *THIS BUSINESS OF MUSIC* 75–76 (10th ed. 2007).

¹⁵ See, e.g., REGISTER OF COPYRIGHTS, 95TH CONG., PERFORMANCE RIGHTS IN SOUND RECORDINGS, 198–99, 205 (Comm. Print 1978) (describing lack of reciprocity between several Rome Convention countries due to differences in performance rights legislation).

¹⁶ See WIPO Performances and Phonograms Treaty art. 4, Dec. 20, 1996, S. Treaty Doc. No. 105–17 available at http://www.wipo.int/treaties/en/ip/wppt/trtdocs_wo034.html [hereinafter WPPT].

¹⁷ The United States’ instrument of ratification of WPPT provides:

Pursuant to Article 15(3) of the WIPO Performances and Phonograms Treaty, the United States will apply the provisions of Article 15(1) of the WIPO Performances and Phonograms Treaty only in respect of certain acts of broadcasting and communication to the public by digital means for which a direct or indirect fee is charged for reception, and for other retransmissions and digital phonorecord deliveries, as provided under the United States law.

apply,¹⁸ and other WPPT countries can, and do, withhold performance royalties to the extent that the U.S. does not materially reciprocate.¹⁹

As the U.S. public performance right is expanded to accompany a wider array of public performances, this will trigger reciprocity with respect to larger amounts of foreign royalties that have heretofore been withheld. The next section attempts to assess the amounts at stake, and how they might influence the design and implementation of the expanded performance royalty.

B. How Much is at Stake?

The magnitude of the worldwide public performance royalties attributable to U.S. recordings is unclear. It has been reported that the total worldwide performance royalties paid to record producers and performers in 2007 was \$1.2 billion.²⁰ According to one source, some 60 percent of the recorded music performed worldwide is attributable to U.S. record companies and recording artists.²¹ Others have estimated that U.S. performers and producers forego \$70–100 million per year in foreign performance royalties that are withheld by foreign collecting societies due to lack of reciprocity.²² Another source puts the figure vaguely at \$600

the United States of America (Sept. 14, 1999), available at http://www.wipo.int/treaties/en/notifications/wppt/treaty_wppt_8.html.

¹⁸ WPPT, *supra* note 17, art. 4(2).

¹⁹ UNITED STATES GOVERNMENT ACCOUNTABILITY OFFICE, PRELIMINARY OBSERVATIONS ON THE POTENTIAL EFFECTS OF THE PROPOSED PERFORMANCE RIGHTS ACT ON THE RECORDING AND BROADCAST INDUSTRIES 14 (Feb. 26, 2010), available at www.gao.gov/new.items/d10428r.pdf.

²⁰ PRICEWATERHOUSE COOPERS, VALUING THE USE OF RECORDED MUSIC 52 (2008), http://www.ifpi.org/content/library/Valuing_the_use_of_recorded_music.pdf.

²¹ *Performers and Performance Rights in Sound Recordings: Hearing Before the Subcomm. on Intellectual Property and Judicial Administration of the H. Comm. on the Judiciary*, 103rd Cong. 1st Sess. 40 (1993) [hereinafter *1993 Hearings*] (statement of Jason S. Berman, President, RIAA). Another source reports that 40% of music distributed worldwide comes from the United States. Joshua D. Levine, *Dancing to a New Tune, a Digital One: The Digital Performance Right in Sound Recordings Act of 1995*, 20 Seton Hall Legis. J. 624, 643–44 (1996). It seems likely that U.S. recordings make up a similar percentage of worldwide public performances.

²² *Performance Rights Act: Hearing on H.R. 848 Before the H. Comm. on the Judiciary*, 111th Cong. 1st Sess. 36 (2009) (statement of Paul Almeida, President, AFL-CIO); Keith Holzman, *Performance Royalties*, http://www.musicbizacademy.com/articles/kh_royalties.htm (last visited Mar. 3, 2011) (Register of Copyrights Mary Beth Peters estimates \$70 million); *Public Performance Right for Sound Recordings (Fact Sheet)*, <http://futureofmusic.org/article/fact-sheet/public-performance-right-sound-recordings> (estimating \$100 million). In 1991, Jay Berman of the

million “over the last several years.”²³ The wide disparity in these estimates may result from any of several factors: the use of questionable or out-of-date data, exaggeration by advocates of the expanded performance right, currency fluctuations, differences in collecting and reporting mechanisms (e.g., where performance royalties from audiovisual transmissions may be lumped in with those from audio transmissions, or where delayed distributions of amounts previously held back may have artificially inflated the amounts distributed in a subsequent year)²⁴, or the sheer difficulty of compiling worldwide data. Also, sources providing figures in the lower range may be netting the incoming royalties against outgoing royalties that will be owed to foreign record companies and foreign performers under reciprocity arrangements, while those in the higher range may be focusing on the loss to U.S. performers and record companies, while ignoring the outflow from U.S. users to foreign rights holders.

According to older data presented at the 1993 congressional hearings on the performance right, the worldwide recording industry earned \$125 million in performance royalties during 1991, mostly from Europe.²⁵ (None, of course, was from the United States.) Due to rapid changes in European laws and collecting society practices during the last twenty years, the amount of performance royalties being generated in Europe has steadily increased.²⁶ At the same time, the partial reciprocity arising from the 1995 enactment of the digital audio performance right in the U.S. means that, after 1995, at least some of the foreign collecting societies that had previously withheld such royalties from U.S. rights holders began to

Recording Industry Association of America (RIAA) told Congress that the U.S. recording industry was being excluded from performance royalties in excess of \$120 million. *Digital Performing Rights: Hearing on H.R. 1506 Before the Subcomm. on Courts and Intellectual Property of the H. Comm. on the Judiciary*, 104th Cong. 1st Sess. (1995) (statement of Jason S. Berman, Chairman and CEO, RIAA); *Copyright Protection for Digital Audio Transmissions: Hearing on S. 227 Before the S. Comm. on the Judiciary*, 104th Cong. 1st Sess. (1995) (statement of Jason S. Berman, Chairman and CEO, RIAA); Stephen Koff, *Recording Artists and Radio Stations Fight Over Royalties, Air Play and Spin*, http://www.cleveland.com/open/index.ssf/2010/06/recording_artists_and_radio_st.html (quoting John Simson, Executive Director of SoundExchange, setting the figure at \$70–100 million per year).

²³ KRASILOVSKY & SHEMEL, *supra* note 14, at 65.

²⁴ See AEPO-ARTIS, PERFORMERS’ RIGHTS IN EUROPEAN LEGISLATION: SITUATION AND ELEMENTS FOR IMPROVEMENT 26 (2009).

²⁵ *1993 Hearings*, *supra* note 21, at 30 (statement of Nicholas Garnett, Director General, IFPI). There was no indication of the nature of the public performances that generated these revenues.

²⁶ AEPO-ARTIS, *supra* note 24, at 27–31.

disburse them, leaving less money “on the table” in subsequent years.

Because some countries have been slow to develop webcasting, simulcasting, and interactive services, and others have been slow to apply their performance royalty requirements to such services,²⁷ the amount of these disbursements to U.S. shareholders has probably increased slightly in recent years, and that increase could become more substantial in the future. However, more recent data from Europe indicates that, in the aggregate, webcasting, simulcasting, and interactive services are generating much smaller royalties than terrestrial broadcasting and performances in public venues.²⁸ This would indicate, then, that the failure to extend the U.S. performance right to terrestrial broadcasting and performances in public venues has prevented U.S. rights holders from collecting the *vast majority* of performance royalties that have been generated in Europe.

In most European countries, performance royalties generated from performances other than transmissions (for example, performances in public venues) represent one-third to one-half of the total performance royalties collected for the use of sound recordings.²⁹ This suggests that expanding the U.S. performance right to restaurants, bars, clubs, and retail establishments that play recorded music, assuming that reciprocity is thereby triggered, will greatly increase the foreign royalties collected by U.S. performers and record producers.

On the basis of this rather disparate data, it is probably fair to say that U.S. rights holders are currently losing several hundred million dollars per year due to the lack of material reciprocity with major markets for U.S. recorded music. If the performance right is not expanded, much of this money will never reach U.S. shores. On the other hand, the loss suffered by U.S. *rights holders* does not necessarily translate to an equally large loss to the overall U.S. economy, since an expanded public performance right for sound recordings will also generate a small *outflow* of royalties from U.S. terrestrial broadcasters and public venues to foreign record companies and recording artists.

The case for an expanded public performance right will be strengthened if better data can be obtained. The ability to collect such data will be helpful in the future as well, when U.S. performers and record producers are eventually able to collect these royalties. That will happen, of course, only if and when the expanded public performance right comes to fruition.

It is also important to note that the expansion of sound recording performance rights to terrestrial broadcasts and, eventually, to other public

²⁷ AEPO-ARTIS, *supra* note 24, at 18–20, 26.

²⁸ AEPO-ARTIS, *supra* note 24, at 26.

²⁹ AEPO-ARTIS, *supra* note 24, at 27–31.

venues will impose new costs on users within the U.S. — users such as radio and television broadcasters, and the operators of public venues such as bars, clubs, retail establishments, and restaurants. Many, probably most, of these costs will indirectly be passed along to consumers, and some marginal businesses that cannot pass along the increased costs may be unable to continue operations. This has been a major political obstacle to expansion of the public performance right. The expansion of the performance royalty to encompass a much broader user base therefore must be done with sensitivity to the differences between users. A nonprofit college radio station, for example, should not be subjected to the same royalty as a large commercial radio operation. Under current law, similar disparities—between large and small webcasters, and between webcasters and satellite or cable broadcasters—have repeatedly required legislative resolution, as well as negotiated settlements, in the context of digital transmissions.³⁰ Thus, the expanded royalty scheme should discriminate carefully to avoid skewing the marketplace in favor of larger operators.

Policymakers, and ultimately the public, must decide if the benefits of the performance right outweigh these costs. The *foreign* royalties that will be generated by the expanded performance right do not impose costs on U.S. consumers and will produce a significant gain to U.S. creators as well as the overall U.S. economy. However, the royalties generated by public performances *within* the U.S. will simply shift wealth from one group (consumers and business owners) to another (the creators of recorded music).³¹ Whether this wealth shift is desirable depends on the value one places on the services of recording artists and record companies. While the prospect of major record labels making more money does not strike everyone as a good thing, it is important to keep several things in mind: (1) the royalty scheme can be structured so that a guaranteed share of the royalty will go directly to performers (as is partially true even under the

³⁰ Webcaster Settlement Act of 2009, Pub. L. No. 111–36, 111th Cong., 1st Sess. (June 30, 2009) (codified as amended at 17 U.S.C. § 114(f)(5)); Webcaster Settlement Act of 2008, 122 Stat. 4974, Pub. L. No. 110–435, 110th Cong., 2d Sess. (Oct. 16, 2008) (codified as amended at 17 U.S.C. § 114(f)(5)); Small Webcasters Settlement Act of 2002, 116 Stat. 2780, Pub. L. No. 107–321, 107th Cong., 2d Sess. (Dec. 4, 2002) (codified as amended at 17 U.S.C. § 114(f)); *see* AL KOHN & BOB KOHN, KOHN ON MUSIC LICENSING 1491–94 (2010).

