Better Late than Never: The Legal Theoretical Reasons Supporting the Performance Rights Act of 2009

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INTRODUCTION

In the summer of 1995, TLC’s sophomore album “CrazySexyCool” finished at number three on Billboard’s Top 200 chart.¹ That same summer, each member of this chart topping R&B recording group separately filed for Chapter 11 bankruptcy.² While TLC’s songs rode the top of the charts, their label was making millions off of them, while each member of the group took home a modest $50,000 to $70,000 a year.³

While there is no disputing that TLC’s troubles were the result of more than just inequitable royalty agreements and contracts,⁴ their story

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¹ The Billboard 200, BILLBOARD, July 29, 1995, at 120 (detailing that the Billboard Top 200 chart is published weekly and ranks the top selling albums in the country using sales data compiled by Nielsen SoundScan); see generally Don Jeffrey, TLC Settlement Includes Pact for LaFace Set, BILLBOARD, Dec. 7, 1996, at 18 (“The figures were eye-opening because the group’s debut album, Oooooohhh . . . On The TLC Tip, has sold 2.4 million units in the U.S. alone, according to SoundScan, and the follow-up, CrazySexyCool, has sold 6.6 million.”).

² In re Watkins, 210 B.R. 394 (Bankr. N.D. Ga. 1997); Risa C. Letowsky, Note, Broke or Exploited: The Real Reason Behind Artist Bankruptcies, 20 CARDOZO ARTS & ENT. L.J. 625, 625 (2002); Jeffrey, supra note 1 (“TLC listed total liabilities of about $3.5 million and assets of less than $1 million in its original filing.”).

³ Bankruptcy Filings Upheld for Members of TLC Trio, N.Y. TIMES, Apr. 11, 1996, at D6 (reporting that TLC’s albums generated more than $100 million in sales for their record label LaFace).

⁴ Jeffrey, supra note 1.
also tells an important cautionary tale to other performing artists: a commercial hit does not guarantee financial security.\(^5\) As TLC experienced, having your song played on the radio does not necessarily mean you are making money.\(^6\) Therein lies a major problem in the way music is introduced to the mainstream and subsequently regulated. While every other industry requires payment for use of products they make available to the public, radio broadcasters have been exempt from paying performing artists like TLC for use of their products for as long as radio has been on the air.\(^7\)

While TLC's story may seem out-of-date, their experience is one commonly shared by less exposed artists, new and old,\(^8\) who experience some marginal mainstream success. TLC's story just happens to be one of the higher profile examples of the immediate impact royalties (or lack thereof) can have on artists.

This problem is gaining public attention in light of growing consensus that the music industry as it has existed for the last century is broken. Particularly troubling for artists today is the fact that CD sales are rapidly declining.\(^9\) In 2006, Nielsen SoundScan reported a twenty-one percent drop in CD sales since the year 2000.\(^10\) The ten top-selling albums showed an

\(^{5}\) See Jon Pareles, 1,700 Bands, Rocking as the CD Industry Reels, N.Y. TIMES, Mar. 15, 2008, at Al. The New York Times reported that the question on everyone's mind at the 2008 South by Southwest music festival, a gathering lauded as one of music's premier conventions for independent artists, was how "21st Century musicians [will] be paid. For nearly all of them, it won't be royalty checks rolling in from blockbuster albums." \(^{id}\)

\(^{6}\) Id.


\(^{8}\) David C. Norrell, The Strong Getting Stronger: Record Labels Benefit From Proposed Changes to the Bankruptcy Code, 19 L.O.Y. L.A. ENT. L.J. 445, 445-53 (1999) (discussing artist Toni Braxton's bankruptcy filing in 1998, claiming to be $2.8 million in debt even though she sold over 15 million albums in the previous five years). Artists, such as those listed, sometimes end up insolvent despite releasing blockbuster albums because of contracts that initially provide large advances. This is a problem because artists have to payback these advances with future royalties, usually earning only a single digit percentage, and because they have to pay tax at the highest income level on these advances because they receive it in a lump sum. \(^{id}\); see also Pareles, supra note 5 ("[M]usicians who have had contracts are lucky if they recoup their advances through royalties.").

\(^{9}\) Michelle Quinn & Dawn C. Chmielewski, Top Music Seller's Store Has No Door, L.A. TIMES, Apr. 4, 2008, at Al (reporting on Apple's iTunes digital music service becoming the first electronic venue to surpass all other U.S. retailers in album sales); David Bernstein, Music Royalties Rise, Even as CD Sales Fall, N.Y. TIMES, Jan. 26, 2004, at C6 (reporting that the twenty-two percent decrease in royalties from CD sales between 2000 to 2002 is failing to make up for the 13.6 percent increase in performance royalties); Brian Hiatt & Evan Serpick, The Record Industry's Slow Fade, ROLLING STONE, June 28, 2007, at 13, available at http://www.rollingstone.com/news/story/15137581/the_record_industrys_decline [hereinafter Slow Fade].

even more drastic decline, selling only 25 million albums in 2006 compared to the 60 million albums sold in 2000.\footnote{11} With this major shift in revenue streams for recording artists and record labels, artists have to expect an even smaller cut of the royalty pie.

Yet, despite the fact that the industry is clearly changing—due to revenue shifting,\footnote{12} innovation in technology,\footnote{13} and new expedited avenues of access to music and media\footnote{14}—the heads of the music industry have been slow to react.\footnote{15} The big players in the industry remain focused on album sales as the industry’s central earning asset,\footnote{16} but as discussed above, album sales are not creating the profits they used to.\footnote{17} Yet despite the fact that records are not selling, the belief that radio play promotes record sales has long justified an imbalance in copyright law as it is applied to music.\footnote{18}

Of particular significance as of December 2007, is the Copyright Act’s treatment of public performance rights for sound recordings.\footnote{19} While

\footnote{11} \textit{Slow Fade, supra} note 9.

