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The Sky Is Not Falling: The Effect of a Performance Right on the Radio Market

GREGORY F. DONAHUE*

INTRODUCTION

"For decades, a symbiotic relationship has existed between the radio and recording industries."[1] Yet, for two industries that are so closely linked, they just cannot seem to get along. For the better part of the past century, the two have been treating each other like parasites rather than symbiotes, while arguments about what is and is not "fair" have whirled through courtrooms, law journals, and Congress.[2] Due to a loophole in U.S. copyright law, terrestrial broadcast radio stations—those that are picked up by AM or FM tuners, excluding any satellite or Internet radio—have never paid the recording artist or recording companies for the songs that they play while the original composer or songwriter is paid a royalty for every play.[3]

In 2007, the Performance Rights Act (the "Act") was first introduced to Congress by Congressman Howard Berman.[4] If passed, the Act would require terrestrial radio stations that broadcast music to pay a royalty to the owner of the copyright in that sound recording.[5] Though the Act died in committee that year, it was reintroduced by Congressman John Conyers, Jr. in 2009, once again sparking off a decades-long debate about whether artists should be paid when their recordings are broadcast on the radio.[6] As of this writing, the Act did not make it to

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1. JAMES N. DERTOUZOS, NAT'L ASS'N OF BROADCASTERS, RADIO AIRPLAY AND THE RECORD INDUSTRY: AN ECONOMIC ANALYSIS 7 (2008), *available at* http://www.nab.org/documents/resources/061008_Dertouzos_Ptax.pdf.

2. *See, e.g.*, *Performance Rights Act: Hearing on H.R. 848 Before the H. Comm. on the Judiciary*, 111th Cong. *passim* (2009) [hereinafter *PRA Hearing*]; *see also, e.g.*, 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 10.

3. *See infra* Part I.A. It is worth noting here that the term "broadcast" is a term of art referring specifically to nonsubscription transmissions. *See* 47 U.S.C. § 153(6) (2006) ("The term 'broadcasting' means the dissemination of radio communications intended to be received by the public, directly or by the intermediary of relay stations.").

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

5. *See id.* at § 2. The sound recording copyright owner may or may not be the recording artist, depending on the circumstances under which the recording was made. However, the Act provides for payments directly to the artist, as well as to the holder of the sound recording's copyright, as detailed in Part II.A.1.

6. *See* Performance Rights Act, H.R. 848, 111th Cong. (2009); *H.R. 4789: Performance Rights Act*, GOVTRACK.US, http://www.govtrack.us/congress/bill.xpd?bill=h110-4789.

a floor vote in Congress. However, it is likely that a substantially similar law will be suggested in the 112th Congress. The amendments proposed in such a law would represent a substantial change to established U.S. copyright law.

Congress has the power "[t]o promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries."[7] This mantra of U.S. copyright law has been repeated in almost every law review article and court decision pertaining to copyright since the Constitution was ratified.[8] The clause establishes that the purpose of U.S. copyright law is to promote the progress of art and science for the benefit of the public by providing economic incentives, in the form of an exclusive monopoly, to the creator or author of those scientific or artistic discoveries or works.[9] Therefore, a chief concern in examining copyright law is the economic impact on both the public and on artists.

In the wake of the Act's introduction in both 2007 and 2009, a flood of articles were published, all investigating the history of U.S. copyright law and examining the economic arguments for and against the Act, that is, the economic value of the royalty and its impact on radio stations and recording artists.[10] This Note takes a different approach. Armed with a recent study of the Act's effects by the Government Accountability Office (GAO),[11] this Note puts those arguments in perspective and then looks beyond the immediate changes to the economic future of the radio and recording industries and the economic value of those industries *to the public*. When the amendment to copyright law, enacting a performance right for sound recordings played on terrestrial radio, is examined in view of the economic implications for the public and the broadcasting and recording industries, it becomes clear that the potential advantages of the right far outweigh the concerns, as both the recording and broadcast industries will continue to survive beyond any changes imposed on U.S. copyright law. Part I briefly examines U.S. copyright law, current radio practices, and the nature of agreements between artists and record labels. Part II examines the arguments advanced over the past three years for and against the Act's changes to copyright law and, in light of recent studies on the issue, tempers some of those concerns. Part III looks to the possible future of radio

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7. U.S. CONST. art. I, § 8, cl. 8.

8. *See, e.g.*, Matthew S. DelNero, *Long Overdue?: An Exploration of the Status and Merit of a General Public Performance Right in Sound Recordings*, 6 VAND. J. ENT. L. & PRAC. 181 (2004).

9. CRAIG JOYCE, MARSHALL LEAFFER, PETER JASZI & TYLER OCHOA, COPYRIGHT LAW 53–55 (8th ed. 2010).

10. *See, e.g.*, Evitt, *supra* note 2; Sunny Noh, *Better Late Than Never: The Legal Theoretical Reasons Supporting the Performance Rights Act of 2009*, 6 BUFF. INTELL. PROP. L.J. 83 (2009); Kevin C. Parks, *Black Hole or Celestial Jukebox?: Section 114 and the Future of Music*, LANDSLIDE, Nov.–Dec. 2008, at 47.

11. U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-10-862, TELECOMMUNICATIONS: THE PROPOSED PERFORMANCE RIGHTS ACT WOULD RESULT IN ADDITIONAL COSTS FOR BROADCAST RADIO STATIONS AND ADDITIONAL REVENUE FOR RECORD COMPANIES, MUSICIANS, AND PERFORMERS (2010) [hereinafter GAO REPORT]. This Note only addresses the House version of the bill; however, the GAO also considered the Senate version, which is substantially similar, in its report. *Id.* at 40.

broadcasting if a similar law is passed and of the recording industry if a similar law is not and argues, based on those futures, that such a law should—and indeed, must—be passed.[12] Only by granting a full performance right for sound recordings can the United States close the gap between the rights offered to the owners of musical compositions and those offered to the owners of sound recordings, and, ultimately, such a change will result in a more robust radio industry and a more financially equitable recording industry.

I. COPYRIGHT, RADIO, AND RECORDING: AN OVERVIEW

U.S. copyright law is derived from the U. S. Constitution. However, it has had to change and adapt since 1788 due to shifts in technology (such as the invention of the ability to capture—record—specific performances and send them to the public via radio signals) that, of late, have become near constant.[13] Therefore, a complete understanding of the issues surrounding a performance right for sound recordings requires a basic understanding of the history of U.S. copyright law, of the business model and standard industry practices of terrestrial radio broadcasting, and of the nature of the recording industry and the agreements forged between recording labels and the recording artists they contract with. This Part provides such an overview in brief.

A. U.S. Music Copyright Law at a Glance

The history of U.S. copyright law has resulted in two separate and unequal protections for musical works: protection for the musical work and protection for the sound recording (known as a phonorecord).[14] Musical works enjoy a full right in the public performance of the work,[15] whereas there is no similar protection for sound recordings performed on terrestrial radio.[16]

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12. For the purposes of this Note, the 2009 Performance Rights Act is used as a model for implementation of a performance right for sound recordings that are played on terrestrial radio.

13. *Cf. Do You Agree with the Government's New Copyright Act?*, CBC NEWS (Sept. 29, 2011), http://www.cbc.ca/news/yourcommunity/2011/09/do-you-agree-with-the-governments-new-copyright-act.html (detailing how Canada's copyright law is outdated due to the rapid pace of changing technologies).

14. For a more complete history of the development of U.S. copyright law regarding sound recordings, see Noh, *supra* note 10, at 89–94. A full accounting of the rights available to each work is not required for the discussions in this Note. However, for a more complete description of performance rights for musical works and sound recordings, see DelNero, *supra* note 8, at 182–89.

15. A full performance right includes the exclusive right to perform or control the performance of the copyrighted work. *See* 17 U.S.C. § 106(4) (2006) ("[I]n the case of literary, musical, dramatic, and choreographic works, pantomimes, and motion pictures and other audiovisual works, [the copyright owner has the exclusive right to authorize or] to perform the copyrighted work publicly . . . .").

16. *Compare id.*, *with id.* § 106(6) ("[I]n the case of sound recordings, [the copyright owner has the exclusive right to authorize or] to perform the copyrighted work publicly by means of a digital audio transmission."). Though it would be a major change to the status

The lack of rights in a sound recording has been traced by many back to *White-Smith Music Publishing Co. v. Apollo Co.*,[17] in which the Supreme Court held that piano rolls—perforated paper rolls through which air flowed to activate the mechanism of a piano[18]—were not "copies" of the composer's musical work because, unlike sheet music, they could not be perceived without the aid of a machine.[19] This standard remained relatively unchanged under the 1909 Copyright Act,[20] which granted a public performance right in the musical work but not in the sound recording.[21]

Sound recordings were first protected by U.S. copyright law under the 1971 Sound Recordings Act, which became effective in 1972 and redefined sound recordings as "works that result from the fixation of a series of musical, spoken, or other sounds, but not including the sounds accompanying a motion picture" and their reproductions as "material objects in which sounds other than those accompanying a motion picture are fixed by any method now known or later developed, and from which the sounds can be perceived, reproduced, or otherwise communicated, *either directly or with the aid of a machine or device*."[22] This language was adopted by the 1976 Copyright Act, which went into effect in 1978.[23]

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quo, the Performance Right Act would not have instituted a full performance right for sound recordings. Though it granted a performance right for terrestrial broadcasts of sound recordings, *see* Performance Rights Act, H.R. 848, 111th Cong. § 2 (2009), there was still no protection for performance of sound recordings in business establishments or under the other exemptions in section 114. *See* 17 U.S.C. § 114.

17. 209 U.S. 1 (1908).

18. *Id.* at 10.

19. *Id.* at 17–18.