³¹ In addition, some small component of this wealth will leave the U.S., because it will be payable to foreign artists and record companies whose recordings are publicly performed in the U.S. This component, then, will not directly benefit U.S. consumers or creators. Because foreign recordings represent only a small share of the recordings publicly performed in the U.S., this outflow of funds will be dwarfed by the inflow of foreign royalties.

current version of § 114³²); (2) the major record labels have been, and continue to be, instrumental in obtaining performance rights for both producers and performers, and in developing methods for implementing the royalty scheme; (3) small independent record labels also benefit from the performance right; and (4) new technology and new business models are making it easier for performers to self-produce and self-distribute,³³ so that, in the future, even the label's share of the performance royalty is likely to offer benefits to performers.

III. CURRENT LAW

This section provides a brief overview of the most important aspects of the sound recording performance right under current law.

In the 1995 Digital Performance Rights in Sound Recordings Act (DPRSRA),³⁴ as amended in 1998, Congress recognized a narrow form of public performance rights in sound recordings. Under §§ 106(6) and 114,³⁵ the performance right applies only to digital audio transmissions—i.e., satellite radio, digital cable and satellite television music services, on-demand digital music streaming, and webcasting (or simulcasting, in the case of terrestrial radio stations that retransmit their programs over the Internet). The right does not apply to terrestrial radio (i.e., FCC-licensed AM or FM stations), or to performances in public venues such as bars, restaurants, clubs, and retail stores; all of these are currently exempt from the sound recording performance royalty.

The nonexempt digital services are divided into two categories: interactive and noninteractive.³⁶ Interactive services stream music on demand; thus, the listener selects the particular recording he or she wishes to hear at a particular time. The recording industry sought and obtained greater control over these services, on the theory that they have greater

³² Under § 114, specified percentages of the statutory licensing fees must be paid to featured and non-featured performers. 17 U.S.C. § 114(g)(2). In contrast, the allocation of interactive licensing fees is determined by the individual performers' contracts with the record companies. *Id.* § 114(g)(1).

³³ The trend toward self-producing is international in scope. See Letter from Fédération Internationale des Musiciens to the European Commission, *Comments on the Notification Published 17 August 2001 (Ref: Case COMP/C2/38.014-IFPI)* ¶ 1.8 (Aug. 17, 2001), available at http://www.fim-musicians.com/eng/pdf/7_1_2_2_2.pdf.

³⁴ Pub. L. 104-39, 109 Stat. 336 (1995).

³⁵ 17 U.S.C. §§ 106(6), 114.

³⁶ See 17 U.S.C. § 114(d)(2)–(3).

potential to displace record sales.³⁷ Accordingly, in order to obtain a public performance license to perform a recording, the interactive service must negotiate directly with the record company.³⁸ In contrast, noninteractive services, such as satellite radio and most webcasters, are more like traditional radio, and have less potential to displace record sales; accordingly, they are eligible for a compulsory license under § 114(f). (This arrangement prevents the record companies from exercising a veto over noninteractive licensing requests; this alleviates the concerns of songwriters and music publishers.)³⁹ The Copyright Royalty Board (CRB) conducts proceedings to set the statutory rate; proceedings to date have been lengthy and complex, and, in some cases, controversial enough to require congressional intervention. Separate royalty schemes have been developed for different kinds of services; in some cases, the royalty is based on gross revenues, while in others it is a flat fee per performance, based on audience size. Once the rates have been set, any noninteractive service can perform sound recordings if it registers for the license with the U.S. Copyright Office, satisfies certain other statutory conditions, and pays the statutory royalty. The statutory royalty is paid to SoundExchange, a nonprofit entity spun off from the Recording Industry Association of America (RIAA), which distributes the royalties to record companies and recording artists.⁴⁰

In the case of interactive services, the negotiated royalty is paid directly to the record companies. Because the law does not require the record company to share the royalty with performers, a performer's right to share in the royalty depends on his or her recording contract.⁴¹ In contrast, for noninteractive services, § 114(g) requires the compulsory license fee to be split as follows (a duty carried out by SoundExchange): 50% to the record company that produced the recording, 45% to the performer(s) featured on the recording (an amount that must be calculated on a per-recording basis, reflecting the actual recordings that were played), and 5% to escrow

³⁷ KOHN & KOHN, *supra* note 30, at 1468.

³⁸ Because § 106(6) designates the digital performance right as an exclusive right, and § 114(d)(2) specifies that the § 114(f) compulsory license applies only to non-interactive digital performances, only the latter fall short of being true exclusive rights that are subject to voluntary negotiation. Even the right to voluntarily negotiate interactive licenses is limited; however, § 114(d)(3) limits the right of the record companies to enter into exclusive interactive licenses.

³⁹ See, e.g., *Digital Performance Rights: Hearing on H.R. 1506 Before the Subcomm. on Courts and Intellectual Property of the H. Comm. on the Judiciary*, 104th Cong. (1995) (Statement of Wayland Holyfield, ASCAP) (expressing "gatekeeper" concerns).

⁴⁰ See generally KOHN & KOHN, *supra* note 30, at 1468–1504 (2010).

⁴¹ 17 U.S.C. § 114(g)(1); DONALD S. PASSMAN, *ALL YOU NEED TO KNOW ABOUT THE MUSIC BUSINESS* 310 (2009).

accounts managed on behalf of nonfeatured performers. The 5% share for nonfeatured performers is split equally between two independently administered escrow accounts, one for musicians and one for vocalists, and payments are disbursed from these accounts to nonfeatured performers “who have performed on sound recordings” (not necessarily the specific sound recordings that generated the royalties).⁴² In order to make accurate disbursements to featured performers and record companies, SoundExchange needs to identify the specific recordings that have been played by each music service, and how often they have been played. Accordingly, to the extent it is technically feasible, each audio transmission under the compulsory license must be accompanied by the identifying information encoded on the sound recording (including, *inter alia*, the title of the recording and the names of the featured performers).⁴³

IV. CRITIQUE OF CURRENT LEGISLATIVE PROPOSALS

In 2008, the Department of Commerce urged Congress to expand the § 114 compulsory license to include terrestrial radio transmissions, arguing that this would: (1) level the playing field between satellite, Internet, and terrestrial broadcasters, (2) increase the incentives for performers and record companies to produce new recordings, and (3) make it possible for U.S. record producers and performers to receive substantial amounts of foreign performance royalties that have previously been held back by foreign PROs.⁴⁴ Public performance royalties would also replace some of the mechanical royalties that record producers and performers have lost due to the proliferation of unauthorized downloads.⁴⁵

The proposed Performance Rights Act (PRA)⁴⁶ would extend public performance rights to terrestrial radio broadcasts. Although the House and

⁴² 17 U.S.C. § 114(g)(2).

⁴³ *Id.* § 114(d)(2)(A)(iii).

⁴⁴ See Letter from Cameron F. Kerry, General Counsel, U.S. Department of Commerce, to the Hon. Patrick J. Leahy, Chairman, Committee on the Judiciary (April 1, 2010), *available at* <http://www.ogc.doc.gov/ogc/legreg/letters/111/S379Apr0110.pdf>.

⁴⁵ The expanded public performance right would not replace the mechanical royalties lost by music composers and publishers as a result of unauthorized downloads; however, this is only because music composers and publishers *already* receive public performance royalties. Arguably, their performance royalties have played an important role in diminishing the impact of their lost mechanical royalties, whereas the loss of mechanical royalties by record companies affects their most important revenue stream.

⁴⁶ H.R. 848, 111th Cong. (2010); S. 379, 111th Cong. (2010).

Senate Judiciary Committees approved their respective versions of the legislation in 2010, and the legislation had the support of the Obama Administration, neither bill proceeded to a floor vote. They are, however, likely to be revived in the 112th Congress.⁴⁷

The House (H.R. 848) and Senate (S.379) versions of the bill are not identical, but both include the following provisions:

The PRA will make the § 106(6) right applicable to all audio transmissions, including not only satellite and Internet transmissions, as under current law, but also terrestrial broadcasts.⁴⁸ However, the right will *not* extend to other public performances of recorded music, such as those in clubs, restaurants, bars, and retail or other business establishments. Thus, the PRA leaves intact the § 114(d) exemption for transmissions *within* business establishments and transmissions *to* business establishments for use in the ordinary course of business.⁴⁹

The PRA also provides relief to smaller terrestrial broadcasters, giving them the option to pay, in lieu of the statutory royalty that would otherwise apply to its over-the-air nonsubscription broadcasts, an annual flat fee determined by their gross revenues.⁵⁰ As discussed below, the Senate version of this proposal offers a bit more relief to the lowest-grossing broadcasters. Although both bills limit this relief to terrestrial broadcasters, expanding this relief to small webcasters as well would foster the growth and diversity of webcasting, especially in less commercial “niche” markets, thus increasing the opportunities for artists (and songwriters) to find an audience.

Under transitional provisions, the new statutory royalty for terrestrial stations does not take effect for one year after enactment (three years, for stations with gross revenues of less than \$5,000,000 during the year immediately preceding enactment).⁵¹ This delay in implementation allows some time for broadcasters and rights holders to develop systems for tracking usage, and for collecting, allocating, and disbursing royalties.⁵²

Outright exemptions apply to eligible nonsubscription transmissions of

⁴⁷ The Obama Administration reiterated its support for the legislation in its recommendations to the 112th Congress. ADMINISTRATION’S WHITE PAPER ON INTELLECTUAL PROPERTY ENFORCEMENT LEGISLATIVE RECOMMENDATIONS 3, 17 (2011).

⁴⁸ H.R. 848 § 2; S. 379 § 2.

⁴⁹ 17 U.S.C. § 114(d)(1)(C)(ii), (iv).

⁵⁰ H.R. 848 § 3(a)(1); S. 379 § 3(a)(1).

⁵¹ H.R. 848 § 3(a)(1); S. 379 § 3(a)(1).

⁵² Counterpoint Systems is a United Kingdom company that performs this service in several countries. *See generally* COUNTERPOINT SYSTEMS, <http://www.counterp.com> (last visited Mar. 4, 2011).

(1) religious services and (2) incidental uses of musical recordings.⁵³

The rates and terms established by the Copyright Royalty Judges must also include the option of a per-program license for terrestrial broadcast stations that make “limited feature uses of sound recordings.”⁵⁴

The PRA also makes a significant change in the way that performance royalties are allocated to *nonfeatured* performers in the case of voluntarily negotiated (i.e., nonstatutory) audio transmission licenses, which are the licenses applicable to interactive transmissions. Under current law, a nonfeatured performer is entitled to receive a share of these royalties from the record company *only* if and to the extent that the performer’s contract with the record company calls for such payments; under this system, most nonfeatured performers receive no payments at all.⁵⁵ Under the PRA, the record company must deposit 1% of the negotiated license fee for each recording into the Intellectual Property Rights Distribution Fund of the AFM and AFTRA (or any successor entity), which will then distribute the fee to the nonfeatured performers who have performed on sound recordings⁵⁶ (presumably using the same system they currently employ for distributing the nonfeatured performers’ share of the *statutory* license fees).⁵⁷ Along with these deposits, the record company must indicate the amounts attributable to each licensee, and, for each sound recording performed, the following information (but only if the information is included in the licensee’s reports):

- (1) The name of the artist;
- (2) The International Standard Recording Code (ISRC) of the sound recording;⁵⁸
- (3) The title of the sound recording;
- (4) The number of times the sound recording was transmitted; and
- (5) The total amount of receipts collected from that licensee.

