



School of Law
UNIVERSITY OF GEORGIA

Journal of Intellectual Property Law

Volume 17 | Issue 2

Article 9

March 2010

The Performance Rights Act and American Participation in International Copyright Protection

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Recommended Citation

Jennifer L. Pridgeon, *The Performance Rights Act and American Participation in International Copyright Protection*, 17 J. INTELL. PROP. L. 417 (2010).

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THE PERFORMANCE RIGHTS ACT AND AMERICAN PARTICIPATION IN INTERNATIONAL COPYRIGHT PROTECTION

*Jennifer Leigh Pridgeon**

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I. INTRODUCTION

Beyond the fairness that this bill provides for performers, we have an opportunity to show the rest of the world that the United States practices what it preaches in protecting intellectual property For the past 70 years Congress has ignored the constitutional mandate that we protect copyrights by completely exempting broadcasters from paying performers, while the vast majority of countries have no such exemption. Our ignorance of intellectual property rights on this issue is a worldwide embarrassment and it must end now.

- Representative Darrell Issa¹

On February 4, 2009 the Performance Rights Act of 2009 was reintroduced to both the Senate and House, proposing an amendment to the Copyright Act.² Under the current Copyright Act, terrestrial radio stations are not required to pay royalties to performers or producers when they play their songs.³ Only songwriters and publishers receive this type of compensation from radio stations.⁴ The bill proposes amending Title 17 of the United States Code to “provide parity in radio performance rights” by requiring terrestrial radio stations to pay royalties to the holders of copyrights in sound recordings when they play their songs.⁵ The passage of the Act has been a hotly contested issue in American copyright protection, with heated debate on both sides. Those against the bill, most notably the National Association of Broadcasters (NAB),⁶ argue (1) radio stations provide a free service for performers, (2) performance rights will harm broadcasters, (3) the rights will harm composers, (4) only record companies will benefit, and (5) better music is created without the performance rights.⁷ On the other side of the debate, those in favor of performance rights argue fairness and incentives to create as the primary reasons they support the extension of these rights.⁸

¹ Press Releases, Senator Patrick Leahy, Leahy Hatch Introduce Bipartisan Performance Rights Legislation: Companion Legislation Introduced Today in House (Feb. 4, 2009), http://leahy.senate.gov/press/press_releases/release/?id=de8bee22-9a3b-4a2d-b387-a9fde8b5228a.

² Performance Rights Act of 2009, H.R. 848, 111th Cong. (2009).

³ 17 U.S.C. § 106 (2002).

⁴ *Id.*

⁵ Performance Rights Act of 2009, H.R. 848, 111th Cong. (2009).

⁶ See Sunny Noh, *Better Late Than Never: The Legal Theoretical Reasons Supporting the Performance Rights Act of 2009*, 6 BUFF. INTELL. PROP. L.J. 83, 87 (2009) (blaming the failure of the bill’s 2007 version on the NAB and its supporters).

⁷ Emily F. Evitt, *Money, That’s What I Want: The Long and Winding Road to a Public Performance Right in Sound Recordings*, 21 No. 8 INTELL. PROP. & TECH. L.J. 10, 12 (2009).

⁸ *Id.* at 11.

While the extension of a public performance right to sound recordings has produced heated debate on both sides, one area that has not garnered much attention has been the potentially enormous effect such an extension would have in the realm of international copyright protection of American sound recordings. The nature of international protection of intellectual property creates a reciprocal system under which copyright holders of one country receive from other countries the protection their own country gives to the alien copyright holders.⁹ Hence, since the United States affords no performance right protection to foreign nationals, few foreign countries protect a performance right for American sound recording copyright holders.¹⁰ In finally recognizing a performance right in sound recordings the United States would not only bring American protection of sound recordings in line with international protection, demonstrating the commitment to international intellectual property protection it purports to have, it would also provide sound recording copyright holders the just compensation they deserve for domestic and worldwide broadcasts. Whether the Performance Rights Act is the proper remedy, however, is a more complex question. At the time of publication, the bill is currently awaiting a floor vote in the House.¹¹

This Note examines whether the time is right for the Performance Rights Act and whether the Act is a sufficient remedy to cure the current defects in the international protection of performance rights in American sound recordings. Part II.A.1 provides an overview of American copyright law from the initial bifurcation of musical compositions into musical works and sound recordings to the eventual limited protection of performance rights in digital sound recordings. Part II.A.2 looks at the arguments of both sides in the debate over the Performance Rights Act of 2009. Then, beginning with the Berne Convention and ending with the WIPO Performances and Phonograms Treaty, Part II.B provides an overview of the development of international copyright protection through a series of treaties. Part III begins with an examination of how an extension of copyright protection to a performance right in sound recordings is an appropriate and logical step in American participation in international copyright protection. Finally, Part III analyzes whether the proposed Performance Rights Act is the appropriate tool for such an extension.

⁹ See *infra* Part II.B.1.

¹⁰ See *infra* Part II.B.2.

¹¹ Performance Rights Act of 2009, H.R. 848, 111th Cong. (2009).

II. BACKGROUND

A. AMERICAN COPYRIGHT LAW

1. *History of Public Performance Rights in Sound Recordings.* The history of sound recording protection in the United States is a short one. United States law separates a musical recording into two pieces: the “musical work” and the “sound recording.”¹² A “musical work” includes the lyrics and notes of the song and is typically held by the songwriter or the publisher.¹³ A “sound recording” is the actual recording of the performance and is typically held by the performer himself or the producer—in most cases the performer’s music label.¹⁴ Musical works have long enjoyed performance right protection, while sound recordings receive little to no protection.¹⁵

The distinction between musical works and sound recordings derives from the 1908 case *White-Smith Musical Publishing Co. v. Apollo Co.*, in which the Court determined that perforated piano rolls were not “copies” of the musical composition since individuals could not look at the roll and reproduce the original musical composition.¹⁶ Congress codified this distinction in the Copyright Act of 1909.¹⁷ The 1909 Act implicitly adopted *White-Smith’s* “direct perception” requirement for copies, which prevents a copyright infringement case from being brought to protect the reproduction or performance of a sound recording, if one is not able to listen to a sound recording and directly perceive the underlying musical composition.¹⁸ The effect of the 1909 Act was to leave artists virtually unprotected from their works being reproduced or broadcast on the radio.

¹² 17 U.S.C. § 106 (2002).

¹³ See H.R. REP. NO. 94-1476, at 53–54 (1976), reprinted in 1976 U.S.C.C.A.N. 5, 5666–67 (noting that given the “settled meaning” of the term, Congress did not feel the need to define “musical work” in 17 U.S.C. § 101); see also Noh, *supra* note 6, at 88 (explaining that the musical work is normally owned by the songwriter or publisher).

¹⁴ 17 U.S.C. § 101 (2002) (defining a sound recording as a work that results from the “fixation of a series of musical, spoken, or other sounds . . . regardless of the nature of the material objects, such as disks, tapes, or other phonorecords, in which they are embodied”). See also Noh, *supra* note 6, at 88 (explaining that the sound recording is ordinarily owned by the artist himself or the artist’s label).

¹⁵ See *White-Smith Musical Publ’g Co. v. Apollo Co.*, 209 U.S. 1 (1908) (recognizing the protection of a musical work, but refusing to extend such protection to sound recordings).

¹⁶ *Id.* at 18.

¹⁷ Copyright Act of 1909, Pub. L. No. 60-349, 35 Stat. 1075 (codified as amended in scattered sections of 17 U.S.C.).

¹⁸ *Id.* § 1(e) (explaining that protection was only extended to prohibit infringements that would allow the infringer to create a mechanical reproduction of the work).

