DANCING TO A NEW TUNE, A DIGITAL ONE: THE DIGITAL PERFORMANCE RIGHT IN SOUND RECORDINGS ACT OF 1995

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I. Introduction

Imagine having the ability to reserve airline tickets through your home computer.[1] Or, a library of movies, television shows and music selections accessible by a cable remote or a key on your home computer for a small monthly fee.[2] There is no longer a

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[1] Interview with Bert Mandelbaum, medical student at Robert Wood Johnson Medical School, Aug. 15, 1995. He bought Airline tickets to the United Kingdom for a lower price than found in most advertised places. *Id.*

[2] 141 CONG. REC. S945-02, S950 (daily ed. Jan. 13, 1995) (statement of Sen. Feinstein). The Senator stated that these digital audio services are springing up in cities, towns, and even rural communities across the nation. *Id.* While today's technology prevents speedy downloading, instantaneous access will be available, due to compression technology and high-speed transmission. *Id.*

need to dream; the future has arrived. While it may be criticized by many, anyone can do just about anything without leaving the confines of his or her home.[3] Already existing companies offer home access to music with sound quality that is virtually identical to the original recording.[4] The need for record stores, video rental stores, VCR's, and other formerly indispensable items will become a thing of the past.[5] It is through digital technology by which this new phenomena can exist.[6]

With these new technologies, however, comes the task of protecting the creators of these artistic works from copyright infringement.[7] The idea of this kind of protection is not new; the framers of the United States Constitution recognized that the progress of

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[3] *Id.* Senator Feinstein believes that these emerging technologies "have the potential to put the current recording industry out of business." *Id.* Digital technology is a whole new industry that can distribute information directly to individual's homes. *Id.* at 949.

[4] H.R. Rep. No. 274, 104th Cong., 1st Sess. 12 (1995); *See also The Digital Performance Right In Sound Recordings Act of 1995: Hearings on H.R. 1506 Before the Judiciary Subcomm. on Courts and Intellectual Property*, June 21, 1995, *available in* WESTLAW, at 1995 WL 371088 (statement of Jason S. Berman, Chairman and Chief Executive Officer of the Recording Industry Association of America). Digital Music Express [hereinafter DMX] and Digital Cable Radio [hereinafter DCR] currently offer multichannel selections that are designed to make home downloading a substitute for purchasing albums. *Id.* One DCR brochure states that "there will be 'no need to spend a fortune on a CD library.'" *Id.* These subscribers "can receive more than forty continuous, uninterrupted, CD-quality channels of prerecorded music." *Id.*

[5] 139 CONG. REC. E1710-02 (daily ed. July 1, 1993) (statement of Rep. Hughes). The technology that allows individuals to download and store information may result in a displacement of retail sales. *Id.* Rep. Hughes stated that "these services may end up killing the goose that lays the golden egg." *Id.* He was attempting to balance the exciting new digital era with the interest in maintaining economic incentives for continued creation of works. *Id.* Presently, retail sales are the primary source of income for record companies and their artists. *Id.* If digitization continues, and people download information for free at home, sales will virtually cease causing the incentives for production of creative works to become nonexistent. *Id.*

[6] *See* 141 CONG. REC., at 949-50. Perfect reproductions of music may be turned in to binary code (zeros and ones). The code can be transmitted virtually anywhere in the world through cable or satellite, maintaining the exact same quality as the original. *Id.*

[7] Howard Seigel, *Digital Transmissions and Sound Recording Performance Rights: The Latest Legal Challenge in Emerging Technologies*, Vol. 7, No. 1 (Winter 1995) NYSBA, originally printed N.Y.L.J., special insert, Dec 5, 1994. Lawyers need to constantly look for any gaps in the law that may be opened by technological advances that surpass legal parameters. *Id.*; *see also* 141 CONG. REC. S14,547-05, S14,550 (daily ed. Sept. 28, 1995) (statement of Sen. Kerry). Digital technology permits perfect reproductions which can be made without any of the degradation that results from analog reproduction. *Id.*

the arts is so essential to the culture of this country, they deserve exclusive protection.[8] As a result of copyright laws, artists are both rewarded for their tangible creations[9] and provided with incentives for continuing their art.[10] Copyright protections have extended to authors, visual artists, dramatic artists, and musicians.[11] These artists enjoy the exclusive right to the work, its reproduction and distribution, and the right to perform it publicly.[12] Protected works include plays, operas, fiction, ballet, pantomimes, and film.[13]