\footnote{12} \textit{Id.} ("Licensing music to video games, movies, TV shows[,] and online subscription services is becoming an increasing source of revenue."); \textit{see also} Quinn & Chmielewski, \textit{supra} note 9; \textit{Digital Sales Predicted to Pass CDs by 2012, FRIDAY MORNING QUARTERBACK}, Feb. 19, 2008, http://www.fmqb.com/article.asp?id=589911 [hereinafter \textit{Digital Sales}].


\footnote{15} \textit{Slow Fade, supra} note 9; Interview by Arthousemusic.org with Jeff Castelaz, President, Cast Management, and Dangerbird Records, in Los Angeles, Cal. (Mar. 2006), \textit{available at} http://www.artistshousemusic.org/node/1468 [hereinafter Jeff Castelaz Interview].

\footnote{16} \textit{See} Jeff Castelaz Interview, \textit{supra} note 15; \textit{see also} Worst Year Ever, \textit{supra} note 10.

\footnote{17} Worst Year Ever, \textit{supra} note 10; Howe, \textit{supra} note 13 (indicating that major record labels still rely on CDs for most of their revenue despite a decline in sales).


\footnote{19} \textit{See generally} ARTHUR R. MILLER & MICHAEL H. DAVIS, INTELLECTUAL PROPERTY IN A
section 106 of the Copyright Act grants exclusive rights to copyright owners of sound recordings to perform their works publicly by means of digital audio transmissions, no such right has been granted for terrestrial audio transmissions, otherwise known as over-the-air radio broadcasts, which means no royalties for traditional radio play. While the controversy surrounding this issue is complicated and multifaceted, at the root of Congress's justification for denying this right time and time again is the economic balance it seeks to maintain between the promotional value of radio for album sales and recording artists' entitlements.

However, in an economy where CD sales have bottlenecked, the reasons that debatably once justified the exclusion of such a right no longer makes legal, equitable, or economic sense. As discussed above, both for established artists, such as chart-topping TLC, and smaller independent acts, royalties matter.

Part I of this Article discusses recently introduced legislation that would grant performance rights for sound recordings for all audio transmissions. Part II discusses the history of this Act and the controversy surrounding it. Finally, Part III provides a look at why this new legislation makes sense, both from a legal perspective and from a theoretical perspective.

I. THE PERFORMANCE RIGHTS ACT OF 2009 (H.R. 848)

On February 4, 2009, Senators Patrick Leahy, Orrin Hatch, Dianne Feinstein, Bob Corker, and Barbara Boxer jointly with Representatives John Conyers, Howard Berman, Darrell Issa, Marsha Blackburn, Jane Harman, John Shadegg, and Paul Hodes, reintroduced to both the Senate and the House the Performance Rights Act—a bipartisan bill that would finally


See MILLER & DAVIS, supra note 19, at 319-20.

See supra notes 19, 21 and accompanying text.

See supra notes 1-8 and accompanying text.
level the playing field by requiring traditional over-the-air radio to pay for play.26 This bill was first introduced at the 110th Session of Congress on December 18, 2007.27 However, it failed to make it to the floor for a vote after being referred to various committees for hearings, most likely due to the strong opposition it faced from the National Association of Broadcasters (NAB) and NAB's supporters.28

As the law currently stands, the Copyright Act limits performance rights for sound recordings to those played over digital audio transmissions.29 In layman's terms this means that the law only grants exclusive rights and subsequent royalty payments to recording artists when an artist's song is played on internet or satellite radio.30 However, when that same song is played over a car radio on the local "Top 40" station, the artist and/or the artist's label receives no royalty payment.31

The proposed act would specifically and most significantly amend sections 106(6) and 114(d)(1) of the Copyright Act.32 It would amend section 106(6) by extending the exclusive right to perform a sound recording publically on any audio transmission versus, as it currently reads, only on "digital audio transmissions."33 Similarly, it would amend section 114(d)(1) of the Act by removing the exemption for "nonsubscription broadcast transmissions" from performance rights for sound recordings on any audio transmission.34 Consequently, an artist would be entitled to payment for use of his/her song on analog, satellite, and internet radio.

Since as early as 1914, songwriters and music publishers have enjoyed this right, as "musical works" have always been entitled to such protection under section 106(4) of the U.S. Code.35 Bear in mind that recorded music

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30 Id.; see also DPRA 1995 REPORT, supra note 22.


33 Id. at § 2(a).

34 Id. at § 2(b) (referencing 17 U.S.C. § 114(d)(1)(A) (2006)); JULIE E. COHEN ET AL., COPYRIGHT IN A GLOBAL INFORMATION ECONOMY 467 (2d ed. 2006).

35 17 U.S.C. § 106(4) (2006) (granting the owner of a copyright exclusive right to, in the
under copyright law is dissected into two property rights: one granting ownership in the "musical work" and one granting ownership in the "sound recording." Musical works are defined as the actual notes and lyrics of a song and generally are the property of the songwriter(s) or publisher(s). Sound recordings, on the other hand, equate to the actual recording because they are "fixed in [a] "phonorecord[]," and are the property of the performing artist or the artist’s label.

Sound recordings were not recognized as copyrightable intellectual property until 1971, and consequently were not granted performance rights when such rights were granted in musical works. While musical works have long required payment for use on terrestrial radio through songwriter collective rights organizations (CROs), like ASCAP and BMI, sound recordings missed out on such profits. The proposed act merely aims to make the property ownership benefits for sound recordings equal to that of musical works and every other copyrightable expression.