After the 1909 Copyright Act denied protection for sound recordings, artists turned to state common law to protect their interest with varied results. In *Waring v. WDAS Broadcasting Station, Inc.*,¹⁹ the Pennsylvania Supreme Court upheld a performer's right to protect a "novel intellectual or artistic" sound recording.²⁰ That Court, concluding that Plaintiff's claim was not recognized under then existing copyright law, found that there was no reason not to enforce a label on an artist's record reading "not licensed for radio broadcasting" regardless of the copyright protection in such a recording.²¹ The Court held, "first, the plaintiff had common-law rights of property in his orchestra's renditions of the songs, and, second, that there is no logical or practical reason why the restriction placed upon the use of the records should not be enforced in equity."²² Hence, the Court recognized a protectable state right in sound recordings.

However, three years later the Second Circuit Court of Appeals reached a different result, refusing to uphold a performer's interest in a sound recording. In *RCA Manufacturing Co. v. Whiteman*,²³ Judge Learned Hand, applying New York law, held that simply printing "not licensed for radio broadcast" was not sufficient to prevent radio stations from broadcasting the record after the record had been purchased. Additionally, Judge Hand found that the performers only retained their common law copyright if they neither sold nor distributed the recording.²⁴ Judge Hand's ruling on the common law copyright protection was ultimately overruled in *Capitol Records, Inc. v. Mercury Records Corp.*,²⁵ seemingly re-opening the door for protection of sound recordings. However, the value of these state rights was minimal since they could only be enforced state by state.²⁶

It was not until sixteen years later in 1971 that United States copyright law finally recognized any protectable interest in sound recordings with the Sound Recordings Act (SRA).²⁷ While the SRA did recognize sound recordings as a protectable interest, the law was aimed solely at preventing the economic benefits being gained by the unauthorized duplication and piracy of sound recordings and failed to provide a performance right in sound recordings.²⁸

¹⁹ 194 A. 631 (Pa. 1937).

²⁰ *Id.* at 635.

²¹ *Id.* at 638.

²² *Id.*

²³ 114 F.2d 86 (2d Cir. 1940), *cert. denied*, 311 U.S. 712 (1940).

²⁴ *Id.* at 88–89.

²⁵ 221 F.2d 657 (2d Cir. 1955) (holding that a plaintiff did not lose his exclusive right to reproduce and sell his records in the United States simply by selling the records to the public).

²⁶ Jonathan Franklin, *Pay to Play: Enacting a Performance Right in Sound Recordings in the Age of Digital Audio Broadcasting*, 10 U. MIAMI ENT. & SPORTS L. REV. 83, 90 (1993).

²⁷ Sound Recording Act of 1971, Pub. L. No. 92-140, 85 Stat. 391 (1971) (made permanent by Pub. L. No. 93-573, 88 Stat. 1873 (1974)) (codified as amended at 17 U.S.C. § 102 (1992)).

²⁸ *Id.*

Five years later Congress again amended copyright law with the Copyright Act of 1976.²⁹ The Act extended protection of sound recordings in two ways. First, the Act replaced the *White-Smith* “direct perception” test with a new “tangible medium of expression” requirement.³⁰ Second, the amended act explicitly provided for protection to original works in any form from which “they can be perceived, reproduced, or otherwise communicated, either directly or with the aid of a machine or device.”³¹ There was no question that sound recordings were now protectable under American copyright law. However, the 1976 Act still failed to recognize a performance right in the newly protected sound recordings. Section 114(a) of the Act explicitly withheld this protection.³² Furthermore, the Act prohibited states from recognizing a performance right in sound recordings. This eliminated the possibility of state-law based protections, like those found in *Waring*.³³

Congress did recognize that there may be a need for protection of performance rights in sound recordings in the 1976 Act. Section 114(d) orders a report on the potential effects of an extension of performance rights to include sound recordings.³⁴ The required report was submitted in 1978 and suggested “that section 114 be amended to provide performance rights, subject to compulsory licensing, in copyrighted sound recordings, and that the benefits of this right be extended to both performers (including employees for hire) and to record producers as joint authors of sound recordings.”³⁵ Congress failed to heed the committee’s report though, leaving a performance right in sound recordings unprotected.

It was not until nearly two decades later that Congress finally acted on the 1978 report. In response to the growth of internet radio and its effects on the music industry, Congress enacted the Digital Performance Right in Sound Recordings Act of 1995 (DPRA), under which the owners of sound recordings were granted the exclusive right “to perform the copyrighted work publicly by means of a digital audio transmission.”³⁶ While on the face of the law Congress seemed to have

²⁹ Copyright Act of 1976, Pub. L. No. 94-553, 90 Stat. 2541 (1976) (codified in scattered sections of 17 U.S.C.).

³⁰ 17 U.S.C. § 102(a).

³¹ *Id.*

³² *Id.* § 114(a) (“The exclusive rights of the owner of copyright in a sound recording are limited . . . and do not include any right of performance under section 106(4).”).

³³ *Id.* § 301 (establishing a single federal system of copyright protection in order to carry out the objectives of uniformity and the promotion of productive creativity).

³⁴ *Id.* § 114(d).

³⁵ Performance Right in Sound Recordings, 43 Fed. Reg. 12,763, 12,766 (proposed Jan. 3, 1978).

³⁶ Digital Performance Right in Sound Recordings Act of 1995, Pub. L. No. 104-39, 109 Stat. 336 (1995) (current version at 17 U.S.C. § 106(6) (2002)).

created a full performance right in digital sound recordings, the Act limited this right substantially.³⁷ The law addressed three specific types of digital transmissions: broadcast transmissions, subscription transmissions, and on-demand transmissions.³⁸ Broadcast transmissions—including all analog radio transmissions—were exempted from the performance right entirely.³⁹ Subscription transmissions were technically covered under the performance right, but the Act provided for a statutory license for subscription services that allowed the services to pay a one time licensing fee, exempting them from future royalty payments.⁴⁰ The licensing scheme is sufficiently broad to exempt most subscription services from the Act's protection, as well.⁴¹ The third category of transmissions, on-demand transmissions, was still subject to the full protection of the Act, but these constitute only a small percentage of the transmissions in question. Given the broad group of exclusions, there was little room left for the Act's purported protections to take effect.

While the DPRA made some headway in recognizing a performance right in sound recordings, the evolving industry of digital broadcasting complicated interpretation of the Act.⁴² In response to the evolution of the digital industry, Congress enacted the Digital Millennium Copyright Act of 1998 (DMCA).⁴³ While it clarified some of the interpretive problems with the DPRA, the DMCA further limited performance rights in sound recordings. The Act extended the subscription service licensing scheme of the DPRA to include webcasting—a growing broadcast industry—and ephemeral recordings.⁴⁴ In effect, the DMCA removed much of the already limited protection afforded to sound recording holders under the DPRA, a step backwards in the protection of performance rights in sound recordings.

Two years after the enactment of the DMCA, the courts weighed in on the protection of sound recordings. In *Bonneville International Corp. v. Peters*,⁴⁵ the court was asked to interpret the DPRA's application to radio stations that broadcast simultaneously over the air and online. Citing numerous committee reports

³⁷ *Id.* Sec. 3 (amending 17 U.S.C. § 114).

³⁸ U.S. Copyright Office, *The Digital Millennium Copyright Act of 1998: U.S. Copyright Office Summary* (1998), available at <http://www.copyright.gov/legislation/dmca.pdf>.

³⁹ *Id.* at 16.

⁴⁰ *Id.*

⁴¹ See 17 U.S.C. § 114(d)(2) (2002) (providing a list of all of the subscription services exempt from the digital performance right).

⁴² See, e.g., *Bonneville Int'l Corp. v. Peters*, 347 F.3d 485, 497 (explaining that it was the "intervening technological development" that prompted the DMCA).

⁴³ Digital Millennium Copyright Act, Pub. L. No. 105-304, 112 Stat. 2860 (1998).

⁴⁴ U.S. Copyright Office, *supra* note 38, at 14, 16.