20. Pub. L. No. 60-349, ch. 320, 35 Stat. 1075 (codified as amended in scattered sections of 17 U.S.C.).

21. *Id.* at ch. 320, § 1(a), (e) (stating that the author has the exclusive right "[t]o print, reprint, publish, copy, and vend the copyrighted work," and, for musical works, "[t]o perform the copyrighted work publicly for profit . . . [and] to make any arrangement or setting . . . in any system of notation or any form of record in which the thought of an author may be recorded and *from which it may be read or reproduced*" (emphasis added)); *see also* Jennifer Leigh Pridgeon, Note, *The Performance Rights Act and American Participation in International Copyright Protection*, 17 J. INTELL. PROP. L. 417, 420 (2010). The 1909 Copyright Act also maintains the distinction by allowing the author of the musical work some control over the "mechanical reproductions" of his or her work by allowing him or her to charge a royalty for the manufacture of the "recordings." Ch. 320, § 1(e), 35 Stat. at 1075.

22. Pub. L. No. 92-140, § 1, 3, 85 Stat. 391, 391, 392 (codified as amended in scattered sections of 17 U.S.C.) (emphasis added).

23. Pub. L. No. 94-553, § 102, 90 Stat. 2541, 2598–99 (codified as amended in scattered sections of 17 U.S.C.); *see* 17 U.S.C. § 101 (2006) ("'Phonorecords' are material objects in which sounds, other than those accompanying a motion picture or other audiovisual work, are fixed by any method now known or later developed, and from which the sounds can be perceived, reproduced, or otherwise communicated, either directly or with the aid of a machine or device. The term 'phonorecords' includes the material object in which the sounds are first fixed. . . . 'Sound recordings' are works that result from the fixation of a series of musical, spoken, or other sounds, but not including the sounds accompanying a motion picture or other audiovisual work, regardless of the nature of the material objects, such as disks, tapes, or other phonorecords, in which they are embodied.").

Despite the longstanding resistance to public performance rights for sound recordings, Congress did recognize a public performance right in digital transmissions of sound recordings in the Digital Performance Right in Sound Recordings Act of 1995 (DPRA).[24] The DPRA requires royalty payments from those who are digitally transmitting sound recordings over the Internet or through subscription services such as SiriusXM Radio, but maintains the exemption for terrestrial radio stations even where the broadcast is digital.[25] These types of digital broadcasts were of major concern to the recording industry because, unlike terrestrial broadcast, the sound quality was as good or substantially similar to CD quality.[26] Therefore, a recording of the stream could be substituted for the purchase of the sound recording, which meant a major blow to the recording industry's bottom line.[27] Thus, terrestrial radio stations have flourished under the same rules and business model for almost a century in spite of the call for increased copyright protection for sound recordings.

B. The Terrestrial Radio Business Model

In the United States, the fact that there is no performance right in sound recordings means that terrestrial radio stations may broadcast sound recordings without the permission of the sound recording copyright owner and without paying that owner any royalties.[28] However, the songwriter—or, more accurately, the owner of the copyright in the underlying musical work—gets royalties for the airplay no matter which artist's recording of the song is used.[29] Furthermore, stations rely on the drawing power of their programming because all revenue generated by a commercial radio station comes from the sale of advertising on that station.[30]

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

25. *See* Noh, *supra* note 10, at 92–93; *see also* 17 U.S.C. § 106(6) (granting an exclusive right to authorize or "perform the copyrighted work by means of a *digital* audio transmission" (emphasis added)); *id.* § 114(d) (exempting "nonsubscription broadcast transmissions").

26. *See* Noh, *supra* note 10, at 92–93; Lauren E. Kilgore, Note, *Guerrilla Radio: Has the Time Come for a Full Performance Right in Sound Recordings?*, 12 VAND. J. ENT. & TECH. L. 549, 562–63 (2010).

27. *See* Kilgore, *supra* note 26, at 563–64.

28. DelNero, *supra* note 8, at 181.

29. *See* Noh, *supra* note 10, at 98–99; DelNero, *supra* note 8, at 181. To clarify the terminology being used in this section, the owner of the copyright in the sound recording or the musical work may seem naturally to be the artist or songwriter, respectively. 17 U.S.C. § 201(a). However, the copyright may be assigned to others, by various methods; therefore, the "copyright owner" is the more appropriate term. *See id*. § 201(b), (d).

30. GAO REPORT, *supra* note 11, at 12. Noncommercial stations, such as National Public Radio (NPR) make money through government grants and public underwriting and are actually restricted from advertising on the air. *See About NPR: Public Radio Finances*, NPR (Oct. 9, 2011), http://www.npr.org/about/aboutnpr/publicradiofinances.html; *see also* 47 U.S.C. § 399b; Commission Policy Concerning the Noncommercial Nature of Educational Broadcasting, 7 F.C.C. 827 (1992).

The radio business model, therefore, is predicated on the ability of the station owner to draw advertisers to pay for the advertising spots and grow the station's bottom line. The GAO's recent report found that stations that have a purely music format tend to make an average of $225,000 more each year than stations with a nonmusic format[31]—those stations that almost exclusively broadcast sports, talk, news, or other programming.[32] For decades, the lack of royalties paid to recording artists, and the resulting boon to terrestrial radio's profit margin, was justified by the fact that radio airplay was the single best means of exposing a new artist or album to the public.[33] In fact, the recording industry used to pay stations for airtime through a now illegal practice known as "payola."[34]

Despite the historical success of radio stations employing the music-format model, radio stations have been losing revenue across the board.[35] Due to iPods, the Internet, and subscription radio services like SiriusXM and cable radio, terrestrial radio has been losing listeners and, along with them, their advertisers.[36] Coupled with the problems that the recording industry faces, the entire relationship between the two has completely deteriorated, with both sides fighting for the last buck.[37] Broadcasters worry that, by requiring a royalty payment to the recording artist, the Act sounded the death knell for terrestrial radio while "taxing" broadcasters in an effort to help record labels mitigate the huge losses in revenue they have suffered due to technological advances and peer-to-peer file sharing.[38]

C. The Recording Industry and the Recoupable Advance

The entertainment industry as a whole—encompassing the literary, motion picture, and music industries—is tied together with complicated agreements between large firms and individual creators.[39] In the recording industry, an artist is

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31. GAO REPORT, *supra* note 11, at 12. The report also found that approximately 70% of commercial radio stations broadcast music and that these stations accounted for approximately 80% of "all commercial broadcast radio revenues." *Id.* at 13.

32. *Id.* at 10.

33. *See id.* at 15.

34. *Id. See also, e.g.*, *U.S. Indicts Four in a Payola Case*, N.Y. TIMES, Feb. 28, 1988, § 1, at 26; *Payola's Roots: Usage of the 1960's*, N.Y. TIMES, Mar. 6, 1985, at A14.

35. GAO REPORT, *supra* note 11, at 11–12.

36. *See id.* at 11; CHRIS ANDERSON, THE LONG TAIL: WHY THE FUTURE OF BUSINESS IS SELLING LESS OF MORE 35–36 (2006).

37. *See, e.g.*, John Frega, Comment, *The Performance Rights Act of 2009 and the Local Radio Freedom Act: Will Performance Rights Kill the Radio Star*, 20 SETON HALL J. SPORTS & ENT. L. 333, 337–38, 344 (2010). *Compare Fiction v. Fact*, THE MUSICFIRST COALITION (2010), http://www.musicfirstcoalition.org/media/fictionvsfact [hereinafter *Fiction v. Fact*], *with The Facts*, FREE RADIO ALLIANCE (2010), http://freeradioalliance.org/media-center/the-facts/ [hereinafter *The Facts*].

38. *See PRA Hearing*, *supra* note 2, at 150–54 (statement of Steven Newberry, President and CEO, Commonwealth Broadcasting Corporation).

39. *See* JEFFREY BRABEC & TODD BRABEC, MUSIC, MONEY, AND SUCCESS: THE INSIDER'S GUIDE TO THE MUSIC INDUSTRY 367 (1994). For an example of a recording contract, see DONALD E. BIEDERMAN, EDWARD P. PIERSON, MARTIN E. SILFEN, JANNA GLASSER, CHARLES J. BIEDERMAN, KENNETH J. ABDO & SCOTT D. SANDERS, LAW AND BUSINESS OF THE

given an advance which is "fully recoupable," meaning that the recording label gives him or her a sum of money, which then must be paid back through royalties earned from album sales.[40] In order to create an incentive to keep costs low, the costs of recording and producing the album are then taken away from the total advance and the remainder is, essentially, the artist's salary for creating the album.[41] The artist does not see any money from royalties until after this amount is recouped by the label; in most cases, however, the artist is not required to pay back the advance if the album does not sell a single copy.[42] Therefore, labels are very risk averse and the recording contract is all about protecting the label financially.[43]

Due to the high risk involved in signing even well-known artists, labels are increasingly unlikely to sign unknown artists whose marketability is untested.[44] By granting a performance right in sound recordings that are broadcast over terrestrial radio, Congress would provide for an additional revenue stream for recoupment of artist advances.[45] This would decrease the financial risk faced by the label upon signing an artist, whether well-established or a new "up-and-comer."[46] Moreover, the artists would begin earning royalties sooner due to the more rapid recoupment of his or her advance by the label.[47]

II. RECOGNIZING PERFORMANCE RIGHTS IN SOUND RECORDINGS

The prospect of finally recognizing a performance right in the terrestrial broadcast of sound recordings has resulted in a fierce debate between the Recording Industry Association of America and the National Association of Broadcasters, and their respective interest groups.[48] The former hails the performance right as an instrument to pay copyright owners of sound recordings their due royalties, to encourage innovation and creativity in the industry, and to bring the United States

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ENTERTAINMENT INDUSTRIES 711–29 (5th ed. 2007).

40. BIEDERMAN ET AL., *supra* note 39, at 709.

41. *See id.*

42. *See id.* at 709–10. For more on advances and recoupment, see DONALD S. PASSMAN, ALL YOU NEED TO KNOW ABOUT THE MUSIC BUSINESS 80–84 (5th ed. 2003).

43. *See* BRABEC & BRABEC, *supra* note 39, at 68.