It should also be noted that the proposed act does not seek to drain revenue from the smaller commercial radio stations. In fact, it includes special provisions which explicitly protect "small, noncommercial, educational and/or religious stations," placing a modest cap on the amount these types of stations can be charged depending on their gross revenues for the year. The proposed act also explicitly protects public broadcasters, limiting public stations to a low, yearly blanket license fee of one-thousand dollars.

Additionally, the proposed act ensures that the gains for recording artists will not come at a cost to owners of musical works, as the act includes a stipulation that plainly preserves performance rights for musical works. The act seeks to create a new right for recording artists, not to take case of musical works, perform the copyrighted work publicly); see 17 U.S.C. § 101 (2006) (defining "public" performance); see also 2 DAVID NIMMER & MELVILLE B. NIMMER, NIMMER ON COPYRIGHT § 8.14[A] (2004).

36 NIMMER & NIMMER, supra note 35, at § 8.19[A].
37 COHEN ET AL., supra note 34, at 444-45.
38 Id.
39 Id.
40 See id. (indicating that a label may contract for such rights to fall completely within its control/ownership, contracting artists' works as "works for hire").
41 Id. at 466.
42 Id.
43 Id. at 465-66; see also Letter from Jenny Toomey et al., supra note 21.
45 Id. at § 3 (stating that small commercial broadcasters whose gross revenues are less than $1,250,000 in any given year will pay $5000 per year for a blanket license).
46 Id.
47 Id. at § 5.
away the preexisting right of songwriters. Senate sponsors of this bill argue that creative artists, musicians, and songwriters are equally important in the creative process and therefore both parties should be fairly compensated for use of their intellectual property.

As mentioned above, there are a few key players in the industry that strongly oppose this legislation. Broadcasters understandably lead the resistance and have proven to be a formidable opponent over the decades. However, due to major shifting in the industry and on Capitol Hill, now seems like the appropriate time for the industry to begin correcting itself.

II. THE HISTORY OF PERFORMANCE RIGHTS IN SOUND RECORDINGS LEGISLATION

Broadcasters have long been the dominating force opposing performance rights in sound recordings. However, this issue came before Congress decades prior to the introduction of radio into the mainstream. U.S. copyright law first recognized musical compositions as protectable intellectual property in 1831, and then, in 1897, deemed copyrights in musical compositions as warranting public performance rights.

During the early years, such rights were difficult to enforce. This changed subsequent to the enactment of the 1909 Copyright Act, which overhauled many preceding copyright laws, and created a clear property interest in performance rights for musical compositions and dramatic works. However, it also limited these rights to public performances engaged in for profit.

Not long after the enactment of the 1909 Act, the first songwriter/song publishers’ CRO was formed. In 1914, a group of songwriters created the American Society of Composers, Authors, and Publishers (ASCAP) for the purpose of protecting music creators’ rights and assuring that they are fairly

48 Id.; Berman Press Release, supra note 27.
49 Id. (quoting statements by the congressional sponsors of the 2007 Performance Rights Act); see also Ayala Ben-Yehuda, Artists, Pols Rally for Performance Rights Act, BILLBOARD.BIZ, Feb. 7, 2009, http://www.billboard.biz/bbbiz/content_display/industry/e3i4922a47daed814de87de49f09df53b1 (regarding the introduction of the 2009 Performance Rights Act).
50 HOUSE REPORT 1978, supra note 28; see also supra note 18.
51 Id.
52 COHEN ET AL., supra note 34, at 426.
53 Id. at 426, 463.
54 Id. at 463.
55 Id. at 426.
56 Id.
compensated for public performance of their works. 57 Three short years later, ASCAP’s clout was tested when the organization brought suit against a restaurant owner for refusing to pay royalties for music played at the restaurateur’s establishment in Herbert v. Shanley Co. 58

At issue was whether music that is not played directly for profit, but has the indirect effect of attracting revenue constitutes “for profit” under the 1909 Act. 59 The Supreme Court held in favor of ASCAP, reasoning that “[i]f music did not pay, it would be given up. . . . [Therefore,] [w]hether it pays or not[,] the purpose of employing it is profit and that is enough.” 60

While this holding is no longer precedent due to amendments in copyright law that will be discussed momentarily, 61 the Court made an important statement that will be considered later in this Article when looking at what support exists for the current proposed legislation asking radio to pay to play.

Essentially, what the Court held is that music has an important promotional value. Regardless of whether patrons were more inclined to dine at the restaurant in this case because of the music played, the Court held that it would not have been played if it were not intended to attract patrons. Thus, the Court found that the indirect value of music should be compensated for. 62

It would have been reasonable for Herbert to extend the value of music to radio and its advertising revenue. However, when this case was decided, radio was a new technology with unknown potential, and was just beginning to emerge in the mainstream. 63 Its popularity did not really begin to peak until the 1930s. 64 By the time radio began gaining popularity, Congress was willing to recognize music performed on the radio as for-profit and for the public, thus entitling songwriters to royalties. 65 As the development and growth of radio began taking shape in the music industry, ASCAP was ready and waiting to provide a convenient method for collecting and distributing royalties. 66 However, since these fees were not

59 Herbert, 242 U.S. at 594.
60 Id. at 594-95 (quoting Holmes, J.).
61 See infra notes 75-77 and accompanying text (discussing 17 U.S.C. § 106 (1976)).
62 Id.
64 Id.; COHEN ET AL., supra note 34, at 463; see HOUSE REPORT 1978, supra note 28, at 35 (citing Stephen M. Werner, AN ECONOMIC IMPACT ANALYSIS OF A PROPOSED CRIME IN THE COPYRIGHT LAW (1977)).
65 See HOUSE REPORT 1978, supra note 28, at 34-45.
66 COHEN ET AL., supra note 34, at 463-64.
set by law, ASCAP had the freedom to raise fees as they saw fit. This became an issue for broadcasters and led to increased competition in CROs and issuances of blanket licenses for thousands of pooled songs.