⁵³ H.R. 848 § 3(b); S. 379 § 3(b).

⁵⁴ H.R. 848 § 4; S. 379 § 4.

⁵⁵ 17 U.S.C. § 114(g)(1)(B).

⁵⁶ H.R. 848 § 6; S.379 § 6.

⁵⁷ Cf. 17 U.S.C. § 114(g)(2)(B) (using the same statutory language). The AFM/AFTRA Fund’s distribution methodology is described at <http://www.raroyalties.org/digital/guidelines.html>.

⁵⁸ The ISRC is an international ISO standard (ISO 3901) that identifies particular sound recordings and music videos by their unique 12-character alphanumeric designations. The ISRC registration authority is the International Federation of the Phonographic Industry (IFPI). See generally ISRC – INTERNATIONAL STANDARD RECORDING CODE, <http://www.usisrc.org/> (last visited Mar. 4, 2011).

The AFM/AFTRA Fund will then distribute 50% of the deposited fee to nonfeatured vocalists and 50% to nonfeatured musicians (after deducting reasonable costs).⁵⁹ Thus, under the PRA, nonfeatured performers will be guaranteed at least a small share of the negotiated performance royalties, even if their individual contracts do not call for such payments.

However, the PRA does not impose on licensees any legal *duty* to provide the information listed in (1)–(5) above, even though the AFM/AFTRA fund will need at least some of this information in order to make accurate distributions to the nonfeatured performers. And if the licensees omit any of this information from their reports to the record company, then the record company does not have to provide it to the AFM/AFTRA Fund. In other words, the record company has no affirmative obligation to assist the AFM/AFTRA Fund in obtaining this information, or any other information, for that matter.⁶⁰

Rather than impose such a duty on *licensees*, the PRA requires the *record company* (the “sound recording copyright owner”) to “use reasonable good faith efforts to include in all relevant licenses a requirement to report” this information.⁶¹ There are potential problems with this approach: (1) the record company has no incentive to make a “good faith” effort to include such provisions in its negotiated licenses with users; (2) even if the record company includes this reporting requirement in a negotiated license, it has no incentive to enforce that requirement; and (3) major record labels, and larger commercial licensees, will be in a better position to comply with these reporting provisions than smaller labels (or self-producing recording artists) and smaller licensees. Thus, the AFM/AFTRA Fund may not receive all of the information needed to make distributions, which may cause the Fund to incur additional expenses in order to make accurate distributions; these expenses will further reduce the total funds available for distribution. Thus, while the PRA’s new distribution method may be better than the current method (which allows the record companies to use their superior bargaining power to retain these royalties), it still falls short of guaranteeing that nonfeatured performers will receive their legal share.

The PRA makes no change to the current rule regarding *featured* performers’ rights to receive a share of a negotiated (i.e., interactive) performance royalty. Thus, their shares will still be determined by the terms of their recording contracts, meaning that in most cases the record

⁵⁹ H.R. 848 § 6; S.379 § 6.

⁶⁰“The sound recording copyright owner shall not be required to provide any additional information to the Fund . . .” S. 379 § 6(1); H.R. 848 § 6(1).

⁶¹ H.R. 848 § 6(1); S. 379 § 6(1).

company will retain their shares.⁶²

If a record company and a terrestrial broadcaster enter into a negotiated license that covers transmissions that are also eligible for the § 114(f) statutory license (that is, the compulsory license that applies to *noninteractive* transmissions), then the statutory license distribution mechanism for featured and nonfeatured performers takes precedence over the mechanisms described above. In other words, the broadcaster must pay 50% of the total negotiated royalty to the agent designated to receive statutory royalties under § 114(f) (i.e., SoundExchange), which then distributes them among featured and nonfeatured performers in the same manner as statutory royalties are distributed under current law (2-1/2% to nonfeatured vocalists, 2-1/2% to nonfeatured musicians, and 45% to featured artists).⁶³

Both bills recite (repeatedly) the same directive found in the current statute⁶⁴—that sound recording performance royalties shall not be considered in any governmental proceeding⁶⁵ pertaining to royalties for the public performance of musical compositions, which “shall not be reduced or adversely affected in any respect as a result of the rights granted by § 106(6).”⁶⁶ Clearly intended to address the objections of songwriters and music publishers, this language underscores the continuing presumption that the underlying musical works deserve greater protection than the recorded performances of those works. Neither bill endorses a corollary rule for protecting recording artists—that the performance royalties payable to songwriters and publishers should not be considered in the determination of performance royalties for sound recordings.

A. Provisions Unique to the House Bill

As an alternative to the statutory royalty, the House bill allows smaller terrestrial broadcast stations the option of paying an annual flat fee based on their annual gross revenues, according to the following schedule:

Annual Gross Revenues

Annual Fee

⁶² S. 379 § 6(1); H.R. 848 § 6(1).

⁶³ 17 U.S.C. § 114(f)(2)(B)–(D).

⁶⁴ *Id.* § 114(i).

⁶⁵ The new bills add the mysterious phrase “or otherwise.” H.R. 848 § 5(a), (c); S. 379 § 5(a), (c). Surely Congress cannot intend that parties engaged in voluntary licensing negotiations for the use of recorded musical compositions will be legally barred from considering the impact of the sound recording royalty.

⁶⁶ S. 379 § 5; H.R. 848 § 5.

<\$100,000	\$500
At least \$100,000 but < \$500,000	\$2,500
At least \$500,000 but < \$1,250,000	\$5,000 ⁶⁷

In the case of public broadcasting entities,⁶⁸ the fees are the same, except that they top out at \$1,000 per year for a station with annual gross receipts of \$100,000 or more.⁶⁹

Section 7 of the House bill expresses congressional intent not to interfere with the public interest obligations of broadcasters to local communities, and Section 8 instructs the Copyright Royalty Judges, in setting statutory rates, to consider their effect on the diversity of broadcasters as well as performers and record labels, specifically:

- (1) Religious, minority-owned, female-owned, small, and noncommercial broadcasters;
- (2) Non-music programming, including local news and information programming; and
- (3) Religious, minority or minority-owned, and female or female-owned royalty recipients.⁷⁰

B. Provisions Unique to the Senate Bill

Like the House bill, S. 379 allows smaller terrestrial broadcast stations to pay an annual flat fee instead of the statutory royalty, and the amount of the fee depends on the station's annual gross revenues. However, the Senate version of the fee schedule offers greater relief to stations grossing less than \$50,000:

<u>Annual Gross Revenues</u>	<u>Annual Fee</u>
<\$50,000	\$100
At least \$50,000 but <\$100,000	\$500
At least \$100,000 but < \$500,000	\$2,500
At least \$500,000 but < \$1,250,000	\$5,000 ⁷¹

As in the House bill, the same fee schedule applies to public

⁶⁷ H.R. 848 § 3(a)(1).

⁶⁸ These are defined in 17 U.S.C. § 118(f).

⁶⁹ H.R. 848 § 3(a)(1).

⁷⁰ *Id.* § 8.

⁷¹ S. 379 § 3(a)(1).

broadcasting entities, but it tops out at \$1,000 for stations with annual gross receipts of \$100,000 or more.⁷²

Under current law, digital transmissions are eligible for statutory licensing only if they are “accompanied, if technically feasible, by the information encoded on that sound recording, if any,” which identifies the title of the sound recording, the featured recording artist, and “related information, including information concerning the underlying musical work and its writer.”⁷³ This information facilitates the task of identifying the parties who are entitled to share in the statutory royalties — the owner of the sound recording copyright, the performers, and the copyright owner(s) of the underlying musical work. The Senate bill, in a provision captioned “Eliminating Regulatory Burdens for Terrestrial Broadcast Stations,” eliminates this requirement for nonsubscription and noninteractive broadcast transmissions.⁷⁴ In other words, the Senate bill eliminates the information-encoding requirement for most terrestrial broadcasters. This recognizes that, when the means of transmission is not digital, the encoded information is less useful because it cannot be transmitted.

However, neither the House nor the Senate version of the bill imposes any duty on terrestrial broadcasters to maintain records of this information in any other manner. While this may indeed reduce the regulatory burden on these users, it increases the burden on the record companies and performers—together with their agent SoundExchange—who need this information in order to ensure that the statutory royalties are properly allocated among the rights holders. This creates an information gap, and some mechanism must therefore be developed to fill that gap. It will not be possible to allocate statutory royalties accurately unless the licensees are required to maintain logs of their musical transmissions and deliver these records to the parties charged with allocating the royalty. This requirement may be burdensome, especially on smaller stations. However, these stations are already required to maintain logs — at least periodically — under their blanket licensing arrangements with ASCAP and BMI. If ASCAP and BMI are willing to cooperate with SoundExchange, it may only be necessary to add additional information to those logs, identifying the particular sound recordings (as opposed to merely the musical compositions).⁷⁵ Although

⁷² *Id.*

⁷³ 17 U.S.C. § 114(d)(2)(A)(iii).

⁷⁴ S. 379 § 2(d).

⁷⁵ The accuracy of the data currently being collected for digital transmissions has been questioned, which suggests that future legislation on neighboring rights should place a greater priority on tracking mechanisms, for both digital and terrestrial broadcasts. See Christopher Herot, *John Simson of SoundExchange at Harvard Law School*, CHRISTOPHER

some of the burden of tracking usage may inevitably fall on the recording industry, other countries have imposed recordkeeping requirements on radio broadcasters that are far more rigorous than anything contemplated by the PRA.⁷⁶

V. LOOKING AHEAD: PUBLIC VENUES

Even if the PRA becomes law, there will still be a significant gap between the public performance rights of performers and record producers and those of songwriters and publishers. Most of the public performances that fall into this gap are those which do not involve either digital or terrestrial transmissions of sound recordings — in other words, on-site performances of sound recordings in public venues, such as clubs, bars, restaurants, and retail establishments, where the recorded music may serve either as background music or as featured entertainment.

Under current law, public establishments are in the same position as terrestrial broadcasters. To obtain the right to perform musical works, they must negotiate with each of the three PROs representing songwriters and publishers to obtain blanket licenses covering the entire catalog of music controlled by that PRO. If they wish to perform recordings of these compositions (as opposed to bringing in live musicians), they do not need the consent of the record companies or recording artists.⁷⁷

The PRA will eliminate this exemption for terrestrial broadcasters, but retain it for public venues. While this is typical of incremental legislative reform, there is no principled justification for continuing to exempt these businesses, and eventually they, too, should be required to pay for the use of these recordings.⁷⁸

HEROT'S WEBLOG (last visited Apr. 7, 2011), <http://herot.typepad.com/cherot/2008/04/john-simson-of.html> (reporting on lecture by John Simson, Executive Director of SoundExchange, who estimates that sampling methods used by ASCAP and BMI missed 41% of artists and 26% of titles).

⁷⁶ *ReSound Engages Nielsen BDS to Track Commercial Radio Music Airplay in Canada* (Sept. 27, 2010), http://www.resound.ca/en/docs/press_release_2010-09-27.pdf (noting that Canada requires radio stations to report radio logs 28 days per year, while mandatory 365-day reporting is the norm in most countries); COPYRIGHT BOARD OF CANADA, STATEMENT OF ROYALTIES TO BE COLLECTED BY SOCAN, RE:SOUND, CSI, AVLA/SOPROQ AND ARTISTI IN RESPECT OF COMMERCIAL RADIO STATIONS ¶¶330–31 (2010), <http://www.cb-cda.gc.ca/decisions/2010/20100709.pdf>.