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[8] U.S. CONST. art. I, § 8, cl. 8. Congress shall have the power "to promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries." *Id.*; *see also* Goldstein v. California, 412 U.S. 546, 555 (1972) (holding that people who devote themselves to intellectual and artistic pursuit will be rewarded with control over the sale on their works). Mazer v. Stein, 347 U.S. 201, 219 (1954) (finding that personal gain is the best means to encourage individual efforts towards advancing science and the arts). *Id.*

[9] Copyright Act of 1976, 17 U.S.C. § 101 (1995) allows for copyright protection only for "works" that are "fixed in tangible medium of expression." *Id.* A work will be deemed as:

> fixed in a tangible medium of expression when its embodiment in a copy or phonorecord . . . is sufficiently permanent or stable to permit it to be perceived, reproduced, or otherwise communicated for a period of more than transitory duration. A work consisting of sounds . . . that are being transmitted, is 'fixed' . . . if a fixation of the work is being made simultaneously with its transmission.

Id.

[10] *See supra,* note 8; *see also* 141 CONG. REC. S945-02, S948 (Jan. 13, 1993) (statement of Sen. Hatch).

[11] *See* 17 U.S.C. § 101.

[12] *Id.* at § 106.

> The owner of copyright . . . has the exclusive rights to do and to authorize any of the following:
> (1) to reproduce the copyrighted work in copies or phonorecords;
> (2) to prepare derivative works based upon the copyrighted work;
> (3) to distribute copies or phonorecords of the copyrighted work to the public by sale or other transfer of ownership, or by rental, lease, or lending;
> (4) in the case of literary, musical, dramatic, and choreographic works, pantomimes, and motion pictures and other audiovisual works, to perform the copyrighted work publicly; and
> (5) in the case of literary, musical, dramatic, and choreographic works, pantomimes, and pictoral, graphic, or sculptural works, including the individual images of a motion picture or other audiovisual work, to display the copyrighted work publicly.

Id.

[13] *Id.* All of the arts enjoy the right over the public performance of their work; sound recordings are the only form of art that are not granted this public performance right. *See id.* at § 106(4), which delineates where rights exist:

The music industry is treated differently than the other arts.[14] A "song" is split into two distinct entities.[15] First, a musical composition is created, which encompasses the actual song as it is written, including the tune and lyrics.[16] The copyright owner of the musical composition is granted protection by the Copyright Act of 1976 ("Copyright Act") for both the composition and any public performance of the work.[17] The second entity, a "sound recording," is

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> Copyright protection subsists . . . in works of authorship fixed in any tangible medium of expression, now known or later developed, from which they can be perceived, reproduced, or otherwise communicated, either directly or with the aid of a machine or device. Works of authorship include the following categories:
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> (1) literary works;
> (2) musical works, including any accompanying words;
> (3) dramatic works, including any accompanying music;
> (4) pantomimes and choreographic works;
> (5) pictorial, graphic, and sculptural works;
> (6) motion pictures and other audiovisual works;
> (7) sound recordings; and
> (8) architectural works.