Up until this point, these royalties were only applied to musical works, because sound recordings had yet to be deemed copyrightable. In fact in 1937, performing artist Paul Whiteman challenged broadcasters by taking radio to court for playing records he had recorded with the RCA Manufacturing Co., Inc., which had been imprinted with the legend: "Not Licensed for Radio Broadcast." While the lower court in this complicated case originally sought to recognize a common-law musical property interest in sound recordings, on appeal this lower court's decision was quickly overturned because sound recordings had yet to be recognized statutorily.

When such recognition was finally granted in the Sound Recording Act of 1971, performing artists lobbied for the same performance rights as musical works, but were denied due to heavy resistance from the broadcasting industry. During these negotiations, it became very clear that the alleged impact of radio play on record sales was the central factor defeating performance rights.

Consequently, when the 1976 Act was enacted, performance rights were still limited to musical works. However, Congress, recognizing the controversial nature of this issue, drafted into this Act a requirement that the Register of Copyrights submit a report, concurrent with the Act becoming effective, "setting forth recommendation as to whether [this provision] should be amended." The Register subsequently submitted a report in 1978, and in it "unequivocally recommended" that a performance right for sound recordings be written into law, reasoning that it was "entirely consonant with the basic principles of copyright law generally, and with those of the 1976 Act specifically."
The 1976 Act was also significant in that it removed the for-profit limitation that had been included in the 1909 Act.\textsuperscript{77} In doing this, Congress essentially broadened the Act's reach. Yet, Congress still made sure to explicitly include music played over the radio in its definition of "public performances."\textsuperscript{78} This was an intentional and specific inclusion, as it was penned into the 1976 Copyright Act less than a year after the Supreme Court ruled to the contrary in Twentieth Century Music Corp. v. Aiken.\textsuperscript{79}

Clearly, Congress felt it important to recognize music played over the radio as a public performance entitled to copyright protection.\textsuperscript{80} Yet Congress also made sure to exclude sound recordings from these rights.\textsuperscript{81} Given the conflicting purposes, Congress's decision was met with opposition from proponents of performance rights for sound recordings from the inception of the 1976 Act to the enactment of the 1995 Digital Performance Rights Act (DPRA).\textsuperscript{82}

Eventually, Congress saw the need for limited performance rights in sound recordings following the advent of internet radio. Internet radio was first introduced onto the web in 1993 as a small computer radio talk show.\textsuperscript{83} However, in the two years that followed, internet radio quickly grew into a popular music outlet, particularly attractive because of its special interest content-based programming.\textsuperscript{84} The rise in this new medium of public performance finally signaled to Congress a substantial enough threat to CD sales to justify granting a limited performance right in sound recordings.\textsuperscript{85}

\textsuperscript{77} COHEN ET AL., supra note 34, at 427.
\textsuperscript{78} See 17 U.S.C. § 101 (2006) (defining a “performance” as any recitation or playing of a musical work directly or “by means of any device,” and defining “public” as any transmission of a performance to the public, by means of any device, “whether the members of the public . . . receive it in the same place or in separate places and at the same time or at different times”) (emphasis added); Herbert v. Shanley Co., 242 U.S. 591, 594-95 (1917) (explaining that prior to the 1975 Act, this case stated that performance need not be directly for profit to constitute a public performance).
\textsuperscript{79} Twentieth Century Music Corp. v. Aiken, 422 U.S. 151, 164 (1975).
\textsuperscript{80} Id. at 158.
\textsuperscript{83} Mary Lu Carnevale & John J. Keller, Cable Company is Set to Plug Into Internet, WALL ST. J., Aug. 24, 1993.
\textsuperscript{85} DPRA REPORT 1995, supra note 22, at 13 (statements by Sen. Hatch). “In a comparatively few years, compact discs . . . have edged out . . . cassette tapes and vinyl records . . .” Id. “[I]n the copyright protection in the digital environment, the creation of new sound recordings . . . could be discouraged . . .” Id. at 14. “[C]urrent copyright law is inadequate to address all the issues raised by new technologies . . . and, thus, [inadequate] to
Consequently, this act created a three tiered system for categorizing digital transmissions based on their likelihood of affecting "phonorecord" sales.\footnote{DPRA 1995 Report, supra note 22, at 23-24.} The way that Congress approached this legislation shows how heavily the pre-internet and pre-satellite radio music industry business model, which depended on album sales, influenced copyright law.\footnote{Cohen et al., supra note 34, at 467 ("The purpose of granting sound recording copyright owners a limited public performance right is to guard against harm to the market for sales of phonorecords.").}

Not long after the enactment of the DPRA, increased development in digital webcasting complicated interpretation of the Act. Consequently, in 1998, Congress amended the provisions enacted in the DPRA to "create fair and efficient licensing mechanisms that address the complex issues facing copyright owners."\footnote{Id.; H.R. Conf. Rep. No. 105-796, at 79-80 (1998).}

Two years later, in Bonneville International Corp. v. Peters, the courts were asked to further interpret the DPRA and to distinguish whether terrestrial radio stations that simultaneously stream their over-air broadcasts on the net should be required to pay DPRA royalties.\footnote{Cohen et al., supra note 34, at 467-68; Bonneville Int'l Corp. v. Peters, 347 F.3d 485, 492-94 (3d Cir. 2003).} Congress issued a ruling that broadcasters who broadcast both over the air and over the net should not be exempt from paying DPRA royalties for the music they broadcast over the net, and the court affirmed.\footnote{Cohen et al., supra note 34, at 467.}