⁷⁷ See 17 U.S.C. § 114(a) (stating that the public performance right under 17 U.S.C. § 106(4) does not apply to sound recordings).

⁷⁸ The Register of Copyrights has consistently adopted this position. See, e.g., *Ensuring Artists Fair Compensation: Updating the Performance Right and Platform Parity for the 21st Century: Hearing before the Subcomm. on Courts, the Internet, and Intellectual Property of the H. Comm. on the Judiciary*, 110th Cong. 115 (2007) (Statement of

Expansion of the right to public venues would raise some of the same questions that must be resolved for terrestrial broadcasters. How will the rates be set—by compulsory license, or through individual or collective negotiation? The typical use of recorded music in public venues is more analogous to terrestrial broadcasting or noninteractive digital music services than it is to interactive music services, because it usually does not allow the listeners to dictate which songs will be played when. Like terrestrial radio, it is also more ubiquitous than interactive music services and does not provide the kind of perfect listening experience that threatens to displace record sales. Therefore, Congress would almost certainly adopt the compulsory license model.

With respect to recordkeeping, however, the expansion of the performance right to public venues will be more problematic than its expansion to terrestrial radio. In order to allocate royalties (compulsory or negotiated) among the various rights holders, the agent in charge of collecting and disbursing those royalties (SoundExchange or a similar entity) will need some way to determine which recordings have been played, and how often. If the burden of monitoring usage falls on the rights holders and their agent, this will be even more burdensome than the task of monitoring radio broadcasts. It would be virtually impossible to monitor thousands of individual venues, geographically disparate, with widely varying music usage (e.g., dance clubs versus grocery stores), to the degree that would be necessary to develop a database from which broader nationwide usage could be extrapolated. How, then, will royalties be allocated? The PROs for songwriters and music publishers do not require venue operators to maintain records of the music they play, relying instead on radio airplay and other proxies to estimate frequency of performance.⁷⁹ Under the PRA as currently proposed, however, terrestrial broadcasters will not be required to maintain records of the recordings they play. Thus, the convenient “radio proxy” will not be available. As suggested earlier, this deficiency in the PRA should be addressed, so that terrestrial broadcasters are required to engage in at least some degree of recordkeeping in order to make allocations of the sound recording royalty as accurate as possible. Alternatively, operators of large commercial venues (for example, large retail chains) could be subject to a limited recordkeeping requirement—perhaps limited to a few days per year—and their records could be used as proxies for the smaller venues. Collecting societies outside the United

MaryBeth Peters, Register of Copyrights); *Internet Streaming of Radio Broadcasts: Hearing before the Subcomm. on Courts, the Internet, and Intellectual Property of the H. Comm. on the Judiciary*, 108th Cong. (2004) (Statement of David Carson, General Counsel, United States Copyright Office).

⁷⁹ KOHN & KOHN, *supra* note 30, at 1281.

States have developed their own methods for estimating usage of sound recordings by public venues as well as broadcasters;⁸⁰ these methods may be useful models for the United States.

Under their blanket licensing arrangements with ASCAP, BMI, and SESAC, public venue operators normally pay a license fee that reflects their revenues and the nature of their business (because music plays a greater role in some businesses than others—e.g., dance clubs versus grocery stores). If the compulsory license is extended to public venues, then the CRB will need to take similar factors into consideration by establishing different rate schedules for different kinds of establishments. There is tremendous variation in the nature of the public venues that perform music, the ways in which they use that music, and the extent to which that music contributes to their gross revenues. In contrast, most digital music services and terrestrial radio broadcasters perform the sole function of delivering audio performances to listeners. The current compulsory licensing scheme for digital audio services, and the proposed extension of that scheme to terrestrial broadcasters, distinguishes between services only on the basis of revenues and audience size; this is a nearly “one size fits all” approach that simply will not work for public venues.⁸¹

VI. PROBLEMS IN SETTING RATES

A. Procedures

To the extent that the CRB or the courts become involved in setting the rates for public performance royalties, § 114(i) of the current law⁸² and the corresponding provisions in both PRA bills provide that the public performance rates for sound recordings shall not be considered in any proceeding to adjust the public performance rates for musical compositions. This language responds to the long-standing concern that any royalties that become payable for sound recordings will reduce the royalties paid for

⁸⁰ For the methods used in France by the Société Civile des Producteurs Phonographiques (SCPP), see *FAQ*, SCPP, <http://www.scpp.fr/SCPP/Home/LASCPP/questionsfr%C3%A9quentes/tabid/240/Default.aspx> (last visited Apr. 7, 2011).

⁸¹ In France, for example, the Société Civile des Producteurs de Phonogrammes en France (SPPF) calculates royalties differently for state-owned radio, private radio (further differentiated according to the amount of nonmusical programming), television stations, discotheques and other recreational facilities, and background music. Code de la Propriété Intellectuelle, Rémunération Equitable Dispositions Réglementaires SPPF [hereinafter SPPF Remuneration], <http://www.sppf.com/legislation.php?rub=2>.

⁸² 17 U.S.C. § 114(i).

musical compositions. It is questionable, however, whether rate-setting bodies should be constrained in this way.

Neither § 114(i) nor the corresponding provisions in the PRA addresses the opposite scenario: whether the performance rates payable for musical compositions should be considered in any proceeding to set the rates payable for sound recordings. In fact, in every congressional hearing addressing the performance right in sound recordings, and even in the international discussions that led to the Rome Convention, opponents of the performance right in sound recordings have repeatedly argued that broadcasters and other users already pay for the rights in the musical works, and cannot afford to pay for both sets of rights.⁸³ This illustrates the widespread perception that authors' rights deserve priority over neighboring rights. This perception is rooted in the same thinking that prevented the United States from recognizing any copyright at all in sound recordings until 1971—that sound recordings are not creative works of authorship, but mere mechanical fixations. This same perception is responsible for sound recording rights being labeled mere “neighboring rights” in most other countries, where they have generally received a shorter term of protection than the term applicable to copyrighted works.⁸⁴

Under current law, the rate-setting procedure for § 114(f) compulsory licenses for performing sound recordings is completely separate from the procedure that establishes the royalty for performing the underlying musical compositions.

For *musical compositions*, public performance royalties in the United States are negotiated between the users (terrestrial broadcasters, digital

⁸³ See, e.g., RICKETSON & GINSBURG, *supra* note 3, at 1221; *Performance Rights Act, Hearing Before the H. Comm. on the Judiciary*, 111th Cong. 142-43, 153-54 (2009) (Testimony and Prepared Statement of Steve Newberry, CEO of Commonwealth Broadcasting); *Performers' and Performance Rights in Sound Recordings: Hearing Before the Subcomm. on Intellectual Property and Judicial Admin. of the H. Comm. on the Judiciary*, 103d Cong. 71-79 (1993) (Testimony and Prepared Statement of Edward O. Fritts, National Ass'n of Broadcasters); *Performance Rights in Sound Recordings: Hearing Before the Subcomm. on Courts, Civil Liberties, and the Admin of Justice of the H. Comm. on the Judiciary*, 95th Cong. 82 (1978) (Testimony of John Bayliss, Combined Communications Corp.); 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 in Sound Recordings*, 12 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 1041, 1053 & nn. 52-54 (2002).

⁸⁴ In the European Union, for example, the copyright term is the life of the author plus 70 years, while the term of protection for live performances and sound recordings is only 50 years. See Directive 2006/116/EC of the European Parliament and of the Council of 12 December 2006 on the Term of Protection for Copyright and Certain Related Rights, OJ L 372, 12-18 (Dec. 27, 2006) [hereinafter Directive 2006/116/EC].

services, and operators of public venues such as clubs and restaurants) and the three performing rights organizations (PROs) that provide collective representation for songwriters and music publishers—ASCAP, BMI, and SESAC. The degree of negotiation varies from individually negotiated deals to take-it-or-leave-it blanket licenses (although the blanket licensing fees of ASCAP and BMI can be challenged in the federal “rate court” in the Southern District of New York).⁸⁵ For noninteractive audio streaming services (such as webcasting and satellite radio), the royalty rate is, in practice, based on a percentage of revenue, subject to minimums. Smaller services simply pay the rate required under standard licenses available on the PRO websites, while larger users such as Yahoo! and MySpace negotiate separately with the PROs.⁸⁶ For interactive streaming and bundled services, such as those offered by Napster, Rhapsody, MySpace, and Yahoo!, negotiations between the users and ASCAP failed, and resolution required the intervention of the courts as well as the CRB.⁸⁷

For *sound recordings*, current law calls for a public performance royalty only in the case of digital audio transmissions (specifically, those which are not altogether exempt from the § 106(6) right).⁸⁸ Under the DPRSRA, the rate-setting method depends on the nature of the service.⁸⁹ In the case of *interactive* music services (those that stream listener-selected recordings on demand), record companies negotiate directly with the services. While the negotiated royalties are not publicly disclosed, they are generally structured as a percentage of advertising revenue or subscription fees, pro-rated for each recording, and based on the number of plays. In case the music service fails to generate sufficient revenue, some deals call for a per-play minimum (usually a fraction of a penny).⁹⁰ In the case of *noninteractive* satellite radio and webcasting services, the compulsory license under § 114(f)⁹¹ applies, and the royalty rate is determined by the CRB.⁹²

Thus, under current law, the performance royalty rates for the use of sound recordings and musical works in digital transmissions are set independently, using two completely different methods—collective

⁸⁵ See KOHN & KOHN, *supra* note 30, at 1263.

⁸⁶ PASSMAN, *supra* note 41, at 246–47.

⁸⁷ *Id.* at 247–49; KOHN & KOHN, *supra* note 31, at 753–64, 776–80, 1269–71; *see also* 37 C.F.R. § 385 (2011).

⁸⁸ The exemptions are listed in 17 U.S.C. § 114(d)(1). Under current law, they include, *inter alia*, terrestrial broadcasts and certain transmissions used in business establishments. The Performance Rights Act would repeal the exemption for terrestrial broadcasts.

⁸⁹ 17 U.S.C. §§ 106(6), 114.

⁹⁰ PASSMAN, *supra* note 41, at 167.

⁹¹ 17 U.S.C. § 114(f).

⁹² 17 U.S.C. §§ 803–805.

negotiation on the one hand (subject to judicial appeal), and administrative rulemaking on the other. This means that there is no place in the rate-setting process to consider the cumulative burden on the music services, and how that burden should be split between the different groups of rights holders. Because the fees are set independently, there is no single body with the authority to determine whether this outcome makes sense or to make the necessary changes if it does not.

Under the proposed Performance Rights Act, the compulsory license under § 114(f) would apply to terrestrial broadcasters, who would then pay the statutory rate for sound recordings, and the blanket license fees for musical works.⁹³ As in the case of digital music services, the rates would be set independently, and would bear no rational relationship to one another; once again, § 114(i), if not repealed, would preclude consideration of the sound recording royalty in any governmental proceeding (e.g., a judicial appeal) to determine the royalty for musical works.