⁴⁵ 347 F.3d 485, 500 (3d Cir. 2003).

indicating Congress's intent that the DPRA's protection only extend to the online transmissions of such radio stations, the court agreed.⁴⁶ The court found that while the DPRA clearly did not extend a performance right to holders of sound recordings being broadcast over terrestrial radio stations, the same stations had to pay the DPRA's royalties if they wanted to broadcast the same songs online.⁴⁷

The *Bonneville* court's 2003 interpretation of the DPRA was the last major change in the protection of performance rights in sound recordings. As it currently stands, American copyright law protects performance rights in sound recordings broadcast over non-exempt digital transmissions.⁴⁸ The effect of the law is a disparity between analog and digital transmissions. When a song is aired over the internet, satellite, or cable radio transmission the artist and producer receive royalty payments for the use of their work.⁴⁹ However, if the same sound recording is aired over traditional terrestrial radio the artist and producer receive no compensation for the use of the supposedly copyright-protected work.⁵⁰

2. *Proposed Changes to Performance Rights in Sound Recording Protection.* In 2007, the Performance Rights Act proposed a major change to the protection of performance rights in sound recordings.⁵¹ The proposed legislation would have dramatically expanded the protection of artists' performance rights. Under the 2007 Act, the Copyright Act would have been amended in three primary ways. First, the 2007 Act intended to provide "equitable treatment for terrestrial broadcasts."⁵² Section 106(6) would be amended to make the performance right applicable to radio transmission generally, changing the text of the code to read "(6) in the case of sound recordings, to perform the copyrighted work publicly by means of an audio transmission."⁵³ However, the second and third amendments would actually serve to limit the extension of the right provided for in the first amendment.⁵⁴ The second way the 2007 Act proposed to change the Copyright Act was to strike the word "digital" in the "exempt transmissions and retransmissions" so that even under the new law, the same exemptions that

⁴⁶ *Id.* (holding that the DPRA's "nonsubscription broadcast transmission's exemption implicates only over-the-air radio broadcast transmissions, and does not cover the internet streaming of AM/FM broadcast signals").

⁴⁷ *Id.*

⁴⁸ 17 U.S.C. § 106 (2002) ("The owner of a copyright under this title has the exclusive rights to do and to authorize any of the following . . . (6) in the case of sound recordings, to perform the copyrighted work publicly by means of a digital audio transmission.").

⁴⁹ *Id.* § 106(4).

⁵⁰ *Id.* § 114 ("The exclusive rights of the owner of copyright in a sound recording . . . do not include any right of performance under section 106(4).").

⁵¹ Performance Rights Act of 2007, H.R. 4789, 110th Cong. (2007).

⁵² *Id.* § 2.

⁵³ *Id.* § 2(a).

⁵⁴ *Id.* § 2(b)-(c).

applied to digital broadcasts under the DPRA would apply to terrestrial transmissions as well.⁵⁵ Finally, the Performance Rights Act of 2007 proposed that the “definitions” section of the Copyright Act be amended to include all audio transmissions, not just digital transmissions, in the “eligible nonsubscription transmission” coverage, and applying those exemptions to the newly protected material.⁵⁶ In effect, the Performance Rights Act of 2007 would have remedied all of the disparities between protection of performance rights in digital and terrestrial broadcasts, while simultaneously taking a large step towards extending the overall protection of performance rights in sound recordings.

However, the Act in no way intended to extend an unlimited protection of performance rights. In addition to the extension of the exemptions discussed in the DPRA, exclusions were written into the Act for small, noncommercial, religious, educational, and incidental uses of sound recordings.⁵⁷ Any commercial radio station grossing less than \$1,250,000 per year would be given the opportunity to pay an annual \$5,000 royalty fee in lieu of the fees they would otherwise have had to pay.⁵⁸ Additionally, any public broadcasting entity could elect to pay for its over-the-air nonsubscription broadcasts with a \$1,000 per year fee instead of the royalties to which they would otherwise be subject to under the Act.⁵⁹ Finally, in order to quell the fears that the Act would create a burden for those using the sound recordings for non-monetary and incidental purposes, the Act provided an exception for sound recordings used in “services at a place of worship or other religious assembly,” and for the more inclusive “incidental use[s] of a musical sound recording.”⁶⁰ For clarification purposes, the Act also included a provision that “[n]othing in this Act shall adversely affect in any respect the public performance rights of or royalties payable to songwriters or copyright owners of musical works.”⁶¹ The idea of this provision was to dispell the notion that extending a performance right to sound recordings would in some way adversely affect the holders of copyrights in musical works.⁶² The point of the Act was to create a new right for musical artists, not revoke the rights already granted to songwriters.⁶³

⁵⁵ *Id.* § 2(c).

⁵⁶ *Id.*

⁵⁷ *Id.* § 3.

⁵⁸ *Id.* § 3(a).

⁵⁹ *Id.*

⁶⁰ *Id.* § 3(b).

⁶¹ *Id.* § 5(b).

⁶² 153 CONG. REC. S15918 (daily ed. Dec. 18, 2007) (statement of Sen. Hatch). *See* Noh, *supra* note 6, at 87–89 (explaining that one of the main objections to a full extension of performance rights is that it will lead to a decreased profit for the holders of copyrights in musical works).

⁶³ 153 CONG. REC. S15918 (daily ed. Dec. 18, 2007) (statement of Sen. Hatch).

Despite its proponents' best efforts, the Performance Rights Act of 2007 never made it to a floor vote in Congress. The bill stirred controversy on both sides of the debate, and two coalitions emerged. On one side was the MusicFIRST (Fairness in Radio Starting Today) coalition, led by performers and record labels in support of the bill.⁶⁴ On the other side were the radio stations, led by the National Association of Broadcasters (NAB).⁶⁵ As 2007 ended, the debate took on a holiday theme. The NAB argued,

After decades of Ebenezer-Scrooge-like exploitation of countless artists, RIAA and the foreign-owned record labels are singing a new holiday jingle to offset their failing business model. NAB will aggressively oppose this brazen attempt to force America's hometown radio stations to subsidize companies that have profited enormously through the free promotion provided by radio airplay.⁶⁶

In response, the MusicFIRST coalition wrote a jingle of its own to the tune of *'Twas the Night Before Christmas*: "T'was the night before recess in the Senate and House / As our leaders worked hard to correct a great louse / A fair performance right danced in their mind / They could no longer leave the artists behind . . ."⁶⁷ Ultimately the NAB won this part of the debate. The 110th Congress closed without voting on the Performance Rights Act.

However, on February 4, 2009 the bill was given new life when Senators Patrick Leahy, Orrin Hatch, Dianne Feinstein, Bob Corker, and Barbara Boxer joined with Representatives John Conyers, Howard Berman, Darrell Issa, Marsha Blackburn, Jane Harman, John Shadegg, and Paul Hodes, to reintroduce the bill to both the Senate and the House.⁶⁸ The 2009 Act proposes the same amendments to the Copyright Act as the 2007 Act and has sparked a similar debate.

The implementation of the Performance Rights Act has been a greatly contested issue in Congress and within the halls of radio stations and record labels throughout the country. Domestic opponents of the bill make multiple arguments against an extension of performance rights to all transmissions. First, opponents argue that radio broadcasts provide free promotion for artists and hence radio stations should not have to pay to play the artists' songs.⁶⁹ Until the 1960s

⁶⁴ Kevin C. Parks, *Black Hole or Celestial Jukebox?: Section 114 and the Future of Music*, 1 No. 2 LANDSLIDE 46, 51 (2008).

⁶⁵ *Id.* at 50.

⁶⁶ *Id.* at 51.

⁶⁷ *Id.*

⁶⁸ 155 CONG. REC. H1041 (daily ed. Feb. 4, 2009); 155 CONG. REC. S1542 (daily ed. Feb. 4, 2009).