While it may seem backwards to advocate for a right in an old technology after previously being granted that same right in a new technology, as the history of performance rights indicates, the DPRA only made its way through Capitol Hill after an imminent threat became undeniable.\footnote{DPRA REPORT 1995, supra note 22, at 10-13 (statements by Sen. Hatch).} Up until that point, legislators were stuck in a stalemate, being tugged at by broadcasters on one end and performing artists on the other.\footnote{Ben-Yehuda, supra note 49 ("[Representative] Conyers said the performance rights compensation issue had been taken up in two dozen Congresses since the 1920s.").} Thanks to the DPRA, legislators have been given a new reason to reevaluate the fairness of no performance right for sound recordings, and the backwardness of protecting artists played over satellite and internet radio, but not analog.\footnote{Id. ("What is turning the tide now, [Representative] Conyers and others said, have been the successes in getting performers' compensation from satellite and Internet radio . . . ").}

In light of this, the introduction of the first Performance Rights Act in 2007 seemed positioned for favor in Congress. However, we saw the tug of
war arise again in October 2007, when U.S. Congressmen Mike Conaway and Gene Green attempted to derail the Leahy and Hatch sponsored 2007 Act by proposing House Concurrent Resolution 2444 in support of the Local Radio Freedom Act. This Act namely declares that a sound recording performance right would function as a burdensome performance tax on radio, which would be detrimental to the radio industry.

Like the first Performance Rights Act, this resolution never made it to the floor. With the recent reintroduction of the Performance Rights Act, the Local Radio Freedom Act has too reemerged, as of February 12, 2009. This time around, supporters of the opposing resolution are calling the Performance Rights Act a "record label bailout." Despite the opposition, proponents of the bill are optimistic, noting that this is the first time in history the issue made it this far in the Capitol. As the fight for performance rights takes to the Hill once again, old arguments will undoubtedly arise, however, in light of the current economic crisis, new considerations must be made.

III. THE TIME IS RIGHT FOR PERFORMANCE RIGHTS IN SOUND RECORDINGS

After over fifty years of debating this issue, the time is ripe to bring sound recording copyright owners into parity with all other copyright holders. Considering the temperament of the music and radio industry today, continuing to withhold performance rights for sound recordings is unjustifiably harmful to recording artists and inconsistent with legislative intent of the Copyright Act. More than sufficient support exists for the enactment of the proposed Performance Rights Act, as this bill is faithful to decades of congressional history and is proper under the theories upon which intellectual property rights are based.

94 Ashton, supra note 70, at 16.
97 Record Label Bailout, supra note 96 (discussing NAB President's letter addressed to House speaker Nancy Pelosi).
98 Ben-Yehuda, supra note 49 ("It's never gotten this far in our history.").
A. The Performance Rights Act is Faithful to Decades of Congressional Intent

In 2006, radio earned an estimated $20 billion in ad revenue.99 From those earnings, songwriters were paid roughly $600 million.100 Recording artists were paid nothing.101 Advertisers pay to have their products endorsed on the radio because they know that there will be an audience—not because an audience tunes in to hear their advertisements, but because an audience tunes in to hear the music.102 Despite the fact that Congress, more than thirty years ago, explicitly recognized music played over the radio as a public performance,103 recording artists continue to lose out on radio’s millions of dollars in profit.104

According to congressional history, legislators have long considered the value of granting sound recordings performance rights protections.105 Some may see this as a demand coming out of left field and as such, some may believe the law as is must provide sufficient protections and thus should be left alone. But, as discussed above, this has never been a dormant issue, rather it is something that has been heavily fought over and, even more importantly, heavily endorsed for the last thirty years.106

When the 1971 Sound Recordings Act was enacted, the Recording Industry Association of America lobbied heavily for sound recording rights, but was overshadowed by concerns from radio broadcasters.107 Broadcasters’ central argument has always been that recordings artists are getting invaluable free promotions via airplay.108 However, the Register of Copyrights has, since the enactment of the 1976 Act, consistently expressed

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99 Butler, supra note 21.
101 D’Onofrio, supra note 18, at 168.
103 See supra note 78 and accompanying text.
104 INT’L MUSICIAN, supra note 102.
105 The 1976 Act was enacted with a request that the Register of Copyright provide more in-depth research on the issue of performance rights for sound recordings, implicitly leaving room in the Act for revision, depending on what the report revealed. 17 U.S.C. § 114(d) (Supp. 1979). This report supported adding a provision granting performance rights for sound recordings. 43 Fed. Reg. 12,763, 12,766 (Mar. 27 1978).
107 HOUSE REPORT 1978, supra note 28; see also Statement of M. Peters 1995, supra note 18.
strong disagreement to this rationale.

As mentioned above, when the 1976 Act was enacted it was enacted with the stipulation that the Register of Copyrights submit to Congress a report setting forth recommendations as to whether performance rights should be granted to sound recordings.\(^{109}\) This report, which was published two years later after significant legal, historical, and economic investigation, overwhelmingly concluded that "sound recordings warrant a right of public performance [as] [s]uch rights are entirely consonant with the basic principles of copyright law generally and with those of the 1976 Copyright Act specifically."\(^{110}\) The Register further concluded that such a right was necessary in order to "eliminate a major gap [in the 1976 Act]... by bringing sound recordings into parity with other categories of copyrightable subject matter."\(^{111}\)

Despite this report, which Congress had requested with respect to this controversial issue,\(^{112}\) Congress refused to amend the 1976 Act accordingly. However, this issue was brought before Congress on many subsequent occasions.\(^{113}\) In 1991, the Register of Copyrights submitted another report in which it again advocated that "sound recordings are valid works of authorship and should be accorded the same level of copyright protection as other creative works."\(^{114}\) It was not until 1993 that Congress began showing serious interest in granting these rights, subsequent to the burgeoning digital audio industry.\(^{115}\) Around this time, the Register submitted another statement, asserting that "justice requires that performers and producers of sound recordings be accorded a public performance right."\(^{116}\)

While the Copyright Office has long felt that the economic benefits of "free promotions" to recording artists is not sufficient justification for withholding this right, such justification is even less relevant today. Despite the congressional apprehension to grant these rights due to this old, outdated argument, it important to note that the pulse of the radio industry is weak at best.\(^{117}\) These days, eighty-five percent of teenagers discover new music through alternative sources, namely internet sources such as the

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\(^{110}\) Id.