17 U.S.C. § 102(a) (1995).

14 Jay L. Bergman, Note, *Digital Technology Has the Music Industry Singing the Blues: Creating a Performance Right For the Digital Transmissions of Sound Recordings*, 24 SW. U. L. REV. 351 (1995). Copyright in music is broken into two distinct categories. *Id.* There is a "musical work" and also a "sound recording." *Id.; see* 17 U.S.C. § 102(a)(2),(7)(1995) which defines eight different types of protected works of authorship. *Id.* Music is the only form of art that is broken into two distinct categories of work. *Id.*

15 *See* Bergman, *supra* note 14. The musical work (also referred to as musical composition) is the song on a page. *Id.* Included within that, are the tune (musical notes) and any accompanying words. *Id.; see also* 17 U.S.C. § 102(a)(2). Typically, this copyright is owned by the composer or songwriter, who sells the song to a music publisher. Bergman, *supra* note 14 The second entity, the sound recording is the artistic contribution to the musical composition. *Id.* Ultimately, what the song sounds like is a matter of the artist's personal interpretation of the written song. *Id.* This includes the singer, musicians and producers of the work. *Id.* In this instance these artists are the copyright owners of the sound recording. *Id.* Often, they sell this right to a record company in exchange for a recording contract. *Id.*

16 *See* Bergman, *supra* note 14, at 353; *see also* 139 CONG. REC. at E1710.

17 *Id.* The copyright owner can license the composition for public performance in clubs and restaurants or for television and radio. *Id.* This is done through the use of performing rights societies such as the American Society of Composers, Authors and Publishers [hereinafter ASCAP], Broadcast Music, Inc. [hereinafter BMI], and the Society of European Stage Authors and Composers [hereinafter SESAC] on a nonexclusive basis. *Id.*; *see also* 17 U.S.C. § 106.

A public performance occurs: (1) "at any place where a substantial number of persons outside of a normal circle of a family and its social acquaintances is gathered;" or (2) a transmission or communication of the work "to the public, by means of

the actual final product, reduced to a cassette tape or compact disc.[18] While copyright owners in "sound recordings" are entitled to protection of the actual piece, the Copyright Act specifically denies these owners the right to receive royalties for any public performances.[19] One of the main reasons for this denial was that the artist would already be receiving income from the sales of the records, compact discs, and cassette tapes.[20] A second reason was the hard lobbying from members of the broadcasting industry who feared that a public performance right in sound recordings would cause severe financial damage.[21]

With digitization, near perfect versions of songs and albums are presently available, or will be available in the near future for a nominal fee.[22] This is through mediums such as satellite, cable,

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any device or process, whether the members of the public" receive the transmission at the same place or time as the performance. 17 U.S.C. § 101.

18 17 U.S.C. § 101. A "sound recording" is defined as a "work that results from the fixation of a series of musical, spoken, or other sounds, but not including the sounds accompanying a motion picture or other audiovisual work." *Id.* A "phonorecord" is defined as:

> any material objects in which sounds, other than those accompanying a motion picture or other audiovisual work, are fixed by any method now known or later developed, and from which the sounds can be perceived, reproduced, or otherwise communicated, either directly or with the aid of a machine or device.

17 U.S.C. § 101.

19 17 U.S.C. §§ 106(1)(2)(3), 114(a) (1995)(protection of the actual piece includes reproduction, preparation of derivative works, and distribution of the copyrighted material). *See also* William H. O'Dowd, Note, *The Need For a Public Performance Right In Sound Recordings*, 31 HARV. J. ON LEGIS. 249 (1994); 139 CONG. REC. at E1710. Under current law, radio stations and restaurant owners do not have an obligation to pay the copyright owner of a sound recording for playing their work(s) publicly. *Id.*

20 *See infra* parts II and III; *see also* Kamesh Nagarajan, *Public Performance Rights In Sound Recordings and the Threat of Digitization*, 77 J. PAT. & TRADEMARK OFF. SOC'Y 721 (1995). In 1992, prerecorded music made approximately $28.7 billion worldwide. *Id.* Record companies have found it difficult in the past to show that an economic hardship will be worked upon them if no public performance royalty is legislated. *Id.*

21 *Id.* at 723. Radio broadcasters do not want to have to pay another royalty payment. *Id.* "Composers groups have also lobbied strongly against performance rights in sound recordings, fearing that if radio stations were required to pay performance royalties to sound recording copyright owners, their slice of the royalty pie would shrink." *Id.* Martin Bandier, the Chairman of EMI Music Publishing believes that artists should receive a performance royalty, but not at the expense of other music industry leaders. *Id.*