⁶⁹ Evitt, *supra* note 7, at 12.

producers actually paid the radio stations to play their songs under a system known as “payola.”⁷⁰ While this practice was banned by Congress in the 1960s, its existence nonetheless demonstrates the importance of radio broadcasts to performers and producers.⁷¹

Secondly, the opponents of an expansion of performance rights to sound recordings argue that a performance right in sound recordings would hurt the already ailing broadcasters.⁷² Critics of the bill point to the decline in annual revenue for radio stations over the past three years.⁷³ Inflicting what the NAB has referred to as an additional tax on the broadcasters would only exacerbate the situation.⁷⁴

The third argument put forth by opponents of the bill is that by providing royalty rights for performers and producers, the songwriters and composers will suffer. This argument is based on the notion that there is a set pool from which broadcasters can pay royalties and by paying royalties to performers the radio stations must necessarily decrease the royalties paid to songwriters.⁷⁵ Since songwriters already have fewer modes of revenue—they do not have the opportunity to benefit from concert ticket sales and merchandise revenue—this would be taking away one of the few revenue streams they have.⁷⁶

Fourth, those against an extension of performance rights claim that the extension will actually only benefit the record companies since many of the performers who would receive the royalty payments contract away their rights to those payments when they sign their record deals.⁷⁷ Not only would this effect undermine many of the reasons proffered for expanding the performance right, it would also give the record companies too much leverage in the industry.⁷⁸

The final argument against extending the performance right to sound recordings is that it might decrease the quality of the music that is created. When performers do not receive royalties for their performances they have a greater incentive to write their own music in order to gain royalties as the songwriter, thus

⁷⁰ Matthew S. DelNero, *Long Overdue? An Exploration of the Status and Merit of a General Public Performance Right in Sound Recordings*, 51 J. COPYRIGHT SOC'Y U.S.A. 473, 507 (2004).

⁷¹ Communications Act Amendments of 1960, Pub. L. No. 86-752, § 8(b), 74 Stat. 889 (1960) (current codification at 47 U.S.C. § 508 (2010)).

⁷² Evitt, *supra* note 7, at 12.

⁷³ *Id.* But see BIA/Kelsey Advisory Services, LLC, *Radio Industry Revenues Expected to Remain Low in 2009; While Mid and Smaller Markets Hold Up Better*, Mar. 26, 2009, <http://www.bia.com/pr090325-radiorevs.asp> (explaining that while radio stations have experienced a decline in revenue over the past few years there are strong indications that by 2011 the stations will show signs of growth).

⁷⁴ Evitt, *supra* note 7, at 12.

⁷⁵ *Id.* at 13.

⁷⁶ *Id.*

⁷⁷ *Id.*

⁷⁸ *Id.*

creating music that the performer is connected to more personally.⁷⁹ If performers begin receiving royalty payments for their sound recordings, this incentive would be lost.⁸⁰

Proponents of the Performance Rights Act have multiple arguments and counter-arguments as well. First, proponents argue that recognizing a performance right is the fair thing to do.⁸¹ Given the compensation schemes already in place for songwriters and composers, as well as the royalties paid by satellite, cable, and internet radio stations, the argument rests on the notion that it is just to provide equal compensation for the performers. Senator Leahy commented when introducing the bill that “[a]ll those in the creative chain of musical production — the artists, musicians, and others who enrich us culturally — deserve to be justly compensated for their work.”⁸² The performers put their talents and work into the sound recordings as much as the songwriters do, and they deserve just compensation for those efforts.

A second argument in favor of the Act is that it actually provides more incentive for performers to create their own works.⁸³ This is the inverse of one of the arguments against the implementation of the Act, the argument that artists have more incentive to write their own music absent a performance right. Proponents of an expanded right focus on the underlying reasons for copyright protection.⁸⁴ If a protected monetary interest in a work gives an artist incentive to create works, then giving him a heightened interest by protecting a performance right in that work will give him even more incentive to create.⁸⁵

A third argument in favor of a full performance right rests on the success of the radio industry as a whole. While opponents of the bill point to the purportedly deteriorating radio industry to argue that a full extension of performance rights would be the death knell for radio, proponents point to projections the radio industry will begin to expand in 2011.⁸⁶

Finally, those in favor of a Performance Rights Act argue that it is the natural progression of congressional intent. Congress first evidenced an intent to recognize performance rights when they suggested in their 1978 report on performance rights that legislation be enacted to protect such a right.⁸⁷ Congress

⁷⁹ *Id.*

⁸⁰ *Id.*

⁸¹ *Id.* at 11.

⁸² Press Release, *supra* note 1.

⁸³ Evitt, *supra* note 7, at 11, 12.

⁸⁴ Noh, *supra* note 6, at 101.

⁸⁵ Evitt, *supra* note 7, at 11.

⁸⁶ See BIA/Kelsey Advisory Services, LLC, *supra* note 73 (explaining the radio industry's troubles over the last few years but projecting industry growth in the coming years).

⁸⁷ Performance Right in Sound Recordings, 43 Fed. Reg. 12,763, 12,766 (proposed Jan. 3, 1978).

later cemented that intent in 1995 with the DPRA.⁸⁸ Given Congress' recognition of the need for a performance right for over thirty years, the Performance Rights Act of 2009 would simply be a logical progression of congressional intent.⁸⁹ The 2009 bill has been scheduled for a floor vote in both the House and Senate and as such has made it further through the congressional process than any other proposed extension of performance rights in sound recordings.⁹⁰

B. AMERICAN COOPERATION IN INTERNATIONAL COPYRIGHT LAW

1. *International Protection of Copyright.* There is no international copyright law. Generally, the only law protecting the unauthorized use of a particular material is the law of the country where that unauthorized use occurs.⁹¹ However, most countries have developed a system of protection for foreign works that are subject to certain conditions.⁹² This system of protection has been simplified by the creation of international treaties and conventions which guarantee signatory countries reciprocal protection of intellectual property under a system of mutual reciprocity.⁹³ The most influential of these has been the International Union for the Protection of Literary and Artistic Works, or the Berne Convention.⁹⁴ Established in 1886, the Berne Convention established five primary objectives of international copyright protection.⁹⁵ First, the Berne Convention intended to promote the development of copyright laws in favor of the protected works'

⁸⁸ Noh, *supra* note 6, at 97.

⁸⁹ *Id.* at 95.

⁹⁰ *Id.* at 94. The bill has also garnered the support of the Obama administration. The Department of Commerce, in a letter written to Senator Leahy, stated,

The Department has long endorsed amending the U.S. copyright law to provide for an exclusive right in the public performance of sound recordings Today, the United States stands alone among industrialized nations in not recognizing a public performance right in sound recordings As a result, substantial royalties for the public performance of U.S. sound recordings abroad are either not collected at all or not distributed to American performers and record companies.

Letter from Cameron F. Kerry, General Counsel, Department of Commerce to Patrick Leahy, Senator, U.S. Senate, Apr. 1, 2010 (available from http://www.grammy.com/files/pr_a_views_letter.pdf).

⁹¹ William F. Patry, *Developments in International Copyright from the U.S. Perspective*, 318 PLI/PAT 349, 369 (Practising Law Institute, Global Intellectual Property Series: Practical Strategies — Trademark and Copyright: Patents, Copyrights, Trademarks, and Literary Property Course Handbook Series, PLI Order No. G4-3870, Oct. 3, 1991).

⁹² *Id.* at 377.

⁹³ *Id.*

⁹⁴ Berne Convention for the Protection of Literary and Artistic Works, Sept. 9, 1886 (as reused at Paris on July 24, 1971 and amended on Sept. 29, 1979, 25 U.S.T. 1341), 828 U.N.T.S. 303 [hereinafter *Berne Convention*].