Ideally, rate-setting legal bodies should be free to consider both royalties in every rate-setting proceeding, to ensure that the cumulative burden on music services and broadcasters is reasonable and not subject to major fluctuations over time. Rather than have two separate rate-setting processes for non-interactive services such as webcasters, terrestrial radio, and satellite radio, there could be a single process—either a collective negotiation or an administrative proceeding by the CRB. The negotiation process could involve joint negotiations, with the record companies, performers, songwriters, and publishers on one side, and the music services and broadcasters on the other. If the royalties for each user group were entirely independent, however, the joint negotiation would be cumbersome and ultimately ineffective, because it would truly be a three-way negotiation. In contrast, if Congress were to legislate that the royalty rates for musical works and sound recordings must be equal, or that they must maintain some other pre-set ratio (e.g., 2/3 to the songwriters and publishers, and 1/3 to the record company and performers, or vice versa), this would eliminate conflict between the two groups of rights holders, in which case the joint negotiation process could be highly effective. (The question of the relative ratios of the two royalties is discussed in the next section.)

Alternatively, rate-setting could be left to separate negotiations between collective societies and users. Under this approach, record companies and performers, through their collective representative (currently SoundExchange, whose passive role in the compulsory licensing scheme would have to be transformed into an active role as a negotiator, unless the

⁹³ H.R. 848; S. 379.

RIAA undertakes this role directly), would engage in the same negotiation process, with the same option for judicial or administrative review, that is currently used to establish the performance royalty for musical works (where the rights holders are represented by ASCAP, BMI, and SESAC, depending on their chosen affiliation). Under this approach, however, the failure of one group of rights holders to reach an agreement with users could stymie the ability of the other group to move forward under their own agreement. In other words, if the songwriters and publishers reached an agreement with broadcasters, but negotiations between the broadcasters and the record companies stalled, the broadcasters would not be able to play recordings of the music they had licensed until the negotiating impasse was resolved. Thus, a system of separate negotiations does not appear to be feasible.

If the law were changed so that the rate for public performances of musical compositions were set administratively, by the CRB, rather than through blanket licenses appealable to the rate court, it is possible that the rates for musical compositions and for sound recordings could be set through separate administrative proceedings. Under § 114(i) and its equivalents in the PRA, the proceeding to set sound recording royalties could take account of musical composition royalties, but not vice versa. However, it would be impossible for a single tribunal, while engaged in setting the rate for the musical composition royalty, to completely ignore the sound recording royalty it had established, albeit in a separate proceeding. Thus, the separation envisioned under § 114(i) would be unsustainable. Even if § 114(i) were repealed, holding two separate rate-setting proceedings would be inefficient. In the United Kingdom, where tariffs for public performances of musical compositions and sound recordings are set through separate proceedings, the most recent tariff announced by the neighboring rights society (Phonographic Performances Ltd, or “PPL”) went into effect immediately, but was significantly reduced by the Copyright Tribunal five years later (after a lengthy administrative proceeding and an appeal to the High Court), necessitating refunds to the licensees of five years of overpayments.⁹⁴ In the U.S., some of the early rate-setting proceedings under § 114 have also been drawn-out affairs.⁹⁵ Thus, if separate administrative proceedings must be undertaken for each type of royalty, the delays (and costs) are likely to multiply.

Another solution is to utilize a joint rate-setting procedure, giving the

⁹⁴ See Louisa Albertini, *Phonographic Performance Ltd v. British Hospitality Association: PPL Case Exposes Difficulties with Aspects of the Copyright Tribunal’s Jurisdiction*, ENT. L.R. 2010, 21(5), 201 (2010).

⁹⁵ See KOHN & KOHN, *supra* note 30, at 1490–94; PASSMAN, *supra* note 41, at 308.

CRB the authority to set rates for both the underlying musical works and the sound recordings. This would eliminate the possibility that stalled negotiations with one set of rights holders could block the effectiveness of an agreement reached with the other set of rights holders. This approach has been used in Canada, where the Copyright Board of Canada has held joint rate-setting proceedings to set the tariffs for each class of users.⁹⁶ This approach has the advantage of efficiency, and would help to protect users from becoming subject to excessively burdensome cumulative royalties. It could only be accomplished, however, by repealing § 114(i). In addition, if ASCAP, BMI, and SESAC are compelled to submit their licensing rates for CRB approval, this arguably undermines the strength of the exclusive public performance right, converting it to little more than a remuneration right (although songwriters could still, in theory, choose not to allow their works to be performed at all). Of course, the antitrust consent decrees under which ASCAP and BMI operate already subject their blanket licensing rates to judicial review;⁹⁷ thus, the collective enforcement of songwriters' and music publishers' exclusive public performance right already resembles a remuneration right rather than a true exclusive right.

When the sound recording performance right is eventually extended to include public venues, the operators of these venues will face the same rate-setting dilemma that currently plagues digital services and threatens to overwhelm terrestrial broadcasters. Operators of public venues may be stymied by incompatible demands from the two sets of rights holders, and overburdened by the cumulative royalties. The same solutions will need to be explored—either joint negotiations, or a joint administrative proceeding—with Congress determining, as a policy matter, the mandatory ratio between the rates for musical works and those for sound recordings.

B. Relative Amounts of the Two Royalties

If a more coordinated rate-setting process can be developed, either through joint negotiations or by enlisting the Copyright Royalty Board, there will remain the substantive question of “How much?” And, specifically, how should the performance royalties for sound recordings and for musical works compare?

If the question of relative rates were left entirely to negotiation, it is unlikely that the respective rights holders would reach agreement. It would be more efficient to establish the relationship between these rates

⁹⁶ See COPYRIGHT BOARD OF CANADA, *supra* note 76.

⁹⁷ See Lionel S. Sobel, *The Music Business and the Sherman Act: An Analysis of the “Economic Realities” of Blanket Licensing*, 3 LOY. L.A. ENT. L.J. 1 (1983).

legislatively. While this might involve a contentious congressional hearing (and would necessitate the repeal of § 114(i)), it would not have to be repeated every time the rate schedule comes up for reconsideration. The relative entitlements of composers and publishers, on the one hand, and producers and recording artists on the other, present an important question of copyright policy, one that should be resolved through the legislative process, with significant input from all of the interested parties, rather than renegotiated repeatedly in multi-party adversarial regulatory proceedings.

It is therefore worthwhile to consider some of the arguments that might be—and in some cases, have been—presented to support conflicting claims as to the “correct” relationship between performance royalties for musical compositions and those for sound recordings. As discussed below, many of these assertions involve questionable factual claims that have neither been proved nor disproved, and may not lend themselves to proof at all.

Arguments that the composers’ and publishers’ performance royalty should be higher than the sound recording performance royalty include:

1. *Musical compositions make a more valuable contribution to creative expression than individual recordings of those compositions.* One could argue endlessly whether this is true or not. How is the value of each contribution measured? If it is measured in the short term, one would focus on what drives consumer demand for particular recordings. Do people listen to recorded music because of the composition or the particular performance? Surely the answer is both, and the exact proportion would constantly vary, depending on the individual listener, the song, and the performance. Should relative values be measured in the long term instead? Does the creation of a musical composition always, or usually, make a greater long-term contribution to creative expression than the creation of a particular recording? Surely this question is unanswerable. Relative rates should not be set based on a questionable judgment that the contribution of the writer is more important than the contribution of the performer.
2. *It is more difficult (or less enjoyable) to write a good musical composition than it is to create a good recorded performance, so writers need more incentive than performers in order to do their work.* According to this argument, sound recording royalties would increase a songwriter-performer’s potential to earn money from performing, and this would reduce his or her incentive to

compose.⁹⁸ This argument requires several questionable assumptions. It assumes that large numbers of good songwriters are also good performers. (To the extent that the skills do not co-exist in the same people, a difference in the relative incentives to employ the two skills will probably not cause one person to switch to an activity in which he or she consistently fails to succeed. A great songwriter who cannot sing a note will not switch to performing, and a great singer who is unable to sell her original compositions will probably not persist in composing simply because the royalty rate is higher.) It also assumes that most songwriter-performers would prefer performing to composing, and that any additional time spent performing decreases the time they would otherwise spend composing (as opposed to other activities). There are no data to back up these assumptions. Finally, if a songwriter-performer cannot make a living as a performer, that artist may abandon the music business altogether (enrolling in law school, perhaps) and never achieve his or her potential as a songwriter.

Arguments that the sound recording performance royalty should be the higher of the two include:

1. *The public is more interested in a particular artist's recording than in the underlying musical composition.* This argument was advanced by PriceWaterhouse Coopers in a report prepared, not surprisingly, for IFPI and eight recording industry collecting societies.⁹⁹ Certainly, most people are not indifferent to whether they listen to Dolly Parton's rendition of "I Will Always Love You" or Whitney Houston's version of the same song. Of course, this is simply the converse of the first argument discussed above, and is subject to the same objections. Some people will be indifferent to the singer. Sometimes it depends on the circumstances. And surely Whitney Houston's fans don't love all of her recordings equally; they will prefer some songs to

⁹⁸ See Shourin Sen, *The Denial of a General Performance Right in Sound Recordings: A Policy that Facilitates Our Democratic Civil Society?*, 21 HARV. J.L. & TECH. 233 (2007) (presenting this argument as a reason for providing no public performance rights for sound recordings at all); Emily F. Evitt, *Money, That's What I Want: The Long and Winding Road to a Public Performance Right in Sound Recordings*, INTELL. PROP. & TECH. L.J., Aug. 2009, at 13 (critiquing Sen).

⁹⁹ See PRICEWATERHOUSE COOPERS, VALUING THE USE OF RECORDED MUSIC 2 (2008), http://www.ifpi.org/content/library/Valuing_the_use_of_recorded_music.pdf.

others. Even where a consumer is strongly motivated to prefer one performer's rendition over another's rendition of the same composition, this may change over time. Some day Whitney Houston may be forgotten, and another performer's cover version of the same song may top the charts. A performance that is strongly preferred in the short term may be forgotten after a few years, and yet the underlying composition may continue to be covered by future performers because it has continuing audience appeal. Thus, this assertion is as unsupportable as its converse.

2. *The costs and risks of producing and marketing a recording are higher than those for the production and marketing of the underlying music.* This argument was made, apparently seriously, in the same PriceWaterhouse Coopers report.¹⁰⁰ However, the report provided no data to support this claim. How does one quantify the "costs and risks" of creating a musical composition? It may not involve renting a studio and sound equipment and paying for session musicians and engineers, but there are costs involved in developing the necessary skills to compose, and there are opportunity costs and risks involved in devoting one's time to composing as opposed to pursuing a more secure occupation. While record companies incur manufacturing, advertising, packaging, and shipping costs, songwriters also incur costs in marketing their works to publishers, and publishers incur costs in marketing these works to record companies and other potential licensees. Furthermore, by focusing only on costs, and ignoring returns, this argument exaggerates the record company's need for a performance royalty. The focus on cost alone ignores the significant difference in the non-performance revenues that the record company and the songwriter derive from their respective efforts — that is, revenues from record sales. Since the record company keeps the lion's share of the revenues from record sales, any performance royalty it receives is simply an additional level of compensation. The copyright owners of musical works receive only a small mechanical royalty from record sales (less than 2 cents per minute of playing time, typically split 50/50 between the songwriter and publisher), and there is no longer much of a market for sheet music; thus, the songwriter's need

¹⁰⁰ *Id.*

for performance royalties is arguably much greater than the record company's.