\(^{111}\) Id.

\(^{112}\) Nimmer & Melville, supra note 35.

\(^{113}\) See generally supra note 9.


\(^{116}\) Statement of M. Peters, supra note 18, at 24.

social networking site, MySpace. Every day new channels emerge, further displacing radio's promotional value. As such, Congress's support of broadcasters is no longer compelling in light of the arguments presented by the Copyright Office supporting performance rights for the last thirty years.

Having recognized an artist's value to satellite and webcast radio, is it logical that the United States would also recognize that same value in terrestrial radio? In Senator Leahy's statement to the Senate he asserted "[t]he work of songwriters is promoted by airplay, but no one seriously questions the right of a songwriter to be paid for the use of his or her work. . . . The time has come to end this inequity." In the past Congress declined performance rights in order to maintain an alleged economic balance between radio and artists. But Congress found that such a right superseded the importance of this alleged balance in 1995, leading to the DPRA. Concerns that new technologies and services could upset the "historic economic balance" meant that the ability to displace record sales became a Congressional issue. It is now evident that Congress's reasoning for supporting DPRA demonstrated great foresight. However, the text accompanying the DPRA also makes the inequity in the distribution of these rights across copyrightable expressions glaringly clear.

118 Id.; Worst Year Ever, supra note 10 ("Indie labels proved especially adept at Internet marketing via outlets like MySpace; the emo label Victory Records sold 558,000 copies of Hawthorne Heights' album The Silence in Black and White without radio play."); Radiohead's Rainbow, supra note 14 (explaining that artists such as Lily Allen and the Arctic Monkeys saw substantial sales without radio).


122 DPRA 1995 REPORT, supra note 22, at 20-21; see also Statement of M. Peters 1995, supra note 18.

B. The Performance Rights Act is Proper and Equitable Under the Theories Supporting Intellectual Property Law

1. Support of the Performance Rights Act under the Incentive Theory. Article I of the U.S. Constitution grants Congress the power to "promote the progress of science and useful arts." As the language of this provision suggests, Congress developed copyright law based largely on the utilitarian incentive theory. This theory suggests that copyright laws were established to provide an incentive for the creation of intellectual property, with the access to such works benefitting the greater good of society. This theory also warns that without granting a monopoly right in these works, there will be no incentive to create, because these works would be too easy to copy and freely disseminate.

Under this theory, the Performance Rights Act is clearly equitable and justifiable. Allowing analog radio stations to broadcast music to a wide audience without any payment to recording artists goes directly against this theory. Additionally, the fact that songwriters are incentivized while performers are not is clearly inequitable and in opposition of this theory. This sentiment was affirmed by recording artist Lyle Lovett, who testified before Congress in favor of this bill, stating that the royalties he earns as a songwriter absolutely motivates his work. John Simson, the executive director of Recording Artists CRO, Sound Exchange, echoed this belief arguing that as "[every other] business needs to pay for its inputs, industries [that] profit off the labor of others should [have to] pay [those] workers."

The fact that songwriters are protected, but performing artists are not makes little sense. Both the songwriter and performer are essential for creating a record and therefore both parties should be incentivized.

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124 This Article does not propose to argue that these theories are an adequate basis upon which to develop intellectual property law today. Instead, it merely attempts to look at the proposed act in view of these theories, recognizing that these theories have historically been used to evaluate the equity of intellectual property laws.

125 U.S. CONST. art I, § 8, cl. 8.


127 Id.

128 Id.

129 INT'L MUSICIAN, supra note 102 ("I love radio, and I appreciate the support I've gotten from radio over the years. . . . [B]usiness is business, and fair is fair—and [radio] shouldn't get to profit off the music we create without compensating us.").

130 Noyes, supra note 121.

131 See Ben-Yehuda, supra note 49.
Consider the song “I Will Always Love You” written and recorded by Dolly Parton and later re-recorded by Whitney Houston.\footnote{Steve Hochman, Pop Eye: Because of ‘The Bodyguard,’ Dolly Parton Will Always Love ‘You’, L.A. TIMES, Jan. 17, 1993, at 63.} While Ms. Parton’s version of this song did modestly well when she released it in 1974, and again in 1982, it only made it to the fifty-third spot of the Billboard Hot 100 Chart.\footnote{Id.; see also Wikipedia.com, I Will Always Love You, http://en.wikipedia.org/wiki/I_Will_Always_Love_You (last visited Apr. 8, 2009).} However, when Whitney Houston recorded and released this song in 1992 it sold over 10 million copies,\footnote{Wikipedia.com, supra note 133.} spent fifteen weeks at number one on various Billboard charts,\footnote{Billboard.biz, Whitney Houston Chart Statistics, http://www.billboard.biz/bbbiz/charts/search/chart_search_results.jsp?rpp=100&sw=&cd=&f=&t=i+will+always+love+you&per=whitney+houston&df=P&prod= &g=s&l=&dl (last visited April 19, 2009).} and ended 1993 as the number one single of the year on the Hot 100 Chart.\footnote{Billboard.com, The Billboard Hot 100 1993, http://www.billboard.com/bbcom/charts/yearend_chart_display.jsp?f=The+Billboard+Hot+100&g=Year-end+Singles&year=1993 (last visited April 19, 2009).} While Ms. Parton is far from unknown in the industry, the revenue she earned off of Ms. Houston’s distinctive and hard-to-replicate performance is significant.\footnote{See Hochman, supra note 132.}