⁹⁵ Patry, *supra* note 91, at 377.

authors in order to bring about better worldwide copyright protection.⁹⁶ Second, the Convention sought, over time, to remove reciprocity as the basis for international protection of intellectual property rights.⁹⁷ Third, original members of the Berne Convention wanted to eliminate discrimination in the allocation of rights against foreign authors in all countries.⁹⁸ Fourth, the signatories aimed to reduce the formalities for the recognition and protection of copyright in foreign works.⁹⁹ Finally, the Berne Convention sought to promote uniform international legislation for the protection of literary and artistic works.¹⁰⁰

In order to achieve these goals, the original members of the Berne Convention enacted a document setting forth three primary principles of international copyright protection: national treatment, automatic protection, and independence of protection.¹⁰¹ The principle of national treatment provides that works created in a member state are to be given equal protection in every other member state, as is granted to the works of nationals of that state.¹⁰² By incorporating the idea of automatic protection, the Convention ensured that national treatment would not be dependent on a formal process, instead protection was granted automatically.¹⁰³ Finally, the independence of protection ensured that the enjoyment and exercise of the rights granted by the Convention would be independent of the protection in the country where the work originated.¹⁰⁴ In effect, the Convention filled the gap in international copyright protection by formalizing the reciprocity that had previously only existed as loose ties between cooperative countries.

Under the Berne Convention, there are two ways in which a work can gain protection, one based on nationality and one based on place of publication.¹⁰⁵ Citizens of member countries automatically receive copyright protection in all other member countries.¹⁰⁶ Furthermore, authors from non-member countries may receive protection for their works in member countries if the work is originally or simultaneously published in a member country.¹⁰⁷

⁹⁶ *Id.*

⁹⁷ *Id.*

⁹⁸ *Id.*

⁹⁹ *Id.*

¹⁰⁰ *Id.*

¹⁰¹ World Intellectual Property Organization [WIPO], *WIPO Intellectual Property Handbook: Policy, Law and Use*, at 262, WIPO Publication No. 489, 5.170 (2004).

¹⁰² *Id.*

¹⁰³ *Id.*

¹⁰⁴ *Id.* at 263.

¹⁰⁵ Berne Convention, *supra* note 94, art. 3(1).

¹⁰⁶ *Id.* art. 5.

¹⁰⁷ *Id.* art. 3(1)(b).

Although the Berne Convention, has been the most prominent international agreement for the protection of intellectual property, for over one hundred years the United States has refused to join, claiming that it would require too much alteration to existing United States copyright law.¹⁰⁸ While the United States refused to join the Convention, they still recognized the need for international copyright protection. On September 6, 1952, the United States signed the Universal Copyright Convention (UCC).¹⁰⁹ While the UCC did not provide as broad a scope of protection as the Berne Convention, it nevertheless formalized international protection at the minimal standard of the individual member countries.¹¹⁰ This meant that nationals of all UCC countries were guaranteed the same protection abroad as they received at home.¹¹¹ Significantly, all Berne signatories also signed the UCC, establishing protection for nationals of Berne countries in not only all other Berne countries, but also all UCC countries.¹¹²

In 1989, the UCC's relevance in American copyright protection was dramatically reduced. On March 1, 1989, the Berne Convention Implementation Act went into effect, making the United States a signatory of the Berne Convention.¹¹³ The UCC's "Berne safeguard clauses" dictate that in cases where coverage of the two documents overlaps, the Berne rule applies.¹¹⁴ The safeguard clauses render the UCC effective in only those countries that are members of the UCC but not the Berne Convention.¹¹⁵ Hence, the UCC's current effect in the United States is only to provide limited protection in those countries that are not Berne Convention signatories.¹¹⁶

The final step of the United States participation in international copyright protection came in the form of the Geneva Convention for the Protection of Producers of Phonograms Against Unauthorized Duplication of Their Phonograms.¹¹⁷ The United States became eligible to join the Geneva Convention in 1971 when Congress amended the Copyright Act to include protection of

¹⁰⁸ 7 WILLIAM F. PATRY, PATRY ON COPYRIGHT § 23:45 (2009).

¹⁰⁹ Universal Copyright Convention [UCC], Sept. 6, 1952, as revised at Paris July 24, 1971, 25 U.S.T. 1341, 943 U.N.T.S. 178.

¹¹⁰ *Id.* art. 2(1).

¹¹¹ *Id.*

¹¹² Compare Berne Convention, *supra* note 94, with UCC, *supra* note 109.

¹¹³ Berne Convention Implementation Act of 1988, Pub. L. No. 100-568, 102 Stat. 2853 (1988) (codified in scattered sections of 17 U.S.C.).

¹¹⁴ 7 PATRY, *supra* note 108, § 23:45; *see also* UCC, *supra* note 109, art. 18(1).

¹¹⁵ UCC, *supra* note 109, art. 17 app.

¹¹⁶ 7 PATRY, *supra* note 108, § 23:45.

¹¹⁷ Geneva Convention for the Protection of Producers of Phonograms Against Unauthorized Duplication of Their Phonograms, Oct. 29, 1971, 25 U.S.T. 309, 888 U.N.T.S. 67 [hereinafter Geneva Convention].

sound recordings and ratified the Convention on March 10, 1974.¹¹⁸ Under the Geneva Convention, the holders of sound recordings are afforded international protection against the unauthorized reproduction and distribution of their works.¹¹⁹ However, the exact definition of “distribution” remains unclear.¹²⁰

2. *International Protection of Performance Rights in Sound Recordings.* While the United States continued to show a desire to conform to international standards, there was still another obstacle to overcome in securing international protection of performance rights in sound recordings for American producers and performers. Having cemented international copyright protection under first the Berne Convention, then the UCC and numerous later treaties, international copyright law still lacked protection of performance rights in sound recordings. While the original Berne Convention made great strides in establishing international intellectual property protection, the Convention failed to extend performance right protection to sound recordings.¹²¹ Like American copyright law’s limited recognition of performance rights, the Berne Convention recognized a performance right in “dramatic, dramatico-musical and musical works.”¹²² However, the Convention failed to extend these rights to sound recordings.¹²³ Neither the UCC nor any subsequent amendments made any mention of sound recording protection or performance rights.¹²⁴

In 1961, recognizing the defect in international protection and the growing need for protection of sound recordings due to the increase in broadcasts, the international community came together to provide an international public performance right in sound recordings.¹²⁵ Signed into effect on October 26, 1961, the Rome Convention for the Protection of Performers, Producers of Phonograms, and Broadcasting Organisations (Rome Convention) provides performers “neighboring rights” against “the broadcasting and the communication to the public, without their consent, of their performance, except where the performance used in the broadcasting or the public communication is itself already a broadcast performance or is made from a fixation.”¹²⁶ While there has been

¹¹⁸ See *supra* note 27 and accompanying text.

¹¹⁹ Geneva Convention, *supra* note 117, art. 2.

¹²⁰ See *Agee v. Paramount Commc’ns, Inc.*, 59 F.3d 317, at 325–26 (2d Cir. 1995) (discussing the Copyright Act’s lack of a definition of “distribution” and ultimately adopting the “copy” definition from 17 U.S.C. § 101).

¹²¹ Berne Convention, *supra* note 94.

¹²² *Id.* art. 11(1).

¹²³ *Id.*

¹²⁴ See generally UCC, *supra* note 109.

¹²⁵ 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].

¹²⁶ *Id.* art. 7(1)(a).

some dispute over whether the “neighboring rights” scheme of the Rome Convention affords the same protection as would be afforded under a pure copyright scheme, the consensus and practical application of the neighboring rights regime of the Rome Convention has been that the performance rights guaranteed in the Rome Convention protect artists in the same way they would be protected under a system based on authors’ rights.¹²⁷ The effect of the Rome Convention was to protect sound recording copyright holders who are nationals of a Rome Convention signatory country in all other signatory countries.¹²⁸ However, the Rome Convention did not provide protection for performers or producers in non-signatory countries.¹²⁹ While it appeared the Rome Convention could finally cure the defects in protection of performance rights in sound recordings for American producers and performers abroad, the United States never signed the treaty.¹³⁰ Thus, American artists and producers gained no protection with the implementation of the Rome Convention.