44. *See* DAYLLE DEANNA SCHWARTZ, THE REAL DEAL: HOW TO GET SIGNED TO A RECORD LABEL: UPDATED & EXPANDED EDITION 4–5, 17 (Gabrielle Pecarsky ed., 2002).

45. *See* BRABEC & BRABEC, *supra* note 39, at 83.

46. *See* SCHWARTZ, *supra* note 44, at 218–23 (detailing some of the pitfalls new musicians fall into with royalties and noting that the "ball is usually in the label's court" and, in negotiations with labels, "[t]he deciding factor is how badly you want the deal versus how badly the label wants you"); *see also* Letter from Mark L. Goldstein, Dir., Physical Infrastructure Issues, Gov't Accountability Office, to John Conyers, Jr., Chairman, Comm. on the Judiciary, House of Representatives (revised June 7, 2010), *available at* http://www.gao.gov/new.items/d10428r.pdf.

47. *See* BRABEC & BRABEC, *supra* note 39, at 83.

48. *Compare Performance Rights Act FAQ*, NAT'L ASS'N OF BROADCASTERS, http://www.nab.org/documents/advocacy/performanceTax/performanceTaxFAQ.asp [hereinafter *FAQ*], *and The Facts*, *supra* note 37, *with Fiction v. Fact*, *supra* note 37, *and RIAA Applauds Introduction of New Performance Rights Legislation*, RADIO INDUSTRY ASS'N OF AM., http://www.riaa.com/newsitem.php?id=7BE7264B-5BC4-C823-777D-73D5B410805A [hereinafter *RIAA Applauds Legislation*].

into congruence with international copyright law.[49] Meanwhile, those opposed to the performance right spout fatalistic prophesies about the end of radio broadcasting as we know it and claim that the money will end up in the hands of the recording industry[50] rather than going to the creative talent behind the recordings.[51]

In the few years since the Act's first introduction in 2007, many politicians and scholars have discussed these arguments in detail.[52] Therefore, further unabridged discussion of the merits and deficiencies of a performance right is unhelpful. Rather, the following is a cursory view of those arguments, tempered by the findings of the GAO.

A. Recording Industry Arguments for a Performance Right for Sound Recordings

1. Increased Revenue for Struggling Artists

One of the most cited arguments for a performance right for sound recordings is the increased earning potential it would grant to artists who are struggling to make a living on the meager payments they are receiving for their work on an album.[53] The additional revenue stream from radio stations' royalty payments, the argument goes, would allow these musicians the fair earnings of their time, talent, and work.[54] However, recent data has shown that the Act will not have as profound an effect on "starving artists" as was originally hoped for.

The GAO's recent study on the Act showed that, in all likelihood, a vast majority of artists will receive less than $1,000 per year from the additional royalty stream.[55] Rather, its study of radio play in 2008 showed that artists already at the top of their field—those artists already making large sums from other revenue sources—would in fact be receiving the lion's share of the revenues from radio

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49. *RIAA Applauds Legislation*, *supra* note 48. There are only four developed countries that do not recognize performance rights in sound recordings: the United States, Iran, North Korea, and China. *See PRA Hearing*, *supra* note 2, at 13 (statement of Rep. John Conyers, Jr., Chairman, H. Comm. on the Judiciary).

50. *See infra* Part II.A.2.

51. *See PRA Hearing*, *supra* note 2, at 150–54 (statement of Steven Newberry, President and CEO, Commonwealth Broadcasting Corporation).

52. *See, e.g.*, Evitt, *supra* note 2, at 11–13; DelNero, *supra* note 8, at 189–201.

53. *See, e.g.*, GAO REPORT, *supra* note 11, at 27; DelNero, *supra* note 8, at 193; Noh, *supra* note 10, at 98–99. A similar but different argument, which often runs concurrent with the right of artists to fair pay, is that the radio broadcasters are being unjustly enriched by their use of free music to draw in advertisers. *See* Noh, *supra* note 10, at 98.

54. *See Music and Radio in the 21st Century: Ensuring Fair Rates and Rules Across Platforms: Hearing Before the S. Comm. on the Judiciary*, 110th Cong. (2008) (statement of John Simson, Executive Director, SoundExchange).

55. The GAO took the actual airplay from the top ten markets and extrapolated for the rest of the country. *See* GAO REPORT, *supra* note 11, at 28. For those stations making more than $1,250,000, those with an undetermined royalty rate, the office assumed a royalty rate of 2.35% of annual revenue. *See id.* The study found that 79% of artists, in fact, will be making less than $1,000 per year, with 21% making less than $10 per year. *See id.* at 30.

airplay.[56] However, the U.S. Copyright Office, in a response to these findings, has stressed that the size of the sum received should have no bearing on whether or not such a change should be implemented.[57]

2. Increased Innovation

A second, often-cited argument in favor of a performance right for sound recordings is that the increased revenue to the performers will increase innovation; that is, the royalties will act as an incentive to create more music and better music.[58] This argument is tied directly to the constitutionality of U.S. copyright law and the fact that Congress's overarching policy reasons for any change to the current copyright scheme should be to further the goal of "promot[ing] the Progress of Science and useful Arts."[59] The frequent counter to this argument is that the money collected from these royalties will end up in the pockets of the record label and, therefore, will not act as an incentive to any musicians at the margins.[60]

However, while labels often do absorb a rather large piece of the royalty pie, the Act had built in protections preventing the record label from taking the entire payment.[61] The Act gave half of the royalty payments for the recording to that recording's copyright owner—often the record label.[62] Featured artists and nonfeatured musicians and vocalists are entitled to a portion of the royalties to be set by the Act. Featured artists are entitled to 45% of the royalty, while nonfeatured musicians and vocalists each get 2.5% of the payment.[63] This ensures that those musicians who are often passed over for recording royalties will receive their portion of the money paid under the Act. In addition to creating incentives for those musicians and vocalists, allowing the record labels to retain a portion of the royalty payments, taken alone, may incentivize a label to take on artists they would have found too risky under the current royalty scheme.

As mentioned in Part I.C above, recording contract negotiations frequently revolve around the size of the advance granted to the artist by the recording company.[64] Because the advances are often very large sums and are typically not required to be paid back by the artist in the event they produce an album that does not sell, additional royalty payments that decrease the artists' time spent "in the

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56. Less than 1% of artists would make $100,000 or more annually. *Id.* at 30. The study also identified that superstar artists would make disproportionately more from the royalties. For example, Lady Gaga would have earned more than $400,000 for her single "Bad Romance" in 2008. *Id.* at 28.

57. *Id.* at 32, 61.

58. *E.g.*, DelNero, *supra* note 8, at 195; Noh, *supra* note 10, at 98.

59. *See* U.S. CONST. art I, § 8, cl. 8; Noh, *supra* note 10, at 98.

60. *See FAQ*, *supra* note 48; *The Facts*, *supra* note 37.

61. *See* Performance Rights Act, H.R. 848, 111th Cong. § 6(2) (2009).

62. *Id.*

63. *Id.*; *see also* GAO REPORT, *supra* note 11, at 23. Additionally, those artists who retain ownership of the copyrights in their sound recordings will receive both the 45% for featured artists and the 50% for copyright owners—in sum, 95% of the royalty.

64. Recall, also, that the featured artists on these albums do not earn royalties until the label has recouped the advance. BRABEC & BRABEC, *supra* note 39, at 83.

red" contribute to the financial health of the label.[65] Moreover, financially secure labels are more likely to take a chance on new talent or to increase the advance they are willing to pay an existing artist.[66]

3. International Congruence

The third main argument for adopting the Act is that, through the protection of performance rights in sound recordings, the United States will finally have laws analogous to other countries with intellectual property regimes similar to that in the United States.[67] The benefits of this congruence is twofold: first, U.S. copyright law would gain some international legitimacy;[68] second, U.S. artists, by virtue of international intellectual property agreements, would begin to be paid for the radio play of their works abroad.[69] Currently, international copyright law on the subject is governed by two major agreements: the Rome Convention[70] and the World Intellectual Property Organization's (WIPO's) Performance and Phonograms Treaty (WPPT).[71] The United States is a signatory to only the WPPT agreement and has never joined the Rome Convention. These treaties require member countries to grant the same protections to sound recordings that are granted in the recordings' countries of origin.[72] Therefore, because the United States does not protect sound recordings that are being broadcast domestically, other countries' radio stations may also broadcast the sound recordings of U.S. artists without paying royalties.[73] Many hoped that, by adopting the Act and thus removing disparities between U.S. copyright law and the requirements of the Rome Convention, the United States would also become a member of the Rome Convention and, under that treaty and the WPPT, U.S. artists would begin to receive an income from the other member countries.[74]

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65. *See id.*

66. *See* SCHWARTZ, *supra* note 44, at 176–77.

67. *See, e.g.*, DelNero, *supra* note 8, at 190; Evitt, *supra* note 2, at 11; Pridgeon, *supra* note 21, at 434.

68. *See PRA Hearing*, *supra* note 2, at 13 (statement of Rep. John Conyers, Jr., Chairman, H. Comm. on the Judiciary); Brandon H. Nemec, Comment, *No More Rockin' in the Free World: Removing the Radio Broadcast Exemption*, 9 J. MARSHALL REV. INTELL. PROP. L. 935, 946 (2010).

69. *See* GAO REPORT, *supra* note 11, at 30–31; Pridgeon, *supra* note 21, at 438–39.

70. International Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organisations, Oct. 26, 1961, 496 U.N.T.S. 43 [hereinafter Rome Convention].

71. World Intellectual Property Organization: Performances and Phonograms Treaty, Dec. 20, 1996, S. TREATY DOC. NO. 105-17, at 18 (1997) [hereinafter WPPT].

72. *See id.* S. TREATY DOC. NO. 105-17 at 32; Rome Convention, *supra* note 70, 496 U.N.T.S. at 52.

73. *See 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. 29 (2007) (statement of Marybeth Peters, Register of Copyrights).

74. *See* GAO REPORT, *supra* note 11, at 30.