3. *The sound recording royalty typically must be split among more people — i.e., the record company, the featured performers, and the nonfeatured performers.* Therefore, a larger aggregate sum is needed in order to compensate each person adequately. The royalty for the underlying composition, however, does not go to just one person either. It is split between the publisher (and perhaps a subpublisher) and the songwriter, or several songwriters if the work is jointly authored. Furthermore, the split in each case is not necessarily equal. Depending on the statutory scheme and the recording contracts, the record company may retain 50% of the performance royalty, and nonfeatured performers as a group may receive only 5% to be shared among the entire group. This is the case under the current statutory royalty scheme for digital audio transmissions in § 114.¹⁰¹ Also, this argument looks only at one side of the equation (rewards) without considering the other side (costs). Finally, it ignores the cumulative effect of receiving performance royalties for numerous works. If a record company releases numerous recordings during a one-year period, the cumulative effect of the royalties will be significant, even if the per-recording royalty is small. A songwriter, in contrast, may write only a few songs in the course of a year.
4. *A sound recording may be in demand for only a short period of time before its popularity fades.* A single musical work, however, can be recorded many times by many artists, and thus may have a longer revenue-producing life. Therefore, the sound recording should receive higher royalties to make up for its shorter useful life. Even if this is true, it contradicts the first argument in favor of higher sound recording royalties — that sound recordings deserve a higher royalty because the public is more interested in a specific recording than in the underlying composition. This argument also leads to the bizarre conclusion that recordings of low quality should receive higher royalties than recordings of high quality, because the latter will have a longer useful life in which the royalties can accumulate.

¹⁰¹ 17 U.S.C. § 114(g)(2).

5. *The career of a performer is typically shorter than the career of a composer.* This could be true, and data might be obtainable to prove it. Because so much music is youth-oriented, successful performers often “age out” of their popularity as they become too old for their fans, or the attention of their fans is drawn elsewhere. Also, the carefully cultivated image that resonates with today’s audience may be difficult to shake off when it ceases to be fashionable, and the performer may not necessarily be successful at “re-inventing” herself as fashions change. This could be an argument for giving larger performance royalties to performers than composers. On the other hand, successful performers can also generate (even if during a short career) substantial revenues from tours, endorsements, merchandise, and personal appearances, opportunities typically not available to composers. This argument may also be somewhat circular; if performers could anticipate a future filled with performance royalties, they might be more selective in their recording projects and their tour commitments, and might be less inclined to suffer from overexposure or burnout so early in their careers. Finally, even if the short-career argument does have some merit for performers, it does not apply to record companies, which will receive performance royalties continually from an inventory of recordings that is constantly changing to appeal to new audiences.

6. *Cable firms have to pay 41.5% of gross revenues for their motion picture programming, and the rate that a music service pays for recorded music should be comparable.* The RIAA reportedly made this argument during the proceeding that established the 1998 statutory licensing fee for digital subscription music services.¹⁰² Not surprisingly, this apples-to-oranges comparison gained no traction, and the rate was set at 6.5%.

Not one of these arguments based on “first principles” or abstract notions of merit or justice is sufficiently persuasive to rebut the countervailing arguments. Perhaps the default rule should simply be that the rates for musical works and sound recordings should be equal.

¹⁰² KRASILOVSKY & SHEMEL, *supra* note 14, at 73.

VII. A COMPARATIVE PERSPECTIVE

In the European Union, even though there has been some degree of harmonization with respect to performance rights in sound recordings, there is still significant variation in the scope and implementation of the rights.¹⁰³ Royalties are usually set through negotiations between the users and the collecting societies representing the rights holders; if they are unable to agree, there is usually a route for administrative or judicial intervention.¹⁰⁴ In some countries, the law requires the royalties to be split equally between the record companies and the recording artist; even where this is not required by law, it has emerged as the customary practice.¹⁰⁵ Collections and distributions are handled by the collecting societies; in most cases this is mandated by law.¹⁰⁶ Currently, European laws are not uniform on the question whether the performer's share of the royalty can be waived in the recording contract. When waivers are allowed, they are routine, due to the weak bargaining position of performers, and the record company generally receives the performer's share. Concern over this practice has led to calls for legislative change.¹⁰⁷

Collecting societies in the EU are, in general, subject to a high level of government regulation and oversight.¹⁰⁸ In Luxembourg, the public performance tariffs are established by administrative action rather than negotiation.¹⁰⁹ Elsewhere in the EU, the tariffs are determined by the collecting societies, usually through negotiations with user groups.¹¹⁰ However, in most EU countries the societies are required either to publish

¹⁰³ AEPO-ARTIS, *supra* note 24, at 18–20, 32.

¹⁰⁴ *Id.* at 21; KEA EUROPEAN AFFAIRS, THE COLLECTIVE MANAGEMENT OF RIGHTS IN EUROPE: THE QUEST FOR EFFICIENCY 82–83, 104, 119–23 (2006) (report prepared for the European Parliament), <http://www.keanet.eu/report/collectivemanpdffinal.pdf>.

¹⁰⁵ AEPO-ARTIS, *supra* note 24, at 21–23, 33; David Laing, *The Economic Importance of Music in the European Union*, Soundscapes.info, Vol. 2 (July 1999), <http://www.soundscapes.info>.

¹⁰⁶ AEPO-ARTIS, *supra* note 24, at 21; KEA EUROPEAN AFFAIRS, *supra* note 105, at 69, 89–96.

¹⁰⁷ AEPO-ARTIS, *supra* note 24, at 7–8.

¹⁰⁸ KEA EUROPEAN AFFAIRS, *supra* note 104, at 89–130; Daniel J. Gervais, *Collective Management of Copyright and Neighbouring Rights in Canada: An International Perspective*, 50–53, 57–58, 60–63 (2001), http://works.bepress.com/daniel_gervais/28.

¹⁰⁹ KEA EUROPEAN AFFAIRS, *supra* note 104, at 112; Law of April 18 on Copyright, Neighboring Rights, and Databases, art. 47 (2001) (Fr.).

¹¹⁰ See KEA EUROPEAN AFFAIRS, *supra* note 104, at 73, 76, 103–17.

their tariffs or to submit them to a government agency.¹¹¹ In Portugal, the tariffs are subject to standards of reasonableness and proportionality.¹¹² In Poland, they must be approved by the Copyright Commission.¹¹³

In Europe, the royalty rates for sound recordings are usually set independently of the rates for musical works (often as a percentage of gross income), although in some cases (mostly nonbroadcast performances) they are set as a percentage of the latter.¹¹⁴ In some EU countries and elsewhere, the collecting societies for musical works and for sound recordings work jointly to increase efficiency—for example, sharing a common log book for tracking usage and allocating royalties to their members,¹¹⁵ or allowing one society to collect the royalties for both.¹¹⁶

In Canada, as in the EU, performance royalties for both sound recordings and musical compositions are subject to a high degree of government regulation. Collecting societies are required to submit their proposed tariffs to the Copyright Board for approval.¹¹⁷ The Board then publishes the proposed tariffs for public comment,¹¹⁸ and is required to take those public comments into account in determining whether to approve or reject the proposed rates.¹¹⁹ In conducting its evaluation, the Board has broad authority to “take into account any factor that it considers

¹¹¹ *Id.* at 76, 103–17.

¹¹² *Id.* at 114; Law No. 83/2001 of 3 August (Collecting Societies of Copyright and Related Rights), ch.1, art. 4(e) (2001) (Port.).

¹¹³ KEA EUROPEAN AFFAIRS, *supra* note 104, at 121; Law of February 4, 1994 on Copyright and Neighboring Rights, art. 108-3 (1994) (Pol.).

¹¹⁴ *See, e.g., Performance Rights in Sound Recordings: Hearing Before the Subcomm. on Courts, Civil Liberties, and the Admin. of Justice of the H. Comm. on the Judiciary*, 95th Cong. 183, 187, 197 (1978) [hereinafter *1978 Hearing*]]. For example, this method applies to background music services in France. *See* SPPF Remuneration, *supra* note 82.

¹¹⁵ *1978 Hearing*, *supra* note 114, at 182.

¹¹⁶ *See* Will Page, *ECADonomics: Understanding Brazil’s Unique Model of Collective Rights Management*, ECONOMIC INSIGHT, Dec. 15, 2010, <http://www.prsformusic.com/economics>.

¹¹⁷ Copyright Act, R.S.C. 1985, c. C-42, art. 67.1(1)–(2) (2011) (Can.) [hereinafter *Canada Copyright Act*]. The 1997 amendments added neighboring rights to Canada’s copyright regime. Maryse Beaulieu & John Lorinc, *CCC-DAMI Research Project on The Working Conditions of Creators in Quebec and Canada*, Summary Report at 19 (1995). Three years of lobbying by the Canadian music industry preceded this enactment. *About CIMA: Our History*, CANADIAN INDEPENDENT MUSIC ASSOCIATION (CIMA), <http://www.cimamusic.ca> (last visited Apr. 14, 2011).

¹¹⁸ *Canada Copyright Act*, *supra* note 117, at art. 67.1(5).

¹¹⁹ *Id.* at art. 68(1).

appropriate.”¹²⁰ In the case of broadcasters, however, a statutory rate of \$100 (CAD) applies to the first \$1.25 million (CAD) of advertising revenues; this reduced rate applies only to the neighboring rights tariff, not the tariff for the underlying musical compositions.¹²¹ Once approved, the final tariffs must be published.¹²²

While the public performance rate for sound recordings in Canada is lower *on paper* than the rate for musical compositions, the effective rates are equal (after the first \$1.25 million in revenues). This is because U.S. sound recordings make up 50–55% of the commercial radio repertoire in Canada.¹²³ Radio stations (and other users) are not required to pay a performance royalty on these U.S. recordings.¹²⁴ Because the sound recording tariff is based on the station’s gross revenues, the rate of the tariff must be reduced to reflect the ineligible portion of the repertoire. This equality in effective rates is not accidental; the collecting societies in Canada¹²⁵ participate in joint tariff hearings,¹²⁶ and the practice of the Canadian Copyright Board has been to establish equal tariffs.¹²⁷ However, ArtistI, one of three organizations representing musical performers, has objected to the equality in rates, arguing that the sound recording royalty

¹²⁰ *Id.* at art. 68(2).

¹²¹ *Id.* at art. 68.1(1)(a)(i). Community broadcast systems are subject to a flat \$100 (CAD) yearly tariff as well. *Id.* at Art. 68.1(1)(b). This example of inequity between neighboring rights tariffs and songwriter/publisher tariffs has been noted. Beaulieu & Lorinc, *supra* note 118, at 103 (“It seems to be received opinion that copyright takes precedence over neighbouring rights.”).

¹²² Canadian Copyright Act, *supra* note 118, at art. 68(4).

¹²³ *Neighbouring Rights, CANADIAN HERITAGE*, <http://www.pch.gc.ca/eng/1274283867016/1274275915148> (last updated May 19, 2010).

¹²⁴ COPYRIGHT BOARD OF CANADA, *supra* note 76, ¶ 309; *New Music Tariffs in Canada Could Spell New Tariffs for Lodging Industry Worldwide*, INTERNATIONAL HOTEL & RESTAURANT ASS’N (2005), http://www.ih-ra.com/html-ihra/ihra31/I31_Alert_New_Mu.htm (suggesting that Canadian hotels would switch to using American sound recordings for background music to avoid otherwise-applicable sound recording tariffs).

¹²⁵ Among others, these include Re:Sound (formerly NRCC), an umbrella organization representing the rights holders in sound recordings, and SOCAN, which represents the copyright owners of the musical works.