In 1996, international protection of performance rights in sound recordings received one final bolster from the World Intellectual Property Organization (WIPO).¹³¹ WIPO passed the WIPO Performances and Phonograms Treaty (WPPT), which provides in part that “performers and producers of phonograms shall enjoy the right to a single equitable remuneration for the direct or indirect use of phonograms published for commercial purposes for broadcasting or for any communication to the public.”¹³² Reaffirming the Rome Convention’s recognition of the same rights thirty-five years before, the WPPT explicitly recognizes a performance right for sound recording holders without any of the questions presented by the Rome Convention’s neighboring rights scheme.¹³³ While supporters of an American recognition of performance rights in sound recordings had hopes that the WPPT would finally provide the rights they sought, Article 15(3) of the WPPT provides an opt-out provision, which the United States took.¹³⁴

¹²⁷ See JAY DRATLER, JR., *INTELLECTUAL PROPERTY LAW: COMMERCIAL, CREATIVE AND INDUSTRIAL PROPERTY* § 601[7] (Law Journal Seminars-Press) (2009); WIPO Performances and Phonograms Treaty art. 7(1), Dec. 20, 1996, S. Treaty Doc. No. 105-17, 2186 U.N.T.S. 245. [hereinafter WPPT]; see also Geneva Convention, *supra* note 117, art. 1(2) (all discussing the hierarchical relationship between neighboring rights and copyright).

¹²⁸ Rome Convention, *supra* note 125, art. 4.

¹²⁹ *Id.*

¹³⁰ *Id.*

¹³¹ World Intellectual Property Organization, What is WIPO?, http://www.wipo.int/about-wipo/en/what_is_wipo.html (last visited Feb. 18, 2010).

¹³² WPPT, *supra* note 127, art. 15.

¹³³ *Id.*

¹³⁴ *Id.* art. 15(3) (“Any Contracting Party may, in a notification deposited with the Director General of WIPO, declare that it will apply the provisions of paragraph (1) only in respect of certain

United States implementation of the WPPT came in 1998 in the form of the DMCA, which actually served to limit protection of sound recordings.¹³⁵ The DMCA invoked the opt-out provision afforded by the WPPT, suppressing any hopes American performers and producers had of securing a performance right in sound recordings under the WPPT.¹³⁶ While the international community established and secured a performance right in sound recordings, the United States on multiple occasions side-stepped the issue and has yet to establish protection for American holders of sound recording copyrights abroad.

III. ANALYSIS

Despite the objections, a full extension of performance right is the next logical step in American participation in international copyright protection. Passage of the Performance Rights Act of 2009 would afford the level of protection many nations already provide while still maintaining the integrity of both the American music industry and the American broadcasting industry.

A. AN EXTENSION OF PERFORMANCE RIGHTS AS THE LOGICAL PROGRESSION OF THE UNITED STATES' PARTICIPATION IN INTERNATIONAL COPYRIGHT PROTECTION

1. *The United States May Have Already Provided for the Protection of Performance Rights.* While the debate rages on domestically over whether a performance right in sound recordings should be passed, there is an argument that the United States is already bound to afford such protection under the various international conventions to which it is already a signatory. While the Geneva Convention purports to leave the decision of whether to extend a performance right to the individual member countries, the text can potentially be interpreted to protect such a right.¹³⁷ The Convention protects against "distribution to the public," defined as "any act by which duplicates of a phonogram are offered, directly or indirectly, to the general public or any section thereof."¹³⁸ Under the Convention, distribution is limited to creating a duplicate of the article.¹³⁹ A "duplicate" is defined by the Convention as an "article which contains sounds taken directly or indirectly from a phonogram and which embodies all or a substantial part of the

uses, or that it will limit their application in some other way, or that it will not apply these provisions at all."); see Digital Millennium Copyright Act, *supra* note 43 (implementing the WPPT in the United States, but only for digital broadcasts).

¹³⁵ See *supra* notes 43–44 and accompanying text.

¹³⁶ Digital Millennium Copyright Act, *supra* note 43, § 405(a).

¹³⁷ See *supra* note 119 and accompanying text.

¹³⁸ Geneva Convention, *supra* note 117, art. 1(d).

¹³⁹ *Id.*

sounds fixed in that phonogram.”¹⁴⁰ However, the definition stops with duplicate, there is no definition of “article” in the text of the Convention.¹⁴¹ If “article” is read to mean bits of a song, then this definition of duplicate could potentially encompass both digital and analog broadcasts—the heart of what would be protected under a full extension of a performance right in sound recordings. This argument is supported primarily by the assertion in the Report of the Rapporteur General that the aim of this distribution provision of the Convention was the copying of phonograms, whether that “copying takes place from the broadcasting of a phonogram or from a copy of a phonogram.”¹⁴² The argument follows that if the aim of the Convention was to protect against unauthorized analog broadcast, that protection would be difficult to separate from a full extension of a performance right in sound recordings.

While the argument based on the reported aim of the Convention seems convincing, there are some strong counterarguments to the premise that the Geneva Convention bound the United States to afford protection, at least internationally, to a performance right in sound recordings. First and foremost is the course of performance. The United States has been a signatory of the Geneva Convention since its inception and has clearly afforded no such protection. While the lack of enforcement mechanisms of such international agreements is well known, there have been no sanctions or commentaries accusing the United States of violating its duties under the Geneva Convention. Similarly, since the signing of the Geneva Convention, the United States has refused to fully adopt the Rome Convention and the WPPT, both of which afforded such protection explicitly, quelling any thoughts that the United States has extended performance rights to sound recordings.

There are arguments based on the provisions of the convention to be made against the claim that the Geneva Convention binds the United States to protect performance rights in sound recordings, as well. First, the Convention explicitly leaves the decision to extend performance rights up to the individual member countries.¹⁴³ Second, the preamble makes it clear that the Convention was not meant to impair any international agreements already in place, particularly the

¹⁴⁰ *Id.* art. 1(c).

¹⁴¹ *Id.* art. 1 (failing to define article).

¹⁴² WIPO, Report Presented by the General Rapporteur, WIPO Doc. PHON.2/38 (Oct. 29, 1971), reprinted in Records of the International Conference of States on the Protection of Phonograms 38 (1975).

¹⁴³ Geneva Convention, *supra* note 117, art. 7(2) (“It shall be a matter for the domestic law of each Contracting State to determine the extent, if any, to which performers whose performances are fixed in a phonogram are entitled to enjoy protection and the conditions for enjoying any such protection.”).

Rome Convention.¹⁴⁴ The argument follows that a guarantee under the Geneva Convention of a full performance right in sound recordings for performers and producers could prejudice the rights granted to not only the producers and performers who were afforded rights under the Rome Convention, but also the broadcasting organizations who received certain protections for their industry under the Rome Convention.¹⁴⁵ A full extension of performance rights written into the Geneva Convention would certainly prejudice those protections for broadcasters written into the Rome Convention.

While proponents of a performance right would certainly welcome any interpretation of the Geneva Convention that supports the claim that the United States is already bound to afford protection to sound recording holders, the textual evidence and course of performance are too strong to overcome. The international community and sound recorders must look to other avenues to gain the protection they seek.

An alternative argument that the United States is already bound to protect performance rights focuses on the idea that the DCMA's invocation of the WPPT was an attempted recognition of a full performance right in sound recordings. In the increasingly global community of music sales, protection of digital performance rights in sound recordings goes a long way towards securing most of the performance rights that would be necessary to afford a high level of international protection. However, the age of terrestrial broadcasts is not over. The analog radio industry's billion dollar yearly revenues are evidence of terrestrial radio's continued significance.¹⁴⁶ An explicit full performance right is still necessary to provide sufficient protection. Given the United States' clear invocation of the WPPT's opt-out provision, there can be no legitimate claim that such a full right has been created.