However, this hope may be misplaced, as both the Rome Convention and the WPPT contain articles that allow member countries to opt out of the provisions of the royalty-enforcing articles of the treaties.[75] The Rome Convention, to which the United States is not a member, provides in Article 12 that:

> If a phonogram published for commercial purposes, or a reproduction of such phonogram, is used directly for broadcasting or for any communication to the public, a single equitable remuneration shall be paid by the user to the performers, or to the producers of the phonograms, or to both. Domestic law may, in the absence of agreement between these parties, lay down the conditions as to the sharing of this remuneration.[76]

However, in Article 16, the Rome Convention states that:

> Any State, upon becoming party to this Convention, shall be bound by all obligations and shall enjoy all the benefits thereof. However, a State may at any time . . . declare that:
> (a) as regards Article 12:
> (i) it will not apply the provisions of that Article;
> (ii) it will not apply the provisions of that Article in respect of certain uses;
> (iii) as regard phonograms the producer of which is not a national of another Contracting State, it will not apply that Article;
> (iv) as regards phonograms the producer of which is a national of another Contracting State, it will limit the protection provided for by that Article to the extent to which, and to the term for which, the latter State grants protection to phonograms first fixed by a national of the State making the declaration; however, the fact that the Contracting State of which the producer is a national does not grant the protection to the same beneficiary or beneficiaries as the State making the declaration shall not be considered as a difference in the extent of the protection; . . . .[77]

Therefore, any benefits that the United States may expect to receive in the form of royalties paid from other countries could be completely wiped out by any country that decides that its stations cannot afford, or should not have to pay, royalties to U.S. artists.[78]

The WPPT has a similar article to avoid royalty payments, of which the United States has taken full advantage. Article 15(1) of that treaty provides: "Performers and producers of phonograms shall enjoy the right to a single equitable

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75. *See* WPPT, *supra* note 71, S. TREATY DOC. NO. 105-17 at 32; Rome Convention, *supra* note 70, 496 U.N.T.S. at 54.

76. Rome Convention, *supra* note 70, art. 12.

77. *Id.* art. 16.

78. This is an option that some U.S. trading partners are considering. *See* DelNero, *supra* note 8, at 192.

remuneration for the direct or indirect use of phonograms published for commercial purposes for broadcasting or for any communication to the public."[79] However, through article 15(3),[80] the United States has chosen to limit its royalty obligations to digital transmissions of sound recordings.[81] It is, therefore, likely that countries unwilling or unable to pay the vast royalties to U.S. artists will exercise this option and avoid paying royalties altogether.[82]

For these reasons, the GAO has declined to comment on the possible economic impact of international royalties for U.S. artists.[83] However, the amount of money a copyright owner may receive is less important than the fact that the copyright owner is receiving fair payment for the use of their recordings—an argument endorsed and frequently advanced by the U.S. Copyright Office.[84] Furthermore, recall that economics is only one of the reasons to adopt the Act and become full members of these international agreements. U.S. copyright law also stands to gain international legitimacy by granting a performance right in sound recordings.[85]

B. Broadcasters' Arguments Against a Performance Right for Sound Recordings

1. Bankruptcy of Radio Stations

Many of the fears for the broadcasting industry revolve around the perception that radio stations will be bankrupted if they have to pay royalties every time a recording is played over the air.[86] It is certainly possible that, if there were a fee assessed on a per-play basis, many stations would face financial ruin—similar to the fate of small webcasters after the passing of the DPRA.[87] However, most

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79. WPPT, *supra* note 71, S. TREATY DOC. NO. 105-17 at 32.

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

81. *Treaties and Contracting Parties*, WIPO.INT, http://www.wipo.int/treaties/en/Remarks.jsp?cnty_id=1279C.

82. *See* DelNero, *supra* note 8, at 212 n.255.

83. *See* GAO REPORT, *supra* note 11, at 30.

84. *See id.* at 32.

85. *See PRA Hearing*, *supra* note 2, at 13 (statement of Rep. John Conyers, Jr., Chairman, H. Comm. on the Judiciary) ("Can you believe that there are only four countries, developed countries, on the planet that don't pay performance rights? The other three are Iran, North Korea and China.").

86. *See, e.g.*, *PRA Hearing*, *supra* note 2, at 153–54 (statement of Steven Newberry, President and CEO, Commonwealth Broadcasting Corporation); *see also, e.g.*, DelNero, *supra* note 8, at 199–200; *FAQ*, *supra* note 48. In an effort to avoid bankruptcy, many broadcasters fear they may have to change their station to a nonmusic format. *See* GAO REPORT, *supra* note 11, at 25. The counters to this argument are contained in this subpart of the Note and are also addressed *infra* Part III.A.3.

87. *See* Brian Flavin, Comment, *A Digital Cry for Help: Internet Radio's Struggle to Survive a Second Royalty Rate Determination Under the Willing Buyer/Willing Seller Standard*, 27 ST. LOUIS U. PUB. L. REV. 427, 441–42 (2008) (detailing the difficulty in setting the appropriate royalty rates for small webcasters and the Small Webcasters

stations that would be subject to this type of payment make enough money to cover this increased cost.[88] Moreover, the Act specifically exempted small stations—and those most likely to close their doors due to the Act's passing—from large royalty requirements.[89]

Small radio stations, public radio stations, and religious radio stations would have been given the option to pay a blanket licensing fee for their broadcasts, or may not have had to make any payments whatsoever.[90] Stations making less than $1,250,000 per year in revenue could decide to pay a blanket fee of $5000 per year.[91] Public radio stations only needed to pay $1000 per annum.[92] Finally, religious radio stations did not have to pay any royalties for music recordings used incidentally or as part of the nonsubscription broadcast of a religious service.[93] Furthermore, those stations that earn revenues above the statutory threshold are likely not those stations that have to worry about a percentage-of-revenue royalty putting them out of business.[94]

2. Loss of Important Public Services

Broadcast radio supporters also frequently argue that radio is an important free medium for offering information such as news, educational programming, and public service announcements.[95] However, radio is beginning to lose listeners,

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Settlement Act of 2002).

88. *See* GAO REPORT, *supra* note 11, at 22–23. Currently, the Act does not specify a royalty rate for those stations making more than $1,250,000, *id.* at 28; therefore, the exact amount expected to be paid must either be negotiated or would have to be set by the Copyright Royalty Judges similar to the payments made by webcasters, *id.* For an analysis of various options for setting rates, see Cassondra C. Anderson, *"We Can Work It Out:" A Chance to Level the Playing Field for Radio Broadcasters*, 11 N.C.J.L. & TECH. ONLINE 72, 87–97 (2009). The GAO used the upper, lower, and median rates from a recent rate-setting hearing—13%, 2.5%, and 7.25% of annual revenues, respectively—when investigating the potential impact on large stations in its report. GAO REPORT, *supra* note 11, at 23.

89. *See* Performance Rights Act, H.R. 848, 111th Cong. § 3 (2009); GAO REPORT, *supra* note 11, at 22.

90. *See* H.R. 848, § 3; GAO REPORT, *supra* note 11, at 22. These stations together make up 75% of all stations in the United States. GAO REPORT, *supra* note 11, at 22.

91. H.R. 848, § 3(a).

92. *Id.*

93. *Id.* § 3(b).

94. While $5000 can certainly seem to be an insurmountable amount for a small station, radio advertising is a multibillion dollar industry. The top three U.S. radio ownership companies, in order, are Clear Channel Communications, Inc. (900 stations, 2008 net income of over $4 billion); Cumulus Media, Inc. (more than 300 stations, 2009 net income of over $126 million); and Citadel Broadcasting Corporation (more than 200 stations, 2009 net income of over $783 million). *Citadel Broadcasting Corporation*, HOOVERS.COM, http://www.hoovers.com/company/Citadel_Broadcasting_Corporation/hjscxi-1.html (relevant sections on file with the author); *Clear Channel Communications, Inc.*, HOOVERS.COM, http://www.hoovers.com/company/Clear_Channel_Communications_Inc/rrxtci-1.html (relevant sections on file with the author); *Cumulus Media Inc.*, HOOVERS.COM, http://www.hoovers.com/company/Cumulus_Media_Inc/hjhhri-1.html (relevant sections on file with the author).

95. *See, e.g.*, *PRA Hearing*, *supra* note 2, at 143 (statement of Steven Newberry,

indicating that, in its present form, radio may be starting to outlive its utility. In the early days of radio, there was no better way to disseminate information quickly to a large body of the public.[96] Radio receivers were—and still are—relatively cheap, and almost every home had one.[97] Later, the wide availability of the television quickly replaced many of the roles traditionally filled by radio.[98] Now, the Internet and broadband bring information to the masses and, even more recently, the Internet has gone mobile as "smart phones" become cheap and available.[99]

The Internet has shown unprecedented growth in even the last decade and, as bandwidth and the availability of broadband services has expanded, the Internet has moved to replace existing print, audio, and audiovisual media.[100] The public now has access to free Internet TV on sites such as Hulu[101] and free Internet radio available on sites like Pandora.[102] Additionally, online music services like Zune Pass allow users to have access to an entire library of songs for a single monthly fee.[103] As more and more radio listeners tune out and begin spending their listening time with other media, radio has even fewer incentives to provide public services such as local news, community information, weather and emergency alerts, and so forth.[104] Furthermore, the great advantage of broadcasting is that it can reach a huge population simultaneously.[105] The utility of this system, therefore, declines proportional to its listenership.

Perhaps the most compelling evidence of the sharp decline in radio's utility is the data on radio's reach. Radio's prime spots—those times when stations have the most listeners—roughly correlate to the morning, lunch, and afternoon rush hours.[106] Radio's listenership increases the most when people are in their cars, where radio is typically the only form of entertainment available.[107] But audience

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President and CEO, Commonwealth Broadcasting Corporation); *FAQ*, *supra* note 48.

96. *See* ANDERSON, *supra* note 36, at 4–5.

97. *See* Lydia Boyd, *Brief History of the Radio Industry*, DUKE LIBRARIES, http://library.duke.edu/digitalcollections/adaccess/radio-tv.html.