Despite the revenue Ms. Parton earns every time Ms. Houston’s song is played on the radio,\footnote{Id.; see also The Greatest: 100 Greatest Love Songs (20-1) (VH1 television broadcast Nov. 6, 2002).} Ms. Houston has yet to collect a penny from analog radio. Cases concerning copyright law provide extensive analysis on the distinction between a fact or idea and an expression of a fact or idea.\footnote{Sid & Marty Krofft Television Prod., Inc. v. McDonald’s Corp., 562 F.2d 1157, 1163 (9th Cir. 1977) (emphasizing that copyright protection broadly protects expressions of idea, but narrowly protects ideas); see also Boisson v. Banian, 273 F.3d 262, 268 (2d Cir. 2001) (stating that copyright protection only covers a specific expression of an idea, not the idea itself); Steinberg v. Columbia Pictures, Inc., 663 F. Supp. 706, 711-12 (S.D.N.Y 1987) (distinguishing between an idea and its expression).} Yet, despite the courts’ careful copyright protection of expressions, Ms. Houston’s irrefutably unique expression of Ms. Parton’s song is not afforded performance rights.\footnote{See D’Onofrio, supra note 18, at 175-76.} In contrast to the utilitarian theory, the incentive theory does not support granting musicians in Ms. Houston’s position less incentive to create a sound recording over musicians in Ms. Parton’s position.

As mentioned earlier in this Article, opponents to the Performance Rights Act argue that the incentive theory does not require that artists be granted an additional incentive, where artists are already granted the incentive of radio play, which theoretically promotes record sales.\footnote{Kharif, supra note 7.}
However, as supporters of performance rights have long alleged, anecdotal evidence suggests that radio not only fails to promote record sales, but that it in fact may have the reverse affect.\footnote{142} In a 2007 study, an economics professor at the University of Texas at Dallas compared record sales and music radio listening in some 100 American cities from 1998 to 2003.\footnote{143} The study found that radio use is negatively related to the sale of sound recordings.\footnote{144} Specifically, the study found that approximately one additional hour of radio listening per person per day corresponded with a 0.75 drop in the number of albums purchased per capita in a given city over the course of a year.\footnote{145} While this study alone is not conclusive enough to debunk the theory that radio promotes sales, it at least shines a light on this unsubstantiated, long-accepted justification.

Opponents to the Performance Rights Act also argue that this legislation will not grant any additional incentives to recording artists, because, if granted, radio royalties will end up in the pockets of the already gluttonous labels.\footnote{146} However, the industry has seen payouts from radio effectively benefit the actual creators—as seen for years with songwriters and song publishers working with CROs, BMI, ASCAP, and SESAC, and in the last few years with recording artists and recording artists’ CRO, SoundExchange.\footnote{147} While some of the profits go to the labels, as SoundExchange currently operates, it ensures that artists profit from digital royalties, breaking up royalties so that fifty percent goes to record companies, forty-five percent goes to featured musicians, and the remaining five percent goes to non-featured, backup musicians.\footnote{148}

The relationship between the labels and artists may bring up the question of why recording artists cannot simply incentivize themselves in how they contract with their labels. Recording group TLC, like many


\footnote{143} \textit{Id.}; Stan J. Liebowitz, \textit{Don't Play It Again Sam: Radio Play, Record Sales, and Property Rights} (Jan. 5, 2007) (unpublished manuscript, on file with the University of Texas at Dallas School of Management), \textit{available at} http://ssrn.com/abstract=956527.

\footnote{144} Liebowitz, supra note 143, at 27-28, 32.

\footnote{145} Mindlin, supra note 142 (referring to Liebowitz, supra note 143, at 27-28.

\footnote{146} Ashton, supra note 70, at 16 (statements made by NAB Executive Vice President, Dennis Wharton); \textit{Record Label Bailout}, supra note 96. NAB President, David Rehr, in a letter addressed to House speaker Nancy Pelosi, stated that "although the proponents of H.R. 848 claim this bill is about compensating artists, in actuality at least half of this fee will go directly into the pockets of big record labels." \textit{Id.}


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artists, were barely out of their teenage years when they received their first offer from a major record label.\footnote{149} However, the parties they were contracting with were music industry veterans.\footnote{150} Many artists do not know what they are getting themselves into because they do not think like lawyers or accountants.\footnote{151} Therefore, the incentive provided by analog radio royalties would have a real impact on these artists.\footnote{152}

2. Support of the Performance Rights Act Under the Moral Rights Theory.\footnote{153} Another theory that intellectual property rights are based upon is the moral rights or personhood theory.\footnote{154} This theory, which is more prominently referenced in European copyright laws, is premised on the idea that humans have a fundamental need to establish property rights in works in which they “have expressed their [unique and personal] ‘wills’” or personalities.\footnote{155} In other words, this theory suggests the government has a moral duty to grant intellectual property rights in order to preserve the personhood or identity of creators. The entitlements that such rights should grant include the right “to control the public discourse of their works, to withdraw their works from public circulation, to receive appropriate credit for their creations, and, above all, to protect their works against mutilation or destruction.”\footnote{156}

Under this theory, the Performance Rights Act is clearly equitable. Sound recording owners, such as TLC, Whitney Houston, and Lyle Lovett, do not just own the notes and words of a song, but also the unique