2. *The United States' Dedication to the Comprehensive Protection of American Copyright Holders Abroad.* Throughout the past fifty years, American participation in international copyright protection has evinced an inclination toward developing a strong system of international intellectual property protection. Through the ratification of everything from the UCC to the Berne Convention to the WPPT, American adherence to international protection has demonstrated a commitment to providing American copyright holders with protection internationally, with an

¹⁴⁴ *Id.* p.mbl. (stating that “[t]he Contracting States . . . anxious not to impair in any way international agreements already in force and in particular in no way to prejudice wider acceptance of the Rome Convention . . .” (emphasis added)).

¹⁴⁵ Rome Convention, *supra* note 125, art. 7.

¹⁴⁶ See Hoovers, *Industry Overview: Radio Broadcasting and Programming*, http://www.hoovers.com/radio-broadcasting-and-programming/--ID_335--/fee-ind-fr-profile-basic.xhtml (last visited Mar. 3, 2010).

aim at allowing American copyright holders to capitalize on their works not only at home but also abroad.

For example, in finally signing the Berne Convention, the United States reaffirmed its interest in pursuing international intellectual property protection, but at a minimal cost to existing American copyright law.¹⁴⁷ The United States amended the Copyright Act to accord with the minimal requirements of the Berne Convention but stopped there.¹⁴⁸ Since becoming a signatory the United States has slowly amended copyright law to adhere more closely to the tenets of the Berne Convention, showing a desire to eventually bring American copyright protection in line with international standards of protection.¹⁴⁹

In addition to the intent evidenced through the United States' signing of treaties, a large part of the internationally-minded argument in favor of extending the performance right is grounded in the United States' pursuit of equitable treatment for its citizens and copyright holders, both domestically and internationally. Currently, a large discrepancy exists in the treatment of the protection of American sound recording holders and those from countries that protect a performance right in sound recordings.¹⁵⁰ Not only do international sound recording copyright holders enjoy protection in their own countries under their own copyright laws, they also receive protection in other countries that afford such protection to their own copyright holders under national treatment provisions, as set forth in the Rome Convention.¹⁵¹ The effect of this protection is to give international sound recording holders the power to dictate when, how, where, and for what purposes their works are broadcast worldwide, a seemingly important aspect of intellectual property protection. The inverse of this is just as true. Not only do American sound recording holders lose protection domestically, they also lose the ability to dictate when and for what purposes their works are broadcast worldwide. In theory, an artist may be associated through her work with radio stations, ideas, and even countries which she finds morally

¹⁴⁷ See *supra* notes 113–16 and accompanying text.

¹⁴⁸ Berne Convention Implementation Act, *supra* note 113.

¹⁴⁹ See generally 17 U.S.C. Ch. 1. Changes in the Copyright Act to bring American law more in line with international copyright protection include: an extension of protection to include architectural works and moral rights for visual art works; an automatic renewal of works published between 1964 and 1977; retroactive protection for foreign works that fell into the public domain for failure to comply with formalities, national eligibility; and, in the case of sound recordings, subject matter protection. *Id.*

¹⁵⁰ Evitt, *supra* note 7, at 11.

¹⁵¹ See *supra* note 125 and accompanying text (noting that the Rome Convention goes so far as to require its members to afford protection to sound recordings, creating a mandatory system of the national treatment for the payment of royalties for the use of sound recordings).

reprehensible. For a supposedly protected right, this result is unjustified and inequitable.

The DPRA and DMCA have done nothing to correct this problem, even in the limited realm of digital sound recordings.¹⁵² Since the United States does not adhere to any international agreement that expressly affords protection of a performance right in sound recordings or in digital sound recordings, American sound recording copyright holders are not granted any digital performance right protection abroad. Theoretically, through the passage of the DPRA, the DMCA, and the United States' concurrent recognition of a digital performance right in sound recordings, American sound recording copyright holders should be able to capitalize on their copyright rights for the international digital broadcast of their works. However, given the minimal scope of the protection afforded by the DPRA and the DMCA, there is no current international agreement to which the United States could become a member that would formalize a system of such limited protection. Consequently, the only way the rights protected by the DPRA and the DMCA can extend worldwide is under the informal theory of mutual reciprocity, the same system that was so unsuccessful in the early days of international intellectual property protection.¹⁵³ Again, for a supposedly protected right, this hardly seems like an appropriate scheme of international protection.

In addition to repairing the disparate treatment of American holders of sound recording copyrights, extending the performance right to sound recordings would also establish an international image in line with what the United States seemingly espouses in other arenas.¹⁵⁴ As explained by Mitch Bainwol, Chairman of the Recording Industry Association of America and a proponent of the extension, “[America is] the only OECD country and virtually the only industrialized nation that doesn't provide the creator compensation for performance on the radio, putting us in the company of nations such as Iran, China, and North Korea.”¹⁵⁵ Clearly this is not the company the United States chooses to keep in other areas of foreign policy, and should not be the company it keeps in the protection of intellectual property rights.

Under the current scheme, American sound recording owners are not only afforded disparate treatment internationally, they are also deprived of capital worldwide. The United States' failure to afford protection of performance rights

¹⁵² See *supra* notes 36, 43 and accompanying text.

¹⁵³ See *supra* notes 91–93 and accompanying text (explaining that the nature of international intellectual property protection creates a system that, unless the countries are obligated by some formal agreement, depends heavily on an informal system of mutual reciprocity).

¹⁵⁴ Evitt, *supra* note 7, at 11.

¹⁵⁵ The Performance Rights Act: Hearing on H.R. 848 Before the H. Comm. on the Judiciary, 111th Cong. (2009) (statement of Mitch Bainwol, Chairman and CEO, Recording Industry Association of America).

in sound recordings results in American sound recording holders losing a potential profit every time their works are broadcast abroad, since international radio stations are not required to compensate the performers or producers. Performance rights are recognized as among the most economically important rights of performers and phonogram producers.¹⁵⁶ The royalties from performance rights are a multi-billion dollar industry to which American sound recording holders have no access.¹⁵⁷ Over \$4 billion in performance right royalties are awarded annually worldwide for musical works.¹⁵⁸ Of that \$4 billion, United States songwriters and composers receive over \$1.5 billion.¹⁵⁹ In 2009, the performance rights royalties awarded for digital sound recordings topped \$147.5 million.¹⁶⁰ Since the United States is a world leader in the production and creation of sound recordings, the figures for sound recording royalties would increase dramatically with an American extension of the performance right to non-digital transmissions.¹⁶¹ As of 2000, American holders of sound recordings lost an estimated \$600 million in foreign royalties due to the United States' failure to recognize a full performance right in sound recordings.¹⁶² Of particular note, one of the rationales for the passage of the DPRA and the DCMA was that the faltering music industry needed new sources of revenue.¹⁶³ Given the music industry's demonstrated desire to find new streams of revenue, and America's trend of trying to garner the greatest possible protection for American copyright holders abroad, the sheer size of the international industry from which American sound recording holders are barred is an argument in favor of extending the coverage of the Copyright Act.

B. THE PERFORMANCE RIGHTS ACT OF 2009 AND THE WPPT: THE AMERICAN SOLUTION

The Performance Rights Act of 2009 is an appropriate first step in the pursuit of establishing international protection of performance rights in sound recordings

¹⁵⁶ See *Woods v. Bourne Co.*, 60 F.3d 978, 983 (2d Cir. 1995) (citing SIDNEY SCHEMEL & M. WILLIAM KRASILOVSKY, *THIS BUSINESS OF MUSIC* 196 (6th ed. 1990)).

¹⁵⁷ See Hoovers, *supra* note 146.

¹⁵⁸ *Id.*

¹⁵⁹ *Id.*

¹⁶⁰ *Id.* SoundExchange, *News Exchange Winter 2010, 2*, available at http://soundexchange.com/wp-content/uploads/2010/02/sx_newexchange_2010winter_v2.pdf.

¹⁶¹ *Id.*

¹⁶² M. WILLIAM KRASILOVSKY & SIDNEY SCHEMEL, *THE BUSINESS OF MUSIC: THE DEFINITIVE GUIDE TO THE MUSIC INDUSTRY* 73 (8th ed. 2000).