98. *See id.*

99. *See* ARBITRON & EDISON RESEARCH, THE INFINITE DIAL 2010: DIGITAL PLATFORMS AND THE FUTURE OF RADIO 26, 28 (2010), *available at* http://www.arbitron.com/study/digital_radio_study.asp.

100. *See id.* at 11–16.

101. *About*, HULU, http://www.hulu.com/about.

102. *About Pandora*, PANDORA, http://www.pandora.com/corporate.

103. *Zune Music Pass*, ZUNE.NET, http://zune.net/en-US/products/zunepass/default.htm.

104. *See PRA Hearing, supra* note 2, at 143 (statement of Steven Newberry, President and CEO, Commonwealth Broadcasting Corporation).

105. *See* ANDERSON, *supra* note 36, at 5.

106. *See Radio's Weekly Reach by Daypart*, RADIO ADVERTISING BUREAU (Dec. 2010), http://www.rab.com/public/marketingGuide/dataSheet.cfm?id=2 (identifying that, in a given week, radio reaches 75.7% of people age 12 and over from 6:00 a.m. to 10:00 a.m., 82.9% of the same age group from 10:00 a.m. to 3:00 p.m., and 82% of that age group from 3:00 p.m. to 7:00 p.m.).

107. *See Radio Is in the Air . . . Everywhere*, RADIO ADVERTISING BUREAU (2011), http://www.rab.com/public/marketingGuide/dataSheet.cfm?id=18 (identifying that, on a typical weekday, 60.4% of people age eighteen or over listen to radio in their cars). In addition to the fact that there are radios in every car, the car is an environment where the lack of interactivity with the medium may be desirable. *See, e.g.*, 625 ILL. COMP. STAT. 5/12-

size is being eroded during these times as well. Subscription services to satellite radio like SiriusXM Radio[108] and the availability of cars that interface with smart phones and multimedia players like the iPod[109] have been lowering consumption of terrestrial radio even during these peak listening times.[110] Therefore, while radio is still undeniably useful to the American public, it certainly is not as important and influential a medium as it once was.

3. Free Promotion of Sound Recordings

The final, and most compelling, argument against a performance right for sound recordings is that terrestrial radio acts as free advertising for the record labels.[111] The thought is that the radio stations, by playing the songs on the radio, are introducing new albums and artists to the public.[112] As mentioned above, however, radio has become less prevalent over the years, and the newer services available have usurped some of these functions.[113] In particular, the GAO found that users of music are now more concerned with access than ownership,[114] and services such as Zune Pass allow for virtually unlimited legal access to music without buying individual albums or single songs.[115]

Additionally, a recent Arbitron survey shows that, while radio is still the first place listeners turn to in order to find new music, the Internet is becoming increasingly used for this purpose.[116] In addition to the on-demand services available online, social networks like Facebook and MySpace allow users to share what they are listening to with their friends and fellow users.[117] Zune's software

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610.2 (West. Supp. 2011) (prohibiting some types of cell phone use while driving).

108. *Corporate Overview*, SIRIUS SATELLITE RADIO, http://www.sirius.com/aboutus.

109. *See, e.g.*, *BMW + MP3*, BMW USA, http://www.bmwusa.com/Standard/Content/Owner/BluetoothYourBMW/iPod.aspx.

110. *See* ARBITRON & EDISON RESEARCH, *supra* note 99, at 27, 37–38.

111. *See, e.g.*, *PRA Hearing*, *supra* note 2, at 146–50 (statement of Steven Newberry, President and CEO, Commonwealth Broadcasting Corporation); *FAQ*, *supra* note 48.

112. *See PRA Hearing*, *supra* note 2, at 146–47 (statement of Steven Newberry, President and CEO, Commonwealth Broadcasting Corporation).

113. *See supra* notes 99–104 and accompanying text; *see also* ANDERSON, *supra* note 36, at 35–36.

114. In other words, when a user can digitally access a song, book, or movie whenever they want, it does not matter to him or her whether or not he or she has ownership over the tangible object. *See* GAO REPORT, *supra* note 11, at 9.

115. *See supra* note 103 and accompanying text.

116. *See* ARBITRON & EDISON RESEARCH, *supra* note 99, at 16 (finding that, among all listeners age twelve and older, 39% responded that they discover new music on the radio while 31% responded that they discover new music on the Internet; however, among twelve to thirty-four-year-olds, 32% responded that they discover new music on the radio compared to 52% who find new music on the Internet).

117. *See About Us*, MYSPACE.COM, http://www.myspace.com/Help/AboutUs ("Aimed at a Gen Y audience, Myspace drives social interaction by . . . connecting people to the music . . . that they love."); *Music on Facebook*, FACEBOOK.COM, http://www.facebook.com/Music#!/Music?v=info (noting that users can now "[l]et [their] content spread virally through user interactions with [their] Page[s]" allowing bands to link up with their listeners and "[s]howcase new releases").

also allows for the creation of music "profiles" for users,[118] and iTunes's recently released social network called Ping allows for similar sharing.[119] Finally, Pandora users create "stations" based on a song or artist that they like and the service, using musical traits or "genes," delivers songs to the user that are similar to the song, artist, or genre that the user specified.[120] Unlike terrestrial radio, however, all of these services have to pay royalties to the owner of the sound recording's copyright.[121]

There are clearly many resources for members of the public looking for new music, but how does radio actually affect sales? The GAO's report only found that the link between terrestrial radio airtime and album or single sales was inconclusive.[122] Specifically, the GAO found that album sales were highest in the first week of the album's release and that sales dropped off sharply thereafter regardless of whether airplay increased or decreased in the weeks following the album's release.[123] Additionally, the top ten broadcast markets showed "no consistent pattern between the cumulative broadcast radio airplay and the cumulative number of digital single sales" in a study of twelve songs of different styles and ages.[124] Furthermore, there is no way to effectively track the piracy of

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118. *See Join the Social*, ZUNE.NET, http://www.zune.net/en-US/promotions/jointhesocial/default.htm ("Explore what your friends are listening to, mark your favorite songs, and send a message to your friends.").

119. *See Ping*, APPLE, http://www.apple.com/itunes/ping ("Follow your friends. Find new music.").

120. *See The Music Genome Project*, PANDORA, http://www.pandora.com/mgp.shtml ("Taken together these genes capture the unique and magical musical identity of a song - everything from melody, harmony and rhythm, to instrumentation, orchestration, arrangement, lyrics, and of course the rich world of singing and vocal harmony. It's not about what a band looks like, or what genre they supposedly belong to, or about who buys their records - it's about what each individual song sounds like."). Pandora also allows individuals and bands to submit music to them to be analyzed and added to their catalogue, allowing artists to self-market themselves without a record label. *See How Do I Submit Music or Comedy to Be Considered for Pandora?*, PANDORA, http://blog.pandora.com/faq/contents/31.html.

121. *See* Digital Performance Right in Sound Recordings Act of 1995, Pub. L. No. 104-39, 109 Stat. 336 (codified in scattered sections of 17 U.S.C.). Digital performances alone generate large revenues, though they pale in comparison to the amounts that would be realized from royalties from terrestrial broadcast radio. For example, in 2009 alone, SoundExchange—the organization responsible for collection and distribution of the royalties collected under the DPRA—reported distributing more than $155 million in royalties. SOUNDEXCHANGE, SOUNDEXCHANGE DRAFT ANNUAL REPORT FOR 2009 PROVIDED PURSUANT TO 37 C.F.R. § 370.5(d), at 6, *available at* http://soundexchange.com/wp-content/uploads/2010/03/2009-Annual-Report-PDF-3-30-10_PRE-AUDIT.pdf.

122. *See* GAO REPORT, *supra* note 11, at 16, 18.

123. *See id.* at 18. Additionally, other media—such as club DJs, television, and other outlets—significantly affected sales. *Id.* at 18–19 (detailing that the week after The Who performed during the 2010 Super Bowl Halftime Show saw increases of digital sales of their songs played from 223% to 329% and then decreases during that same week despite receiving only a 4.5% increase in air time on terrestrial radio).

124. *Id.* at 16–17 ("[A] recently released Latin song was played on broadcast radio over 4,600 times but sold less than 1 digital single per spin. In contrast, an R&B/Hip Hop song

that music in order to gauge album popularity due to radio play that did not result in sales for the industry.[125]

One additional study is worthy of note. In 2007, Professor Stan Liebowitz conducted a study which found that radio play, rather than promoting the sale of sound recordings, was actually acting as a substitute for recording sales.[126] Professor Liebowitz found that, generally, music listening is divided into two categories: "specific" (where the listener wants to hear one or many specific songs) and "nonspecific" (where the listener wants to listen to music in general or, perhaps, a specific genre, but not any song in particular).[127] Of the two, nonspecific listening is the more prevalent use of music, and radio is a substitute for nonspecific listening to recorded music.[128] However, Professor Liebowitz does point out that his data did not track the sales of specific songs, but rather the total sales of music in the largest radio markets.[129] Even so, terrestrial radio obviously has an effect—positive or negative—on the sale of the songs that are played. Moreover, it is equally obvious that new media formats and new forms of music dissemination spurred by the advance of the Internet are likely to continue to supplant terrestrial radio's role as a marketing tool for new music.

III. THE FUTURE OF MUSIC AND RADIO

Regardless of how this Act, or any other, changes the landscape of U.S. copyright law, demand for music is unlikely to stay still or decrease. Rather, it is far more likely that technological increases will allow music to pervade our lives to ever increasing degrees.[130] Moreover, a basic concept upon which our market-based economy is built is that people will pay for that which they find valuable, and when supply decreases and demand stays constant or increases, they are willing to pay more.[131] As discussed previously, this economic argument is of major constitutional

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released more than 9 years ago received fewer than 1,100 spins but sold almost 13 digital single sales per spin.").

125. *See id.* at 21.

126. *See* Stan J. Liebowitz, *Don't Play it Again Sam: Radio Play, Record Sales, and Property Rights* 7 (Univ. of Tex. at Dall. Sch. of Mgmt., Working Paper, 2007), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=956527.