22 *Id.* There are already existing companies that provide music digitally. *Id.* Presently, these companies offer the same services as radio stations, but with much better sound quality and no commercial or Disc Jockey [hereinafter DJ] interruptions. *Id.* The copyright owner of the music compositions receives a public performance roy-

and computers.[23] Thus, traditional sales of records will be seriously threatened.[24] In response to this threat, Congress has recently passed the Digital Performance Right in Sound Recordings Act of 1995.[25] This Act grants copyright holders of sound recordings the right to receive royalties for public performances of their works on digital subscription and interactive services.[26] Such legislation acts to protect artists' works, alleviates the financial loss suffered from a loss in sales, and maintains the incentive to continue the creativity that enriches our American culture.[27] Part II of this note sets forth the historical background that has led to the seemingly overdue introduction of public performance rights in sound recordings.[28] Part III will examine the case law of sound recordings as it has evolved through history.[29] Additionally, Part IV will discuss the Digital Performance Right In Sound Recordings Act of 1995, from its first proposal in Congress in 1993, to its final draft as present law.[30] Finally, this note will conclude by examining the impact the new Act shall have on U.S. Copyright law and the music industry.[31]

II. Historical Background: History of Public Performance Rights in the United States Legislation

The Copyright Act of 1909 was the precursor to modern Copyright legislation.[32] Among other things, this Act provided only

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alty. *Id.* Since November 1, 1995, the copyright owner of the sound recording receives a public performance royalty for these digital subscription services. The Digital Performance Right In Sound Recordings Act of 1995, P.L. 104-39, November 1, 1995, 109 Stat 336 [hereinafter 1995 Act]. Other services such as "pay-per-listen" and the "Celestial Jukebox" have operations in the preparatory stages. Nagarajan, *supra* note 20, at 723 (citing N. Jansen Calamita, *Coming To Terms With The Celestial Jukebox: Keeping The Sound Recording Copyright Viable In The Digital Age*, 74 B.U. L. REV 505, 552 (1994)). These services will allow the listener to call up any song selection, from a library of choices. *Id.*

23 *See* Nagarajan, *supra* note 20, at 723.

24 *See* 141 CONG. REC.

25 *See* 1995 Act, *supra* note 22; *see also infra* part IV.

26 *Id.*

27 *See supra* note 6; *see also* "Green Paper" *infra* note 101.

28 *See* 141 CONG. REC., at S946.

29 *See infra* Part III.

30 *See infra* Part IV.

31 *See infra* Part V.

32 Copyright Act of 1909, ch. 320 § 1(d), 35 Stat. 1075 (1909) (codified at 17 U.S.C. §§ 101-810 (1978)) [hereinafter 1909 Copyright Act]; For a comprehensive analysis of the 1909 Act and analysis of modern copyright law see Emio F. Zizza, Note,

copyright owners of "musical compositions" the right to the public performance of their works.[33] However, technology grew so quickly in the ensuing years that the purpose and language of the Act was rendered somewhat obsolete.[34] Ultimately, Congress began revising copyright law in the 1950's.[35] In 1971 Congress amended the 1909 Act, and for the first time, a copyright in "sound recordings," was established.[36] The Sound Recording Act of 1971 granted its owner the exclusive right to reproduce and distribute his or her product.[37] The primary purpose of this Act was to inhibit the surge of tape piracy that had begun at that time.[38] After further extensive research, Congress introduced the Copyright Act of 1976 to eradicate the problems of the 1971 Act.[39] The 1976 Act provided the copyright owner of a sound recording the exclusive right to prepare derivative works of the recording[40] and to publicly

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Eliminating the Preferential Treatment of Foreign Works Under United States Copyright Law: Possible Impacts of the Copyright Reform Bill of 1993, 19 S. HALL LEGIS. J. 681 (1995).