¹²⁶ COPYRIGHT BOARD OF CANADA, *supra* note 76, ¶ 15. The tariffs are not totally equal, however, because Re:Sound is allowed to collect its full royalty rate for commercial radio stations only to the extent that their revenues exceed \$1.25 million CAD.

¹²⁷ *Statement of Case of the Canadian Association of Broadcasters, Re: Consolidated Commercial Radio Tariffs Proceeding (2008-2012)*, Copyright Board of Canada 8 (Sept. 5, 2008), http://www.cab-acr.ca/english/research/08/sub_sep0508.pdf. This is said to be “[b]ased on the notion that neighbouring rights should be equal in value to musical work . . . performing rights.” *Neighbouring Rights, supra* note 123.

should be set independently, and should be higher than the royalty for musical works.¹²⁸ Performers are entitled to 50% of the sound recording royalty.¹²⁹

In the United Kingdom, the public performance tariffs for musical compositions and sound recordings are set independently by the respective PROs—PRS for the former and PPL for the latter—but each tariff may be reviewed by the Copyright Tribunal to determine whether it is “reasonable under the circumstances.”¹³⁰ The rate-setting methods used by the two PROs are completely different, making rate comparisons difficult.¹³¹ Because user groups have not disclosed the amounts they are actually paying under the two tariffs,¹³² it is impossible to state whether the “bottom line” figure is higher for the PRS tariff or the PPL tariff. The Copyright Tribunal considers the musical composition tariff to be a relevant comparator for determining whether a proposed sound recording tariff is reasonable.¹³³ Because the UK has no provision analogous to § 114(i), presumably the converse is permissible as well. The Copyright Tribunal has in fact considered the PRS tariff in determining whether a proposed PPL tariff is reasonable.¹³⁴ In a recent proceeding, however, the Tribunal decided that the PRS tariff was a less relevant comparator than the previous PPL tariff, and therefore rejected most of the increase that PPL had proposed.¹³⁵ The Tribunal’s explanation of its reasoning leaves the impression that, despite the difficulty of drawing direct comparisons due to differing methodologies, the PRS tariff is indeed somewhat higher than the PPL tariff.¹³⁶

¹²⁸ *Neighbouring Rights*, *supra* note 123.

¹²⁹ Canadian Copyright Act, *supra* note 117, at art. 19(3); *Musicians’ Neighbouring Rights Royalties Frequently Asked Questions*, <http://www.mnrr.ca/faq.html#2> (last visited Apr. 14, 2011).

¹³⁰ *Phonographic Performance Ltd v. The British Hospitality Ass’n & Ors*, [2009] EWHC 209 (Ch) ¶ 17 (Feb. 12, 2010).

¹³¹ For example, even where both organizations base their licensing fees on the square footage of an establishment, they use different increments, so that no apples-to-apples comparisons are possible. *Id.* ¶¶ 24–33, 96–99.

¹³² *Id.* ¶¶ 57–59.

¹³³ *Id.* ¶¶ 61, 93–95.

¹³⁴ *Id.* ¶¶ 73–75.

¹³⁵ *Id.*

¹³⁶ *Id.* ¶¶ 93–99.

VIII. CHALLENGES

As the preceding discussion has shown, expanding the scope of the public performance right in sound recordings is not a simple undertaking. The task of rate-setting alone will require fundamental policy decisions affecting the interests of rights holders, licensees, and consumers. As discussed below, however, even when the substantive and procedural issues pertaining to rate-setting have been resolved, additional implementation challenges lie ahead.

A. Tracking Usage

As noted earlier,¹³⁷ § 114(d) currently requires digital broadcasts to include, “if technically feasible,” the information encoded in the sound recording that identifies the title of the recording and the featured recording artist; while this requirement helps to track usage of recordings via digital transmissions, it will not be helpful in tracking their usage in terrestrial broadcasts or in non-broadcast situations such as public venues. Because the statutory royalty mechanism does not allow SoundExchange or any other collecting agent to negotiate the terms of the royalty with the individual users, some mechanism will be needed to determine which recordings are being played in these settings, and how often. The ability to impose such a requirement may or may not be within the authority of the CRB,¹³⁸ and may require further legislation.¹³⁹

B. Building, Maintaining and Sharing a Database of Rights Holders

It will also be necessary to build and maintain a database of recordings that identifies the producers and featured performers, and maintains an updated record of their contact information. If ownership of the copyright changes hands, this information will also have to be updated. This database must be accessible not only to the agent in charge of collections and disbursements, but also to the stakeholders—producers and performers—in order to verify that their information has been properly recorded.

Identifying the ownership of sound recording copyrights may be

¹³⁷ See *supra* text accompanying note 73.

¹³⁸ The CRB currently has the authority to dictate the form and manner of recordkeeping with respect to the statutory license for digital transmissions under § 114(f)(4). See KRASILOVSKY & SHEMEL, *supra* note 14, at 75; 37 C.F.R. Part 370. If Congress expands the scope of the statutory license, it should expand the Board’s authority over recordkeeping commensurately.

¹³⁹ See notes 75–76, 79–80, *supra*, and accompanying text.

complicated by several factors. Courts have yet to resolve the question whether work-made-for-hire provisions in recording contracts are enforceable, and if they are not, beginning in the year 2013 there may be a wave of terminations in which the ownership of those copyrights will revert to the performers.¹⁴⁰ Performers may find themselves jointly owning these copyrights with others who performed in the recording, or jointly with the record company.

Federal copyright law does not currently protect sound recordings made in the United States before February 15, 1972.¹⁴¹ Although some of those recordings may be protected under state copyright laws until 2067,¹⁴² state law protection does not render them eligible for performance rights royalties under the federal scheme.¹⁴³ However, recent legislative proposals would restore federal copyright in these older recordings, in which case they too would be entitled to performance royalties.¹⁴⁴ The producers and featured performers on those older recordings would then have to be identified, along with their contact information, and added to the database. Because there will be gaps in the data, the disbursing agent will also have to establish procedures for dealing with funds that cannot be disbursed, perhaps holding them in reserve for some period of time in hopes that the rights holder can be located, and, if not, dedicating them to some other use.¹⁴⁵ Due to the length of the copyright term for sound recordings in the U.S., and the fact that some of these recordings will be more than a few decades old, there may be a significant amount of missing data; an informational campaign by the music industry and the musicians' unions would encourage the successors and heirs of producers and performers on

¹⁴⁰ See Mary LaFrance, *Authorship and Termination Rights in Sound Recordings*, 75 S. CAL. L. REV. 375 (2002).

¹⁴¹ See *Goldstein v. California*, 412 U.S. 546 (1973).

¹⁴² 17 U.S.C. § 301(c) (1998).

¹⁴³ The public performance right for sound recordings under 17 U.S.C. § 106(6) applies only to "the owner of copyright *under this title*," and the italicized language can only refer to Title 17 of the U.S. Code.

¹⁴⁴ Congress has directed the Register of Copyrights to undertake a study on the desirability and means of extending federal copyright protection to pre-1972 sound recordings. COPYRIGHT OFFICE, NOTICE OF INQUIRY; FEDERAL COPYRIGHT PROTECTION OF SOUND RECORDINGS FIXED BEFORE FEBRUARY 15, 1972, 75 Fed. Reg. 67777-01 (Nov. 3, 2010).

¹⁴⁵ This is analogous to the "orphan works" problem in the Google Books settlement. Foreign collecting societies already have well-established mechanisms for undisbursable sums, largely because they have been withholding the royalty shares that would go to U.S. rights holders were it not for the lack of reciprocity. In some cases, these funds are contributed to cultural programs or to programs aimed specifically at assisting the development of young musicians. See Piaskowski, *supra* note 13, at 193-94 (describing practice in France).

these recordings to come forward and be added to the database.

Another challenge in building and maintaining an accurate database of rights holders will arise from the restoration of U.S. copyrights in foreign sound recordings under § 104A,¹⁴⁶ including those made prior to 1972. Identifying these rights holders, and obtaining updated contact information, will in some cases be complicated, due to the age of the recordings and the fact that the rights holders are located overseas. One question to be resolved is whether these parties will be required to file a “Notice of Intent” under § 104A(e) in order to be able to claim their shares; such a requirement will simplify the task of maintaining the database, but will place a burden on the foreign rights holders. If the parties cannot be identified and located, the funds due to them will be undisbursable. If § 104A(e) applies, and it probably will, foreign collecting societies and other musicians’ organizations may be able to assist by publicizing this requirement and encouraging foreign rights holders to take the necessary steps to claim their rights. Because the term of protection for sound recordings can be considerably shorter outside of the United States (typically lasting fifty years),¹⁴⁷ it is possible that foreign collecting societies will have failed to maintain updated information for older sound recordings that nonetheless continue to generate performance royalties in the United States, which will make distributions to these foreign rights holders more challenging. Much of this burden will fall on the foreign collecting societies. However, in order to remit the correct amount of royalties to each foreign collecting society, the U.S. collecting society will need to know at least where the fixation took place, and the nationality of the performers, in order to determine how much to remit to each foreign collecting society. To the extent this information is not readily available, some funds may be undisbursable, and the question will arise of what to do with the undisbursable amounts attributable to these “orphan works.”

In addition to the administrative challenge of identifying the rights holders for each recorded work and maintaining updated contact information for those parties, organizing this information into a database accessible to the collecting societies presents a technological challenge. Significant progress toward this goal has already been made at the international level. A consortium of international organizations representing rights holders, including, among others, the International Confederation of Societies of Authors and Composers (CISAC) and the International Performers Database Association (IPDA), has created an ISO-

¹⁴⁶ 17 U.S.C. § 104A (1998).

¹⁴⁷ See, e.g., Directive 2006/116/EC, *supra* note 85; *Capitol Records v. Naxos of America, Inc.*, 372 F.3d 471, 479 (2d Cir. 2004); KRASILOVSKY & SHEMEL, *supra* note 14, at 440.

certified global standard (Draft ISO 27729), called the International Standard Name Identifier (ISNI), for identifying contributors to a wide variety of creative works, including music recordings. The ISNI is similar to the ISBN used for books. The ISN International Agency, a London-based nonprofit organization established in December of 2010, will assign the 16-digit ISNI numbers (through registration agencies) and administer the database. The ISNI database is scheduled for initial release in mid-2011.¹⁴⁸

C. One Collecting Society or More?

Currently, SoundExchange is the sole collecting and disbursing agent for the § 114(f) statutory royalty.¹⁴⁹ Tracking usage of specific recordings is relatively easy because the necessary information is encoded in the digital recordings. However, as the performance right expands to terrestrial broadcasts and public venues, identifying which recordings are played, and how often, will become more difficult and less precise. Sampling, logbooks, and selective monitoring will help, but a certain amount of judgment and extrapolation will be required, as it is in the case of musical works. Songwriters and publishers can choose to affiliate with ASCAP, BMI, or SESAC, and one basis for choosing one of these societies over another is the methodology that the society uses to make these judgments. Another consideration is the administrative expense that the society subtracts before disbursing funds to the rights holders.¹⁵⁰ For the same reasons, producers (especially independent producers) and featured

¹⁴⁸ See *How to easily identify all digital content contributors?*, INTERNATIONAL CONFEDERATION OF SOCIETIES OF AUTHORS AND COMPOSERS (CISAC), <http://www.cisac.org/> (last visited Apr. 14, 2011), INTERNATIONAL STANDARD NAME IDENTIFIER (ISNI), <http://www.isni.org/> (last visited Apr. 14, 2011); KRASILOVSKY & SHEMEL, *supra* note 14, at 450; Juha Hakala, *International Standard Name Identifier: An Introduction*, TECHNOLOGY WATCH REPORT, <http://metadaten-twr.org/2010/02/03/international-standard-name-identifier-an-introduction/#more-280>.