127. *Id.* at 8.

128. *Id.* at 9. In fact, radio is so frequently substituted for music recordings that one study found that in 2003, the average American spent five times more time listening to the radio than to a music recording. *Id.* at 7; *see also id.* at 29–30 (noting that sales of recordings fell drastically when network radio was introduced in the mid-1920s).

129. *See PRA Hearing*, *supra* note 2, at 51–52 (testimony of Stan Liebowitz, Ph.D., Ashbell Smith Professor of Managerial Economics, University of Texas at Dallas). In his report, Professor Liebowitz also mentions that, in the specific listening market, radio may have a positive effect on sound recording sales, but cautions that this is the lesser use of music. Liebowitz, *supra* note 126, at 10.

130. Even twenty years ago, the prospect of having a soundtrack for your entire day on a single device smaller than your wallet that you could listen to in the car, on the bus, at work, or while walking down the street would have seemed ludicrous. Not even a Walkman or portable CD player offered the same kind of portability and access to large volumes of music offered by mp3 players.

131. This very basic tenet of economics is taught in the most elementary economics

concern due to the fact that U.S. copyright law is ensconced in the U.S. Constitution's grant of a monopoly over copyrighted works.[132] This forms the foundation for the remainder of this Note.

A. The Future of Radio

If a performance right in sound recordings is enacted, the National Association of Broadcasters claims that radio stations will be bankrupted or forced to change to new, non-music formats.[133] Operating on the assumption that those who find radio valuable will be willing to pay for it, however, the future of radio looks very different. In particular, we will see new advances in radio that have been a long time in the making, and as radio is replaced by other media, radio stations may become more specialized or attain new business models.

1. Sound Quality and Substitution

One of the rationales for the discrepancy between digital service and broadcast royalty rate requirements is the difference in sound quality available from one medium to the other.[134] Digital services broadcast at or near to CD quality,[135] raising the possibility that a listener can or would completely bypass buying an album by recording directly from the digital stream.[136] Sound quality, then, becomes somewhat of a liability for the radio stations. However, the technology already exists for radio stations to broadcast digital signals along their existing slivers of the electromagnetic spectrum and, in fact, many stations are already doing so and tapping into the market for high definition, or "HD," radio.[137] If a

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courses. *See* TOM GORMAN, THE COMPLETE IDIOT'S GUIDE TO ECONOMICS 70–71 (2d ed. 2011).

132. *See supra* notes 7–9 and accompanying text.

133. *See supra* Part II.B.1.

134. *See The Digital Performance Right in Sound Recordings Act of 1995: Hearing on H.R. 1506 Before the Subcomm. on Courts & Intellectual Prop. on the Judiciary*, 104th Cong. 1 (1995) [hereinafter *DPRA Hearing*] (testimony of Jason Berman, Chairman and Chief Executive Officer, Recording Industry Association of America), *available at* http://judiciary.house.gov/legacy/489.htm ("With new digital technology, a transmission service, simply by acquiring a single copy of a compact disc, can deliver CD-quality sound electronically to millions of homes and cars . . . .").

135. *Id.*

136. *Cf. HD Radio*, FUTURE OF MUSIC COALITION, http://futureofmusic.org/article/fact-sheet/hd-radio. The other concern, as expressed by Mr. Berman, was that an on-demand digital distribution system could completely replace sound recording sales without ever having to pay any royalties. *DPRA Hearing*, *supra* note 134 ("[T]he advent of on-line electronic delivery services, what some have called 'audio on demand' or the 'celestial jukebox,' which will enable consumers to select music to listen to at their convenience without ever buying the compact disc or ever having to make an actual copy.").

137. iBiquity Digital Corporation, a pioneer in the field of HD radio technology, lists that more than 2000 stations (and growing) currently broadcast in HD. *See HD Radio Stations*, HD RADIO, http://www.hdradio.com/find_an_hd_digital_radio_station.php. The National Association of Broadcasters has also been working to increase the number of stations adopting HD Radio. *See Innovation in Radio*, NAT'L ASS'N OF BROADCASTERS,

performance right was granted to sound recordings, the incentive may exist to further increase radio technology because the stations are already paying the requisite royalty and need not fear further effects of the increased sound quality.

In addition to the sound quality benefits of digital radio signals, digital signals are more robust. They are less likely to bleed through into adjacent frequencies.[138] Typically, the first two, and sometimes three, adjacent radio frequencies to an established station must be left clear in order to avoid any interference.[139] Digital signals, on the other hand, could be run directly adjacent to one another without any fear of interference.[140] Additionally, multiple broadcasts could be run on a single frequency—similar to digital TV broadcasting—freeing up the limited electromagnetic spectrum for additional radio channels or for other purposes.[141] Because of the limited nature of the electromagnetic spectrum,[142] freeing up more of the spectrum is financially and technologically beneficial and is necessary in order to increase the number of wireless services and technologies available to the public.[143] In addition to the prospect of digital technology freeing portions of the electromagnetic spectrum, the elimination of struggling radio stations at the margins will free up additional space on the spectrum and allow more access either to those stations attempting to enter the market or for other wireless applications (assuming, of course, that portions of the spectrum are indeed reassigned or sold off). While not directly related to U.S. copyright scheme, the availability of

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http://www.nab.org/radio/innovation.asp ("The cost savings for NAB members of any size can be upwards of $10,000 per station due to NAB's early investment in this advanced transmission technology."). Additionally, HD Radio is being incorporated into automobiles and allows pausing, rewinding, and recording of live digital terrestrial broadcast music streams. *See HD Radio*, *supra* note 136. However, this functionality is already drawing criticism from the recording industry. *See id.* ("The RIAA has urged the FCC and Congress to impose a mandatory 'broadcast flag' — a bit of code embedded in songs and 'read' by HD radio receivers — on HD radio content. Songs that were "flagged" would not be downloadable to a hard drive.").

138. *See* Fed. Commc'ns Comm'n, *Digital Radio – The Sound of the Future*, FED. COMM. COMMISSION, http://www.fcc.gov/cgb/consumerfacts/digitalradio.html [hereinafter *Digital Radio*]; *HD Radio*, *supra* note 136.

139. *See HD Radio*, *supra* note 136.

140. *See Digital Radio*, *supra* note 138; *HD Radio*, *supra* note 136.

141. *See Digital Radio*, *supra* note 138; *HD Radio*, *supra* note 136. This would be substantially similar to the digital television transition undertaken in 2009 which resulted in large swaths of spectrum being freed for use in telecommunication. *See* Fed. Commc'ns Comm'n, *Frequently Asked Questions: The Digital Transition*, DTV.GOV, http://www.dtv.gov/consumercorner.html.

142. Because there is a limited range of frequencies and different applications require different "bandwidths"—ranges of frequency generally set by the size of the information payload to be delivered—the FCC regulates the airwaves in order to maximize the efficiency of the spectrum's use, generally trying to maximize public benefit. *See* Nat'l Broad. Co. v. United States, 319 U.S. 190, 216 (1943) ("The 'public interest' to be served under the Communications Act is thus the interest of the listening public in 'the larger and more effective use of radio.' The facilities of radio are limited and therefore precious; they cannot be left to wasteful use without detriment to the public interest." (citation omitted)); *see also* JERRY KANG, COMMUNICATIONS LAW AND POLICY: CASES AND MATERIALS 80–83 (3d ed. 2009).

143. *See Nat'l Broad. Co.*, 319 U.S. at 216.

bandwidth on the electromagnetic spectrum is, nonetheless, an important matter of public policy under the purview of the Federal Communications Commission (FCC).[144] Moreover, allowing greater access to the electromagnetic spectrum by the public or for the public benefit is an important goal of the FCC.[145]

2. New, Competing Technologies

Whether or not a performance right is granted to sound recordings, it seems likely that technology will continue to allow users more access to music on demand at any place and time of the user's choosing. On a personal music device, there are no—or at least fewer—ads to listen to, and the music can be chosen and customized as the listener wants. This alone makes radio unattractive by comparison: there is no DJ talking about celebrity gossip, there is no obnoxious commercial trying to get you to buy a car from "John's Junkers,"[146] and if you want to know the news or weather, "there's an app for that."[147]

As the number of options for all-in-one devices that offer Internet, music, video, and phone service;[148] the availability of subscription and subscription, access-based services;[149] and higher quality, specialized radio increases, it is likely that people's attention will be taken further from their standard radios.[150] Other entertainment outlets—for example, television—are also struggling with similar issues. However, the current radio industry is unlikely to keep up in the same way that television is now fighting to keep the attention of its viewers.[151] TV and radio are different by the very nature of their programming: TV viewers can only see a certain show at certain times—absent the ability to record the program and watch it later—while radio listeners generally hear the same songs or genre broadcast repeatedly on their favorite music radio station without much choice or difference in either the

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144. *See supra* note 142 and accompanying text.

145. *See Nat'l Broad. Co.*, 319 U.S. at 216.

146. Although some listeners may actually enjoy ads and DJ banter. *See* Liebowitz, *supra* note 126, at 8. Additionally, it should be noted here that John's Junkers was created as an example and any relation to any current or past establishment by the same or similar name is entirely coincidental.

147. The phrase "there's an app for that" was at the heart of an advertising campaign for the Apple iPod and iPhone—by promoting the mobile applications they provided—and was trademarked by Apple, Inc. THERE'S AN APP FOR THAT, Registration No. 3,884,408.

148. *See* ARBITRON & JACOBS MEDIA, GOIN' MOBILE: THE IMPACT OF SMARTPHONES ON AMERICAN LIFE 3 (2010), *available at* http://www.arbitron.com/downloads/Goin_Mobile_Exec_Summ.pdf.

149. *See supra* notes 103, 108 and accompanying text.

150. *See* ARBITRON, *supra* note 99, at 3, 11, 76–77.