33 Copyright Act of 1909, ch. 320, § 1(d), 35 Stat. 1075.

34 *See* O'Dowd, *supra* note 19, at 251-52 (citing Jessica Litman, *Copyright Legislation and Technological Change*, 68 OR. L. REV. 275, 277 (1989)). The purpose of the original Act was to protect public performance, because it was the greatest manner in which an artist's work could be heard and promoted. *Id.* This was prior to the advances that were made in telecommunications and radio broadcasting. *Id.* The public performance would increase the demand for the artist's sheet music, which was the greatest source of income for songwriters during that era. *Id.*

35 *See id.* This was in response to technological changes that had occurred over the years. *Id.* For example, record, cassettes, and radio broadcasting became avenues through which musician's works could be copied and distributed for profit without the artist's knowledge or consent. *Id.* Additionally, the need to conform to international copyright law became an important consideration for American lawmakers. *See* Zizza, *supra* note 27, at 690 n.43.

36 Sound Recording Act of 1971, Pub. L. No. 92-140, 85 Stat. 391; (codified at 17 U.S.C. § 102(1995)) [hereinafter Sound Recording Act]; 141 CONG. REC., at 948. Sound recordings have been a recognized copyright since 1971. *Id.* The main reason for the recognition of this copyright was to prevent the increase of piracy that had begun as a result of the ease in duplication of records and tapes. *See* Bergman, *supra* note 14, at 353.

37 *See* Sound Recording Act, supra note 36, at 391.

38 *Id.*

39 17 U.S.C. § 101 (1978). The act did not become effective until January 1, 1978. *Id.* Congress began revision of the 1909 Act in 1955 by conducting studies and hearings. *See* Zizza, *supra* note 27, at 690 n.43(citing SIDNEY SHEMEL & M. WILLIAM KRASILOVSKY, THE BUSINESS OF MUSIC 134 (1990)). Public performance rights was one of the most debated issues. *Id.* Interest groups including cable television, restaurant owners and broadcast radio all lobbied furiously against the introduction of a public performance right in sound recordings. *Id.*

40 17 U.S.C. § 114(b)(1995). The Act is expressly limiting. *Id.*

distribute the "phonorecord."[41] Although it was a heavily debated issue, public performance rights to the copyright owner in a sound recording were expressly denied by the 1976 Act.[42] The original draft granted public performance rights to the sound recording copyright owners, however, heavy opposition by broadcaster's lobbying efforts blocked its passage.[43] However, the issue of public performance was not forgotten; the language of the 1976 legislation instructed the U.S. Copyright Office to examine the issue.[44] Almost immediately, the Copyright office declared that the denial of public performance royalties to owners of copyright in sound recordings was an unjustifiable practice.[45] The 1978 Report constructed a scheme that would benefit both performers and record producers, as co-authors of a sound recording.[46] These reports seemed to have had no effect on Congress, as no steps were taken to advance the public performance royalty right in the following years.[47]

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41 17 U.S.C. § 114(b) (1995). *See supra* note 18 (defining "phonorecord").

42 17 U.S.C. 114(a) (1995). "The exclusive rights of the owner of copyright in a sound recording . . . do not include any right of performance." *Id.*

43 S. 1111, 94th Cong., 1st Sess. 1-4 (1975). The original draft proposed mandatory payments for public performances that were commercially broadcast. This would have forced radio stations to pay an annual flat fee to the creators and owners of copyright in sound recordings. *Id.* at 3-4. Edward Molnar, Comment, *Performance Royalties and Copyright*, 8 SETON HALL L. REV. 678, 680-81 n.9 (1977).

44 17 U.S.C. § 114(d) states in pertinent part:

> On January 3, 1978, the Register of Copyrights, after consulting with representatives of owners of copyrighted materials, representatives of the broadcasting, recording, motion picture, entertainment industries . . . shall submit to the Congress a report setting forth recommendations as to whether this section should be amended to provide for performers any performance right in such material. The report should describe the status of such rights in foreign countries, the views of major interested parties, and specific legislative or other recommendations, if any.

Id.