The ISNI must be distinguished from the ISRC, which identifies only the recording. See *supra* note 58 and accompanying text. It also differs from the International Standard Musical Work Code (ISWC) (ISO 15707), an 11-character code that identifies a specific musical composition, and which is administered by the ISWC International Agency. See INTERNATIONAL STANDARD MUSICAL WORK CODE (ISWC), <http://www.iswc.org/> (last visited Apr. 14, 2011).

¹⁴⁹ An aspiring competitor, Royalty Logic, represents some labels and performers in receiving royalties from SoundExchange, but does not yet have the legal authority to compete with SoundExchange in tracking usage and collecting royalties directly from users, and must depend on SoundExchange's usage data. See MUSIC REPORTS, <http://www.royaltylogic.com> (last visited Apr. 14, 2011).

¹⁵⁰ See Nigel Parker, *Music Business: Infrastructure, Practice and Law* 203–05 (2004); PASSMAN, *supra* note 41, at 235; KRASILOVSKY & SHEMEL, *supra* note 14, at 142.

performers may want a choice of organizations with which to affiliate. AFM and AFTRA may be helpful in this regard.

If multiple collecting and disbursing societies develop, they will need to share access to the database of rights holders. If the expanded public performance right requires broadcasters and venue operators to maintain records of the recordings they play, then in order to avoid burdening smaller webcasters, broadcasters, and venue operators with excessive recordkeeping, the societies might agree to share access to the logbooks (if any) that the amended law requires these parties to maintain.

D. Exceptions and Limitations

Any royalty scheme that covers a diverse array of users—small and large broadcasters, “niche” webcasters, major retail chains, and small “mom and pop” establishments—must be sensitive to the economic differences between these users. If the statutory or negotiated royalty rates under the expanded performance right are not responsive to the needs of nonprofits and other small operators, these users will not be able to deliver performances to consumers, and consumers, in turn, will have fewer choices. For example, college radio stations should receive special accommodations under the royalty scheme.

The hospitality industry will likely respond to an expanded public performance right by seeking a concomitant expansion of the § 110(5) privilege. Under current law, § 110(5)(B)¹⁵¹ permits a large percentage of bars, restaurants, and retail establishments to play radio or television broadcasts of music for their patrons without paying a public performance royalty to the owners of the musical compositions.¹⁵² These industries would certainly demand a similar privilege with respect to sound recordings. While the current version of § 110(5)(B) has been held to violate the United States’ obligations under the TRIPS Agreement,¹⁵³ an expansion of this provision to encompass sound recordings appears to be less problematic, because TRIPS does not require the United States to

¹⁵¹ 17 U.S.C. § 110(5)(B) (2005).

¹⁵² See Panel Report, *United States – Section 110(5) of the U.S. Copyright Act*, WT/DS160/R para. 6.118–6.133 (June 15, 2000) (finding that a substantial majority of U.S. eating and drinking establishments, and a large percentage of other business establishments, qualify for the § 110(5)(B) exemption).

¹⁵³ *Id.* The TRIPS Agreement is the Agreement on Trade-Related Aspects of Intellectual Property Rights, which is administered by the World Trade Organization. The United States became a party to TRIPS in 1994, as part of the Uruguay Round of the General Agreement on Tariffs and Trade (GATT). Agreement Establishing the World Trade Organization, art. III & annex 1C (April 15, 1994).

provide any public performance rights in sound recordings.¹⁵⁴ Nor would an expanded version of § 110(5)(B) prevent the United States from adhering to the Rome Convention; Article 15 of Rome specifically permits a signatory country to recognize the same limitations for neighboring rights that it recognizes for copyrights.¹⁵⁵ Even if an expansion of § 110(5)(B) did not violate international agreements, however, it could provide an excuse for neighboring rights countries to deny full reciprocity to U.S. performers and record companies seeking to collect their share of foreign performance royalties.

E. Section 114(i)

As noted earlier, the broadening of sound recording public performance rights will highlight the infirmity of § 114(i), which bars any governmental body from considering the sound recording royalty in setting the rate for the musical composition royalty. When the DPRSRA was enacted, § 114(i) was a political accommodation that was necessary to defuse opposition from songwriters and music publishers.¹⁵⁶ Those same groups will likely vehemently oppose any effort to repeal or weaken § 114(i), as evidenced by their success in retaining this provision in both versions of the proposed PRA. Indeed, the entrenched interests of songwriters and composers appear to present the single greatest political obstacle to implementing a full performance right for sound recordings. Yet there is no policy justification for retaining this provision, which favors one group of rights holders over another based solely on being the first to achieve their “place at the table.” Section 114(i) stands in the way of establishing a fair and efficient rate-setting procedure. As evidenced by the recent UK proceedings, it is *possible* to establish performance royalties for one group of rights holders while giving little weight to the cumulative effect of the two royalties on users.¹⁵⁷ However, such a procedure increases the risk of unreasonable and economically unjustified burdens on users.

¹⁵⁴ Article 14(1) of TRIPS protects the rights of performers in their live musical performances, and Article 14(2) protects the reproduction rights of record producers. However, nothing in Article 14 addresses a public performance right in sound recordings.

¹⁵⁵ Rome Convention, *supra* note 1, art. 15(2).

¹⁵⁶ *Copyright Protection for Digital Audio Transmissions: Hearing on S. 227 Before the S. Comm. on the Judiciary*, 104th Cong. (1995) (statement of MaryBeth Peters, Register of Copyrights).

¹⁵⁷ See *supra* notes 130–36 and accompanying text.

F. A Note on Derivative Works

One other category of performances that would be encompassed by a full public performance right consists of performances of sound recordings that have been incorporated into motion pictures or other audiovisual works, including theatrical or television films. Under current law, negotiated master use licenses permit the integration of the sound recording into a derivative work;¹⁵⁸ however, such licenses do not automatically confer public performance rights on the licensee, because the licensee does not need a public performance license under current law. However, if a full public performance right is granted to sound recordings, incorporating such recordings into films that are performed in movie theatres (or other public venues, such as airplanes) or on television, or which are streamed by a service such as Netflix, will necessarily implicate this right.

Addressing this additional right in the master use license should not be problematic on a *prospective* basis; because these licenses are voluntarily negotiated and are not subject to judicial or administrative oversight, the parties are free to reach any agreement as to the licensing fee. Indeed, adding this additional right to future licenses may have only a modest effect on the typical licensing fee: because record companies will probably share only a small portion of this fee with recording artists (as determined by their individual recording contracts), any increase in the master use license fee will be pure profit to the record company, with no increased expense.

A more difficult question is presented by *existing* master use licenses. Because record companies and filmmakers negotiated these licenses at a time when there was no public performance right in sound recordings, these licenses typically do not convey a public performance right. If and when record companies become entitled to a full public performance right as a matter of law, it is conceivable that they would demand additional royalty payments as a condition of the continued public performance of the existing films in which their recordings have been incorporated. Copyright owners of motion pictures would be likely to resist these demands, and if the parties could not reach a voluntary settlement, then some judicial or legislative solution would be required.

To some degree this problem may be avoided if the duty to obtain a public performance license is placed on the party responsible for the performance, whether that is a movie theatre (unlikely in the case of older films) or other public venue operator, a television broadcaster, or a video streaming service.

¹⁵⁸ See KOHN & KOHN, *supra* note 30, at 1545; RICHARD SCHULENBERG, LEGAL ASPECTS OF THE MUSIC INDUSTRY 398 (2005).

Alternatively, it can be argued that incorporating a sound recording into an audiovisual work causes the incorporated recording to lose its separate character as a sound recording, because it is now part of the audiovisual work.¹⁵⁹ Under this analysis, public performances of the audiovisual work would not constitute public performances of the sound recording; thus, the existing master use license would continue to be sufficient without any need for further negotiation.

However, if neither of these solutions is adopted, then the copyright owner of an existing motion picture will face the problem of obtaining permission for future public performances of any sound recordings incorporated in that work. In that case, § 104A of the Copyright Act offers a possible model for resolving this problem. Under that provision, creators of derivative works that incorporated public domain foreign works before the copyright in those foreign works was restored (in 1996 and later years) are entitled to continue exploiting those derivative works if they pay “reasonable compensation” to the owner of the copyright in the restored work.¹⁶⁰ If the parties cannot agree on the amount of this compensation, then it will be determined by a federal district court.¹⁶¹ One objection to applying this paradigm to existing master use licenses is that, if voluntary negotiations do not succeed, these disputes will place further demands on the limited resources of the federal district courts. If these disputes begin to crowd the federal docket, then a statutory license may be needed—for example, a set percentage of the film’s future performance revenues.

One final possibility is that the legislation that expands the public performance right for sound recordings could expressly exclude pre-existing master use licenses. Unlike the restoration of copyrights under § 104A, recognition of a public performance right in sound recordings is not mandated by TRIPS. Thus, creating a limited exception for pre-existing master use licenses would not violate TRIPS. Like an expansion of § 110(5)(B), however, it could undermine efforts to establish reciprocity with other Rome and WPPT signatories.

IX. CONCLUSION

The policy debate surrounding a public performance right in sound recordings has been well rehearsed for over forty years. Despite a strong consensus in favor of the right, the political will has materialized slowly.

¹⁵⁹ Under the Copyright Act, the definition of a sound recording specifically excludes “the sounds accompanying a motion picture or other audiovisual work.” 17 U.S.C. § 101.

¹⁶⁰ 17 U.S.C. § 104A(d)(3)(A).

¹⁶¹ *Id.* § 104A(d)(3)(B).

The still-pending Performance Rights Act is the next incremental step. However, it is limited to broadcast performances, and excludes on-site performances of recorded music in public venues (clubs, stores, bars, restaurants, and other venues where recorded music is played). Because it falls short of the full performance right recognized by most Rome Convention countries, it will fail to trigger full reciprocity from those countries, depriving U.S. rights holders of substantial overseas royalties. While the PRA piggybacks on the existing statutory royalty mechanism created for digital subscription transmissions and webcasting (already complex in itself), enacting a full performance right that encompasses dispersed public venues will present even greater implementation challenges. As public performance rights are broadened, the number of licensees will increase, and the nature of their music-related activities and revenue streams will be more diverse. This will make rate-setting and data collection more challenging; one size will no longer fit all.

Further complicating the task is the proliferation of rights holders due to changes in the music industry and its legal environment. The dominance of major record labels is slowly declining as musicians embrace new alternatives for funding, promotion, and distribution. Increasingly, these artists will retain the copyrights in their recordings. Identifying all of the rights holders for each sound recording, and maintaining an accurate database of their contact information, will present formidable challenges.

Expanding the performance right presents significant political challenges. However, the expanded right is more likely to become a reality if the recording industry can develop a plan to overcome the implementation challenges. Thus, producers and recording artists should be prepared to address practical objections to the expanded right by having a plan for implementing the right in a manner that is sensitive to the best interests of rights holders, service providers, and consumers.