151. Television stations have been offering their content online and have changed their advertising strategies both online and offline. *See* Stuart Elliott, *Trying to Keep the Viewers When the Ads Come On*, N.Y. TIMES, May 14, 2007, at C1. Because radio is such a mobile medium, it is unlikely that it will be able to offer the same interconnectivity, at least until more mobile devices offer both Internet and radio capabilities. *See* ARBITRON, *supra* note 99, at 63, 64, 66–70; *cf.* Elliott, *supra* note 151, at C1. Moreover, those listeners who are tuning in on the web are increasingly turning to Internet radio rather than online simulcast streams of terrestrial radio stations. *See* ARBITRON, *supra* note 99, at 23–24.

programming or the scheduling.[152] However, even broadcast genre-based stations will have difficulty competing against services like SiriusXM Radio, which has a huge range of programming as well as channels that are available nationwide, eliminating a need to worry about losing a radio signal or having to look for a new station.[153]

To truly compete with new devices and new media, radio stations will likely have to change the way they select their programming or the way they offer their programming. It is certainly not outside the realm of possibilities to start offering on-demand radio services, especially with some of the technological advances in digital broadcasting that have already been realized.

3. If Radio Is Valuable, People Will Pay for It

As discussed in the opening to Part III, people will pay for what they find valuable.[154] Radio broadcasters have claimed that they offer valuable services to the recording industry, to their advertisers, and to the public at large.[155] On the other hand, people are flocking to the Internet and new media in droves and threatening terrestrial stations' bottom lines.[156] If Congress passed a law granting sound recordings a performance right, there would certainly be additional costs imposed on radio stations;[157] but would this really destroy radio as we know it? Not if people are willing to pay for it.

If advertisers find radio advertising valuable, they should be willing to pay more for it. This means that, theoretically, when stations are forced to sink or swim, advertisers will probably be willing to pay increased rates for their advertising spots if stations are forced to increase their advertising rates. Moreover, advertisers on stations that sink will likely move to stations that have not closed their doors, increasing revenues naturally for those stations still afloat.

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152. *See* ARBITRON, *supra* note 99, at 22. *But see supra* Part III.B.1.

153. *See Corporate Overview*, *supra* note 108; *see also* Letter from Mel Karmazin, CEO, SiriusXM Radio Inc., to SiriusXM Stockholders (Apr. 21, 2010), *available at* http://investor.siriusxm.com/common/download/download.cfm?companyid=SIRI&fileid=366184&filekey=EF741909-023A-4EB8-9F1C-3E8CDA7E2F8A&filename=SIRIUS_XM_Annual_Report_Proxy_2009.pdf (detailing that, in 2009, SiriusXM had 18.8 million subscribers and "was the only major U.S. radio company to grow revenues" with a four percent revenue increase to $2.53 billion); ARBITRON, *supra* note 99, at 74 (indicating that 27% of those surveyed thought satellite radio had a "big impact" on their lives, while only 22% responded that local terrestrial radio had a "big impact" on their lives); Liebowitz, *supra* note 126, at 9 ("[A]n individual would need to spend an inordinate amount of time listening to radio before even one desired song was played, to say nothing of a larger collection of songs (note that this is somewhat less true for satellite radio which sometimes has a station devoted to songs from but a single artist, e.g., the Elvis Presley or Bruce Springsteen stations on Sirius Satellite Radio).").

154. *See supra* note 131 and accompanying text.

155. *See supra* Part II.B.2.

156. *See* GAO REPORT, *supra* note 11, at 11–12; ARBITRON, *supra* note 99, at 3.

157. GAO REPORT, *supra* note 11, at 21.

However, many potential advertisers avoid radio because they believe or have found in the past that radio does not give them the desired results.[158] Many of these entities may have tried to advertise on radio in the past and simply selected the station that will give them a spot for the lowest price without assessing the potential audience at that time on that station.[159] If these businesses had instead selected stations that played to audiences similar to their own consumers, they would have seen higher returns on their investments, even if they had to pay more for their advertising.[160] Therefore, where the marginal stations shut down and push advertisers onto more popular stations, the effect would be mutually beneficial for both the surviving radio stations and for their advertisers, even at higher advertising rates.[161]

Similarly, the public may be willing to pay for radio if they find it to be a valuable resource for news, information, and music.[162] National Public Radio and its member stations have operated on a budget largely consisting of listener donations and corporate underwriting for years.[163] If radio stations begin going off the air left and right, communities that are underserved may be willing to pay for their terrestrial radio through some system of direct donations.[164]

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158. *See* VICTOR PROOTH, "RADIO ADVERTISING DOES NOT WORK." SAYS WHO? 33 (2006); *see also* MARC G. WEINBERGER, LELAND CAMPBELL & BETH BRODY, EFFECTIVE RADIO ADVERTISING vii, 9–10, 32–34 (1994).

159. *See* PROOTH, *supra* note 158, at 33; *cf.* WEINBERGER ET AL., *supra* note 158, at 32 ("One criticism sometimes directed toward radio is its fragmented reach. However, fragmentation is radio's greatest strength because fragmentation *is* targetability." (emphasis in original)).

160. *See* PROOTH, *supra* note 158, at 33, 129–32; *cf.* ELIZABETH J. HEIGHTON & DON R. CUNNINGHAM, ADVERTISING IN THE BROADCAST AND CABLE MEDIA 231–34 (1984) (providing examples of radio station rate cards and the correlation between the audience and the price of the spot).

161. That is to say, if the advertisers continued to advertise on radio, and assuming that the more popular stations cater to their intended demographics, they may have to pay the higher price to advertise on more popular radio stations, but they will also see an increased return on their investments. *See* PROOTH, *supra* note 158, at 33; *cf.* WEINBERGER ET AL., *supra* note 158, at 18–19, 22–23, 34–35 (pointing out radio's targetability, cost efficiency, and value-added potential).

162. Especially given that, as supply dwindles with no change in demand, consumers should be willing to pay higher prices. *See* GORMAN, *supra* note 131, at 70–71.

163. *See About NPR: Public Radio Finances*, *supra* note 30 (noting that 32.1% of public radio member station revenue in 2008 came from individual contributions and 21.1% of member station revenue came from business sponsorship).

164. It is difficult to imagine people paying for a service that had been free and, if radio is not valuable enough to pay for, then it may be that radio will eventually cease to exist. However, the fact that people are willing to pay for NPR now when a majority of radio stations are free suggests that some radio is valuable enough for the public to open its collective wallet if need be. *See id.*; *cf.* ARBITRON, *supra* note 99, at 59 (indicating 51% of those surveyed said they would be "very disappointed" if their favorite radio station went off the air). *But see* Frega, *supra* note 37, at 367 ("In light of the current economic recession, public radio stations are experiencing a decline in donations received during pledge drives."). Also consider that, as with advertisers, as marginal stations go off the air, listeners will be funneled to other stations. This increases the potential donor pool for those stations.

In addition to the financial benefits for the radio stations, users should begin to see benefits from a subscription/donation radio business model as well. In television, cable networks are generally more likely to provide programming that is satisfactory to their viewers than are broadcast networks because cable networks are supported by subscriptions as well as advertisers.[165] Whenever a television subscriber is unhappy with a network's programming, or with cable programming in general, he or she is free to cancel his or her subscription and immediately affect the bottom line of the cable company.[166] In stark contrast, broadcast TV programming is dictated solely by its advertisers.[167] If programming is unsatisfactory to viewers, they will tune out and, over time, advertisers will notice and pay for advertising spots on different programming.[168] Therefore, market forces react much more quickly on subscription-model services than on broadcast-model services. Theoretically, switching to a business model directly incorporating listener money would help both the financial health of the radio stations and their utility to the public through the increased accountability tied to the listeners' dollars.

Recall two of the broadcaster concerns detailed in Part II.B: (1) in order to avoid the financial hardships associated with royalty payments, some radio broadcasters may be forced to switch to a non-music format,[169] and (2) the loss of broadcast radio would lead to a loss of services that are important to the public.[170] Changing

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165. *See* Project for Excellence in Journalism, *Economics: Cable TV*, STATE OF THE MEDIA, http://stateofthemedia.org/2010/cable-tv-summary-essay/economics/.

166. *Cf. id.* (noting that a poll found "that 35% of people who watch[ed] video online said they might cancel their cable subscriptions within five years" and that, "[n]ot coincidentally, Comcast launched Fancast Xfinity TV, an online service for its subscribers . . . . [which] allows subscribers to watch cable TV content online").

167. *See* Project for Excellence in Journalism, *Economics: Network TV*, STATE OF THE MEDIA, http://stateofthemedia.org/2010/network-tv-summary-essay/economics/ ("'In broadcast television, we are competing against a business model,' said one network executive. 'Our evening newscast beats all the cables combined at 6:30 and even in prime time. But we don't have those subscription fees.'" (quoting a network executive)).

168. Obviously, the process takes much longer because it takes time for program ratings and revenues to filter back to the advertisers, to be correlated, and to result in a decision to spend advertising dollars on a different station or program. *See* Brad J. Bushman & Colleen M. Phillips, *If the Television Program Bleeds, Memory for the Advertisement Recedes*, 10 CURRENT DIRECTIONS IN PSYCHOL. SCI., no. 2, Apr. 2009 at 45 ("The bottom line—profits—really determines what programs are shown on television. If advertisers refused to sponsor them, violent TV programs would become extinct. According to former CBS Programming Chief Jeff Sagansky, 'The number one priority in television is not to transmit quality programming to viewers, but to deliver consumers to advertisers. . . .'"); *see also* Project for Excellence in Journalism, *Economics: Local TV*, STATE OF THE MEDIA, http://stateofthemedia.org/2010/local-tv-summary-essay/economics/ (detailing that on-air advertising "represent[s] nearly $9 out of every $10 of revenues" for local stations); Project for Excellence in Journalism, *Economics: Network TV*, *supra* note 167.

169. *See supra* note 86; *PRA Hearing*, *supra* note 2, at 143 (statement of Steven Newberry, President and CEO, Commonwealth Broadcasting Corporation) ("So what are my options? . . . Do I move to a nonmusic format which will have the effect of playing less music, which will ultimately harm the performers?").