45 *U.S. Register of Copyrights, Report On Performance Rights In Sound Recording: Hearings Before the Subcomm. on Courts, Civil Liberties and the Administration of Justice of the House Comm. on the Judiciary*, H.R. Doc. No. 15, 95th Cong., 2d Sess. (1978) [hereinafter Register's report]. The Register strongly urged Congress to implement a public performance right in sound recordings, as lack of such is an anomaly in the law. *Id.*

46 *Id.* S. Rep. No. 128, 104th Cong., 1st Sess. 10-11 (1995); *see also Copyright Protection for Digital Audio Transmissions: Hearings on S. 227 Before the Senate Judiciary Comm.* March 9, 1995, *available in* WESTLAW, at 1995 WL 102507 (statement of Marybeth Peters, Register of Copyrights and Associate Librarian for Copyright services).

47 *Id.* Legislation was introduced following the 1978 report. *Id.* However, Congress again refrained from taking any measures in that direction. *Id.*

Since the 1976 Act, bills have been introduced in Congress attempting to solve this apparent anomaly to copyright law, but all have failed.[48] It seems that the recent developments in technology and the introduction of digitization have been the catalyst, spurring Congress into action.[49] The loss of profits from record sales caused by the ease and quality of digital services may act to destroy the constitutional intent of encouraging artists to produce more music.[50] As a result, the Audio Home Recording Act of 1992 "AHRA" was enacted as a first step in countering unauthorized home duplication of artists' copyrighted works.[51] Under the Act,

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The existent injustice of Congressional denial of royalties to the copyright owner in a sound recording was more apparent because public demand for a specific performer's rendition is paramount to the efforts of the composer, songwriter, or publisher. *See* 141 CONG. REC., at 948. Yet, they receive no compensation for its public performance. *See id.* "It could be noted that Willie Nelson authored a country music standard when he composed 'Crazy,' a song he has also recorded. But, Patsy Cline made the song a classic, by her inimitable performance of it." *Id.* "Many cover versions of songs become very successful due to the performer's interpretation, such as Rod Stewart's recent version of Sam Cooke's 'Havin' A Party.' It is clear that a performer's contribution to a sound recording is at least as important as the composer's, lyricist's, or publisher's . . . " Nagarajan, *supra* note 20, at 723.

48 Seigel, *supra* note 7. The Performer's Rights Society of America, headed by Frank Sinatra, and the Recording Industry Association of America [hereinafter RIAA], as representatives for artists, producers, and record companies have attempted to direct congressional attention to the need for public performance royalty rights. *Id.* Numerous attempts at creating a performance right in sound recordings have been made in Congress. H.R. 6063, 95th Cong., 1st Sess. (1977); H.R. 997, 96th Cong., 1st Sess. (1980); H.R. 1805, 97th Cong., 1st Sess. (1981). However, all of these attempts have been struck down, primarily by the lobbying of interest groups such as National Association of Broadcasters [hereinafter NAB] and performing rights societies who fear the burden of paying even more royalties. *See* Nagarajan, *supra* note 20, at 723. Additionally, music publishers have consistently been opposed to the introduction of a public performance royalty for sound recordings. 139 CONG. REC. at E1710.

49 H.R. Rep. No. 2576, 103rd Cong., 2d Sess. (1993), S. Rep. No. 1421, 103rd Cong., 2d Sess. (1993). The introduction of the Digital Performance Right in Sound Recordings Act of 1993 was not enacted because it was too broad. 139 CONG REC. E1710.

50 *Id.*; 141 CONG. REC. S11945-04 (Aug. 8, 1995); *see also Mazer*, 347 U.S. at 219.