¹⁶³ See *supra* notes 36–43 and accompanying text (explaining that one of the propelling factors behind the DPRA and DMCA was the deleterious effect digital technologies were having on the music industry).

for American copyright holders. However, it will need to be coupled with a ratification of one of the international treaties that secures such a right worldwide in order for the expansion to be truly effective.

1. *The Performance Rights Act Will Bring American Protection into Line with International Standards.* The Performance Rights Act would provide a comprehensive performance right in sound recordings. The proposed changes to the Copyright Act comport with the language of the international treaties providing the same right.¹⁶⁴ The amended Copyright Act would read, “The owner of a copyright under this title has the exclusive right to do and to authorize any of the following . . . in the case of sound recordings, to perform the copyrighted work publicly by means of an audio transmission.”¹⁶⁵ The language of the WPPT mirrors this sentiment precisely: “Performers shall enjoy the exclusive right of authorizing the making available to the public of their performances fixed in phonograms, by wire or wireless means, in such a way that members of the public may access them from a place and at a time individually chosen by them.”¹⁶⁶

While the Act appears to provide a full performance right, the exemptions written into the Act could potentially nullify the rights granted. On the other hand, the broad exemptions are a practical necessity given the heated debate the bill and its 2007 version evoked domestically. The nature of the American legislative process creates a system of compromise, and the Performance Rights Act is the direct result of that system. Although the proponents of a performance right in sound recordings would ideally like to see a system without limitations, such a system would never make it through the hurdles of the congressional committee and floor debate system.

In addition to the pragmatic purpose of the limitations, they will also serve to ease the broadcast industry and performance rights organizations into the process of collecting royalties on behalf of performers and producers. Given the significant impact that full extension of performance rights to sound recordings will have on the royalties industry, the monitoring companies that most copyright holders hire to collect royalties, like ASCAP, SESAC, BMI, and SoundExchange, will face a large transition. While fully resolving the inequitable treatment and associational problems of not recognizing performance rights in sound recordings, and for the most part providing royalties for the broadcast of sound recordings, the Performance Rights Act of 2009 provides the balance needed to ease the United States into the protection of such rights.

2. *The WPPT is the Appropriate International Agreement for the United States to Provide International Protection.* Even with the passage of the Performance Rights Act

¹⁶⁴ See *supra* note 5 and accompanying text.

¹⁶⁵ Performance Rights Act of 2009, *supra* note 5, § 2.

¹⁶⁶ WPPT, *supra* note 127, art. 10.

and an extension of American protection of sound recordings to include a full performance right, the United States will still have to sign on to an international agreement protecting sound recordings in order to ensure that there is more than the informal mutual reciprocity system protecting sound recording copyright holders. The question remains, however, which international agreement will provide the best coverage. The two treaties that would provide such protection are the Rome Convention and the WPPT.

The Rome Convention is not a viable means of achieving the type of coverage the United States seeks for international protection of performance rights in sound recordings. Established in 1961, the Rome Convention has not been able to adapt to the technological advances in the music industry and has become an anachronistic relic of earlier copyright protection.¹⁶⁷ While joining the Rome Convention would, under the language of the agreement, provide protection for American sound recording copyright holders, the extent of the protection would be questionable, primarily in the protection of digital sound recordings. The Rome Convention makes no express delegation of protection to digital sound recordings¹⁶⁸—the one area where it can be absolutely sure the United States seeks to protect given the passage of the DPRA and the DMCA.¹⁶⁹ While the Rome Convention could be interpreted to include these digital transmissions, getting bogged down in interpreting the language of the statute leaves room for doubt in an area that has already been convoluted for far too long.

Perhaps the most telling argument against the United States becoming a member of the Rome Convention rests in the story of the WPPT. One of the leading reasons WIPO pushed for a new treaty was the growing challenge of protecting copyrights in the digital world, a recognition of the defects in the Rome Convention's applicability to current trends in the global music industry.¹⁷⁰ Further recognition of the Rome Convention's defects can be seen in the fact that most of the Convention's signatories signed on to the WPPT at its inception, an act that would not have been necessary had the Rome Convention's signatories felt that the agreement afforded proper protection.¹⁷¹

¹⁶⁷ See Jean-Francois Verstrynge, *The Spring 1993 Horace S. Manges Lecture – The European Commission's Direction on Copyright and Neighboring Rights: Toward the Regime of the Twenty-First Century*, 17 COLUM.-VLA J.L. & ARTS 187 (1993).

¹⁶⁸ Rome Convention, *supra* note 125.

¹⁶⁹ See *supra* notes 36, 43 and accompanying text.

¹⁷⁰ WPPT, *supra* note 127, pmbl.

¹⁷¹ See *Contracting Parties: WIPO Performances and Phonograms Treaty*, WIPO, http://www.wipo.int/treaties/en/ShowResults.jsp?lang=en&treaty_id=20 (last visited Feb. 18, 2010). See also *Contracting Parties: Rome Convention*, WIPO, http://www.wipo.int/treaties/en/ShowResults.jsp?treaty_id=17 (last visited Feb. 18, 2010).

The WPPT affords the United States the best opportunity to finally secure performance rights in sound recordings abroad. The WPPT's superiority can be seen in three areas. First, the WPPT affords explicit comprehensive protection for performance rights in sound recordings.¹⁷² Second, the WPPT is a timely agreement able to adapt to the changing technology of the music industry. Adaptability was, after all, one of the compelling reasons for the WPPT's inception. Finally, the United States has already signed on to the WPPT and would merely have to revoke the invocation of the opt-out provision to make the international protection of the performance rights in sound recordings effective, cutting out the international and domestic hurdles any new agreement might have to overcome.

IV. CONCLUSION

American copyright law does not currently protect performance rights in sound recordings, essentially nullifying any claim to international protection of such a right. While proponents of an extension of performance rights have attempted to argue that the text and policy behind the adoption of certain international agreements has bound the United States to the protection of performance rights, the arguments against this claim are too strong to overcome. In order to afford this level of protection new legislation is required.

The best claim in support of performance rights is to look to the policy and intent behind the United States' current domestic and international intellectual property law. America's signing on to various international agreements including the UCC, the Berne Convention, and the Geneva Convention demonstrates a commitment towards securing protection for American copyright holders abroad. Given this commitment, it seems only logical to extend the protection of sound recordings in a way that much of the world already has.

Similarly, the United States has demonstrated a commitment to securing equitable treatment for its copyright holders domestically, as evidenced by the underlying reasons for allowing protection of copyright generally. However, the current state of American protection of sound recordings creates a great disparity between the treatment of sound recordings and other copyright-protected materials, most notably musical works. This disparity not only prevents American sound recording holders from protecting their copyrighted works at home, but also abroad.

¹⁷² WPPT, *supra* note 127, art. 6 ("Performers shall enjoy the exclusive right of authorizing, as regards their performances: (i) the broadcasting and communication to the public of their unfixed performances . . .").

In extending performance rights to sound recordings and signing on to an international agreement to the same effect, the United States would ensure sound recording copyright holders the right to control the distribution of their works worldwide. A necessary congruent of this extension would also be the right to capitalize on those protected rights and tap into an otherwise neglected international stream of revenue, which would provide a boost to the faltering American music industry as a whole. Finally, a full extension of performance rights will align the United States' laws with prevailing international intellectual property regimes.

Given these imperatives, Congress should pass the Performance Rights Act of 2009 as it stands, providing a full performance right in sound recordings with the necessary compromises inherent in the American legislative process. However, simply passing the Act will not be sufficient. The United States must also revoke its invocation of the opt-out provision in the WPPT in order to ensure that American sound recording copyright holders are afforded national treatment protection worldwide. In doing so, Congress and the Executive will remedy a large defect in American copyright law and demonstrate to the international intellectual property community their full commitment to the global protection of copyrighted materials.