170. *See supra* Part II.B.2; *PRA Hearing*, *supra* note 2, at 143 (statement of Steven

to a non-music format would decrease station revenues to the tune of about $225,000 per year, on average.[171] However, if switching to a nonmusic format means incorporating more news and talk programming, and that programming—news and weather especially but, to an extent, talk and sports as well—is considered "community affairs programming,"[172] then switching to a nonmusic format should increase the utility of the station to the listeners. While this would not increase the revenue of the station in terms of advertising dollars,[173] the increased utility to the public may translate into increased public contributions, assuming of course that these contributions became part of the broadcast radio business model.

Therefore, should Congress implement a performance right for sound recordings, the benefits on the public are twofold. The new copyright scheme should increase artists' revenue, thereby increasing the amount of new and novel music available to the public. Furthermore, the resulting shifts in the radio industry—changes to funding models, technological increases, and programming—will increase the utility of the electromagnetic spectrum, of radio in the public's daily lives, and in radio programming quality overall. However, the broadcasters will not be changing alone. The future of the recording industry is uncertain under any copyright regime, and there will likely be changes in recording label business models as well.

B. The Future of Recording

What if a performance right for radio broadcasts is not enacted? The recording industry has operated for nearly a century without enjoying a performance right in sound recordings. Consequently, it is highly unlikely that the entire industry will fail on the outcome of this legislation alone. As it has become possible to take music everywhere with us, it has only become more important in the everyday lives of Americans. Operating under the assumption that the public is willing to pay for the music it finds valuable—an assumption that has nonetheless been called into question with the rampant file sharing of the early 2000s[174]—music production will certainly continue.

1. The Decline of the Recording Industry

The current state of decline in the recording industry and the rise of music piracy over the Internet seem to contradict the premise of this Note: that the public

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Newberry, President and CEO, Commonwealth Broadcasting Corporation) ("So what are my options? Do I reduce the community affairs programming, including essential news and weather service in times of emergency, because I cannot reduce my electric bill?").

171. *See* GAO REPORT, *supra* note 11, at 12.

172. *See supra* note 170.

173. Since we know music stations generate more revenue now. GAO REPORT, *supra* note 11, at 12.

174. *See* Universal Studios v. Corley, 273 F.3d 429, 442–43 (2d Cir. 2001) ("[T]he excitement of ready access to untold quantities of information has blurred in some minds the fact that taking what is not yours and not freely offered to you is stealing.").

is willing to pay for music.[175] It is no secret that massive file sharing has led to an unaccountable loss in album sales for the industry.[176] However, there are those who blame the music industry itself for the problems it now faces.[177]

For years, the music industry operated in a manner that forced music lovers to buy a full album that had, at best, two or three tracks the listener actually wanted.[178] The other ten or so tracks were essentially worthless to the buyer, unless the album was some sort of compilation of "Greatest Hits."[179] File sharing allowed users to only get the songs they actually wanted and avoid paying the markup for the rest of the music—or, for that matter, without paying for anything at all. Rhapsody and similar music services operate, and have thrived, under a business model that allows single songs to be downloaded for far less than the whole album.[180] Therefore, in a buyer-friendly market, it seems that the public *is* more than willing to pay for its music.[181]

2. Technological Increases Will Lower the Production Costs for Music

Finally, the music industry largely benefits—and will continue to benefit—from technological advances. The ability to transfer music to end users through digital downloads significantly decreases the production costs of pressing physical CDs, storing them, and shipping them to retailers.[182] If the recording industry embraces these low cost production and distribution methods, they may be able to produce

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175. *See* THE RECORDING INDUS. ASSOC. OF AM., 2008 CONSUMER PROFILE, *available at* http://76.74.24.142/8EF388DA-8FD3-7A4E-C208-CDF1ADE8B179.pdf.

176. *See* GAO Report, *supra* note 11, at 21.

177. *See* Brian Hiatt, Evan Serpick, Steve Knopper & Nicole Frehsée, *The Record Industry's Slow Fade*, ROLLING STONE, Jun. 28, 2007, at 13–14 ("'The record companies have created this situation themselves,' says Simon Wright, CEO of Virgin Entertainment Group . . . . [M]any in the industry see the last seven years as a series of botched opportunities.").

178. *See* PASSMAN, *supra* note 42, at 378.

179. *See id.* at 110.

180. *C.f.* ANDERSON, *supra* note 36, at 6–10.

181. Another oft-cited argument for the sudden drop in album sales was the end of the "replacement period" of music sales, that is, a period of artificially inflated sales due to older music lovers replacing their vinyl or tape libraries with CDs. *C.f.* FELIX OBERHOLZER-GEE & KOLEMAN STRUMPF, FILE-SHARING AND COPYRIGHT 16 (2009), *available at* http://www.nber.org/chapters/c11764.pdf. The music industry has largely refuted this argument and claims that the loss in sales was due to music piracy. *See* Hiatt et al., *supra* note 177, at 13. Though the near impossibility of tracking the extent of online music piracy makes it almost impossible to ascertain just how much of the decline may be attributable to the replacement theory. Professors Oberholzer-Gee and Strumpf found in their Harvard study that piracy did not have as great an effect on decreases in music sales as was previously thought. OBERHOLZER-GEE & STRUMPF *supra*, at 1, 16 (noting that piracy accounts for only 20% of the music industry's decline in sales); *id.* at 5 (noting that 80% of those surveyed said they bought at least one album after sampling the album on a file-sharing network); *id.* at 24–25.

182. *Cf.* ANDERSON, *supra* note 36, at 18–29.

and disseminate albums and singles even more rapidly than they do today and further increase their profits.

Even without the royalty provided by a performance right for sound recordings, record labels now have the unprecedented ability to store music in digital form and reproduce it on demand in real time.[183] Never before, and in almost no other industry, is just-in-time production so perfectly executed.[184] In fact, recent research has shown that the ability to offer such a large variety of products to consumers, even in very small quantities, can add up to millions in profits: the so-called "long tail."[185] If recording labels were to fully embrace these markets, and offer music more on the terms of their end users, they may be able to cash in on the investment rather than squander money in lawsuits against the very people they hope will buy their music.[186]

CONCLUSION

A performance right for sound recordings is not a panacea capable of curing all the recording industry's problems; neither is it the harbinger of death for terrestrial radio broadcasters. The Act was an important step toward unifying a bifurcated system of music copyright that has inexplicably lasted more than a century. The sky will not fall on either industry solely on the existence of a performance right for sound recordings. However, from an economic and legal standpoint, a performance right just makes sense. Its mutual benefits to the broadcast industry, recording industry, artists, and public are undeniably justified.

For the recording industry, the right represents an increase in royalty payments to both the recording artists and sound recording copyright owners. The new revenue stream will lighten their financial burdens and may create incentives to increase innovations by encouraging artists to create and encouraging recording

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183. *See id.* at 7.

184. Just-in-time production is a theory in business where products are created just-in-time for them to be ordered, thereby reducing product overproduction, as well as the costs associated with storing and selling excess products. *See* GEMBA RESEARCH, JUST IN TIME PRODUCTION (2002), *available at* http://www.gemba.com/uploadedFiles/justintimeproduction%281%29.pdf.

185. In an oversimplified example, selling 5000 albums from a superstar artist is just as profitable for a digital download service as selling five albums each from 1000 virtually unknown artists. *See* ANDERSON, *supra* note 36, at 24 ("[T]hese millions of fringe sales are an efficient, cost-effective business. . . . [A] niche product sold is just another sale."). For such a model to work, there must be a demand for these fringe artist and, implausibly, there is. *See id.* at 25–26 (detailing that more choice "reveals latent demand"); *id.* at 7 (noting that 98% of the 10,000 tracks available on Ecast sold at least one track per quarter).

186. *See Music Industry Drops Bid to Sue Song Swappers*, BOS. GLOBE (Dec. 20, 2008), *available at* http://www.boston.com/business/articles/2008/12/20/music_industry_drops_bid_to_sue_song_swappers/ ("Because of high legal costs for defenders, virtually all of those hit with lawsuits settled, on average for around $3,500. The association's legal costs, in the meantime, exceeded the settlement money brought in."). However, the recording industry has pressed on with those suits still in progress. *Id.*; *see also* Maverick Recording Co. v. Harper, 598 F.3d 193 (5th Cir. 2010), *cert. denied*, 131 S. Ct. 590 (2010).

labels to sign newer, untested artists. The benefits of such a system, ultimately, will be enjoyed by the purchasing and/or listening public.

While not directly benefitting the radio industry, the performance right will push changes on the radio industry that will be beneficial to the listening public. By forcing weaker stations at the margins to close their doors, advertisers and listeners will consolidate into stations that are more robust, resulting in a mutual benefit to the surviving stations and the listeners. Moreover, if the listening public finds the struggling stations valuable, they may be willing to pay directly to keep those stations on the air, mutually benefitting each party as the radio stations are held afloat by the listeners' contributions and are, thus, more accountable to their listeners for the programming that they offer. The result is likely a leaner, more consolidated, and more advanced radio industry.[187]

Therefore, a performance right for sound recordings represents more than a simple shifting of wealth; it is a greater push toward recognition of a full right to control the performance of sound recordings. It is in the best interests of artists, copyright owners, the future health of the radio industry, and, most importantly, the American listening public.

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187. When it comes to mass media outlets, consolidation may generally be seen as a negative (fewer outlets means less variety in the messages and viewpoints expressed). However, the donation scheme proposed by this Note could, at least in theory, effectively force stations to cater to as wide an audience base as possible. Therefore, no station thus supported has an incentive to subscribe to any one narrow viewpoint (except, perhaps, in geographic areas where a single viewpoint is prevalent). Additionally, while it is not the focus of this Note, it is worth pointing out that the Internet currently allows mass dissemination on a previously unprecedented scale, ensuring that the voice of even the smallest minority is not silenced. *See* ANDERSON, *supra* note 36, at 98–99 (noting that the "ants [now] have megaphones").