\footnote{149} See generally Sonia Murray, TLC: Struggling in the Spotlight, AUSTIN AMERICAN STATESMAN, July 12, 1999, at E1 (emphasizing the problems faced by each artist in the group due to their success at such a young age).
\footnote{150} Id. at E6. In 1991, they were signed to the management and production company of former R&B singer, Perri “Pebbles” Reid, who was also the wife of LaFace Records co-owner, Antonio “L.A.” Reid. Id.
\footnote{151} Tony Pendleton, For Some Artists, Price of Fame Can Be Bankruptcy, SUN HERALD (Biloxi, Miss.), Apr. 3, 1998.
\footnote{152} Sisario, supra note 147, at E1. In 2001, singer Suzanne Vega received a $41 check from SoundExchange. Id. In 2004 her check had increased to $800. Id. This article states that “[t]he amount paid by SoundExchange to artists like Ms. Vega for royalties earned from satellite and Internet radiotap[lay]...is a fraction of what is made in royalties by composers and publishers from traditional radio.” Id.
\footnote{155} Fisher, supra note 126, at 171 (explaining that this theory is derived largely from the writings of Kant and Hegel’s Philosophy of Right) (citing Justin Hughes, The Philosophy of Intellectual Property, 77 GEO. L.J. 287, 299-330 (1988)).
\footnote{156} Fisher, supra note 123, at 171.
expression of it, as fixed in some medium.\textsuperscript{157} The quality that each artist adds to a performance is unique and deeply personal. In some cases it is literally impossible to replicate.\textsuperscript{158} As discussed, a recording artist’s interpretation of a songwriter’s work can add incredible color and distinction to a musical work, not to mention a significant increase in a work’s profitability.

At the widely telecast 2009 Inaugural Ball for the 44th President of the United States, Barack Obama, recording artist Beyoncé performed “At Last,” a song written in 1941 by Mark Gordon and Harry Warren. The song was recorded a number of times over the years, most notably by recording artist Etta James in 1961.\textsuperscript{159} While Beyoncé was widely praised for her performance, Etta James publically criticized the cover of her hit song.\textsuperscript{160} Ms. James’s reaction is an example of how the creator needs to have a property right in his or her creation, in order to preserve the personhood.

Etta James’ rendition of “At Last,” though almost fifty years old, is still the most recognized version of this song.\textsuperscript{161} As the moral rights theory suggests, Ms. James’ identity, at least publicly, is very much tied up in her performance of “At Last.” Yet, despite this fact and the fact that Ms. James’ version of “At Last” is still played frequently on the radio, Ms. James receives no compensation from analog broadcasters for the unique work she created.\textsuperscript{162} Now, in her seventies, Ms. James’ opportunities to profit from this classic hit are limited.\textsuperscript{163} Yet her creation continues to be freely consumed by radio and its audiences, inspiring new musicians to create their own interpretation of this timeless song. Ms. James’ reaction to a newer artist’s performance of her hit song shows the nature of the moral

\begin{footnotesize}
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\item 157 See supra notes 36-40.
\item 158 See, e.g., Ludovic Hunter-Tilney, Mariah Carey’s Superhuman Octaves, FIN. TIMES, Apr. 18, 2008, available at http://us.ft.com/ftgateway/superpage.ft?news_id=flo041820082030469655 (noting that recording artist Mariah Carey is famous for her eight-octave vocal range and her unique virtually inaudible whistle).
\item 160 Id.
\item 161 Id.
\item 162 Id.
\item 163 See generally The Performance Rights Act: Hearing Before the Subcomm. on Courts, the Internet, and Intellectual Property of the H. Comm. on the Judiciary, 110th Cong. (2008) (statement of Nancy Sinatra, recording artist and daughter of Frank Sinatra) (“Some [recording artists] are forced to tour until they die, if they can still sell tickets . . . Lacking a pension, many live out their old age hearing their song on the radio knowing that radio is making money while they are living in a home somewhere unable to make ends meet.”).
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rights theory. Ms. James and other sound recording owners should be entitled to receive credit and subsequent compensation for appropriation of their works on the radio, because stripping these creators of their rights wrongfully injures their personhoods under the moral rights theory.

Some proponents of this theory go so far as to argue that governments should grant greater protections to the fruits of highly expressive intellectual activities, like musical works, because these works are closer to a person's will or personality. All things considered, it is undeniable that the proposed legislation is in line with this theory as well as the incentive theory.

CONCLUSION

The Performance Rights Act is long overdue. Congressional history supports the enactment of this bill. The theories on which intellectual property rights are granted upon also support this bill.

Radio and major labels have long been in an advantageous position, and both parties freely exploit these positions. However, the industry is changing. Artists are evolving and becoming smarter and more business savvy. New labels are emerging with modern, unconventional business models and are proving to be far more viable in the current market. The forward-thinking industry participants see the central assets in the music business as the monetization of access to an individual song and the branding of artists—not revenue from CD sales. Enactment of the Performance Rights Act, while appearing backwards, would finally bring Congress and broadcasters into the current marketplace, by showing the rest of the industry, and the rest of the world for that matter, that the current market values access to individual songs. Further, enactment of this bill would finally give artists the credit they deserve for their performances across every medium.

164 Fisher, supra note 126, at 171-72 (referencing John Hughes' guidelines for the "proper shape of an intellectual property system"); see also Hughes, supra note 153.
166 Letter from Jenny Toomey et al., supra note 21, at 1; McBride, supra note 165.
167 Every other developed country worldwide grants performance rights in sound recordings, placing the United States in a category with North Korea, China, and Iran in excluding these rights. Butler, supra note 21; Letter from Jenny Toomey et al., supra note 21.