51 Audio Home Recording Act of 1992, 106 Stat. 4237, H.R. 3204, 102d Cong., 1st Sess. (1992); S. 1623, 102d Cong., 1st Sess. (1992) [hereinafter AHRA]; *See* Seigel, *supra* note 7, at 1. "This law provides for a tax on digital audio recording equipment (exceptions are made for certain professional machines, telephone answering devices and other specific types of hardware not used for copying music), as well as a tax on blank digital tapes." *Id.* There is also a requirement that machines capable of multigenerational copying be equipped with a "Serial Copy Management System" device, which restricts serial copying. *Id.*

digital audio tape recorders and blank digital tapes are taxed to reimburse performers, producers, and publishers for losses in record sales.[52] It is perhaps this piece of legislation, coupled with the swift surge of available digital technology that led to the introduction of the Digital Performance in Sound Recordings Act of 1995.[53]

Even prior to the enactment of the AHRA, the Copyright Register issued another report on the implications of digital audio transmission services in 1991.[54] This was provided under the joint request of Chairman DeConcini and Representative Hughes, chairman of the House Subcommittee on Intellectual Property.[55] Overwhelmingly, the report recommended the recognition of a performance right in sound recordings, not exclusively limited to digital transmissions.[56] Still, Congress refrained from taking any action.[57]

Finally, Congress proposed the Digital Performance Right In Sound Recordings Act of 1993.[58] However, that Act was rejected in

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[52] Jonathan Franklin, Note, *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, 93 (1993). Two-thirds of the tax revenues are distributed to the Sound Recordings Fund. *Id.* Approximately forty percent of the revenues shall go the performers, while the remainder will be distributed to record companies. *Id.* The AHRA "was an important first step in recognizing the rights of copyright owners and creators in the new digital environment." *Copyright Protection for Digital Audio Transmissions: Hearings on S. 227 Before the Senate Judiciary Comm.* March 9, 1995, *available in* WESTLAW, at 1995 WL 100510 (statement of Mark Tully Massagli, President of American Federation of Musicians). "Indeed, that legislation marks the first time in the history of U.S. copyright that performers have been specifically included in the copyright law." *Id.* Mr. Massagli views the Digital Performance Rights In Sound Recordings Act of 1995 as a continuation of the recognition of performers. *Id.*

[53] *Id.* Copyright law should be tailored to meet the increasing capabilities of technology. *Id.; see also* 139 CONG. REC. E1710.

[54] *U.S. Register of Copyrights, Report on Copyright Implications of Digital Audio Transmission Services* (Oct. 1991) [hereinafter 1991 Copyright Report]. The performance right issue was the most controversial issue in the report. S. Rep. No. 128, 104th Cong., 1st Sess. 11-12 (1995); *see also Copyright Protection for Digital Audio Transmissions: Hearings on S. 227 Before the Senate Judiciary Comm.* March 9, 1995, *available in* WESTLAW, at 1995 WL 102507 (statement of Marybeth Peters, Register of Copyrights and Associate Librarian for Copyright services). Lines were split between broadcasters and record companies. *Id.* Ultimately, the Copyright office again came to the conclusion that sound recordings should be protected at the same level as other creative works. *Id.*

[55] *See* 141 CONG. REC., at S947.

[56] *Id.*

[57] *Id.; see also* Franklin, *supra* note 52, at 93.

[58] Digital Performance Right in Sound Recordings Act of 1993 (H.R. 2576 and S. 1421). That act was brought by Rep. Howard Berman and Rep. William Hughes in the House of Representatives and by Sen. Diane Feinstein and Sen. Orrin Hatch in

its entirety because of intense conflict between interested parties within the music industry.[59] Subsequently, a "Green Paper" and a final "White Paper" were written by the Clinton administration's "Information Infrastructure Task Force's Working Group on Intellectual Property Rights."[60] These were issued just after the 1993 Act was defeated. One of the paper's focal points ironically suggests that section 106 of the 1976 Copyright Act be amended to provide a public performance right to copyright owners in sound recordings.[61] Today, the 1995 Act fills what appears to have been a gap in copyright law.[62]

III. Case History

As stated earlier, the origin of copyright protection lies in the Constitution.[63] This "Copyright Clause" has been interpreted broadly by the courts, to ensure incentives for the creation and pursuit of the Arts and of Science.[64] With regard to music, the precursor to modern case law was in 1908, in the case of *White-Smith Music Publishing Co. V. Apollo Co.*[65] The Court opined that, although a specific sound (in this instance, piano rolls) was "fixed in a tangible medium of expression,"[66] it could not be considered a part of the original musical composition.[67] While the distinction between the two types of "music" became evident, sound record-

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the Senate. *Id.* Rep. Hughes serves as Chairman of the House Judiciary Subcommittee on Intellectual Property. *Id.*

59 141 CONG. REC. D801-01 (daily ed. June 28, 1995); *see also supra* note 21.

60 *See* Seigel, *supra* note 7, at 1.

61 *A Preliminary Draft of the Working Group on Intellectual Property Rights,* Information Infrastructure Task Force at 120-21 (July 1994) [hereinafter "Green Paper"]. The Green Paper states that the failure to have this right is an inequity within federal copyright law. *Id.*; *see also* Seigel, *supra* note 7, at 1.

62 *See* Bergman, *supra* note 14, at 353. The new digital era threatens to create a chasm within copyright law unless immediate measures are taken. *Id.*

63 U.S. CONST. art. I, § 8, cl. 8.

64 *See Mazer,* 347 U.S. at 219 (holding that copyright law is intended to encourage the production of literary and artistic works to increase culture). Reward to the owner is a secondary consideration. *Id.*

65 209 U.S. 1 (1908); *see* Franklin, *supra* note 49, at 85. This case made the first legal distinction between musical compositions and sound recordings. *Id.*

66 *See supra* note 9 (defining "fixed" and "tangible medium of expression").

67 *White-Smith,* 209 U.S. at 17. The court determined this because sound that was fixed in the recording could not be reproduced from a reading of the original musical composition. *Id.*

ings were deemed mere copies of the original work.[68] These "copies," as the Court called them, did not deserve any protection under the copyright law.[69]

For years, the courts had a difficult time deciding whether sound recordings were deserving of any protection.[70] This was true until 1955, when the Second Circuit decided *Capitol Records v. Mercury Records.*[71] In that case, the Court determined that New York law cannot permit free copying of a performance recorded for reproduction and sale by the copyright owner/plaintiff.[72] Thus, a right to reproduce and distribute prerecorded music was created at common law.[73]

Subsequently, in 1971, a recognizable copyright interest in sound recordings was codified.[74] This codification was upheld on constitutional grounds in the seminal case of *Shaab v. Kleindienst.*[75] The court determined that any technical advances unanticipated by the Constitution's framers cannot prevent the protection of sound recordings under copyright law.[76] Moreover, the court determined that compulsory licensing was unnecessary because it would hinder the incentive for recording companies to invest in

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68 *Id.* at 18.

69 *Id.; see also* RCA Manufacturing Co. v. Whiteman, 114 F.2d 86, 89 (2d. Cir. 1940) (holding that phonograph records are registerable for copyrights under the 1909 Act); Waring v. WDAS Broadcasting Station, Inc., 194 A. 631, 633 (Pa. 1938) (holding the an orchestra proprietor could not prevent that sale of a recorded version of his performance under copyright law).

70 *RCA Manufacturing Co.*, 114 F.2d at 88. There, Judge Learned Hand refused to grant an interest to the creator of a record, once it was bought and played on a radio broadcast. *Id.* Subsequently, that decision was ignored by other New York courts. *See* Capitol Records, Inc. v. Mercury Record Corp. 221 F.2d 657 (2d Cir. 1955).

71 *Capital Records*, 221 F.2d at 662. This case was decided solely on principal, because there was no federal or state law that controlled. *Id.*

72 *Id.* at 663. Allowing individuals to freely copy a recording that has been invested in and for which a contract has been made would be in direct contradiction with general precepts of law. *See id.* Judge Learned Hand, in his dissent, strongly argued that the decision went against the spirit of federal copyright law. *Id.* at 667

73 *Id.*

74 *See* Sound Recording Act, *supra* note 36.

75 345 F. Supp. 589 (D.D.C. 1972). Plaintiff alleged the following: sound recordings did not qualify as writings under the copyright clause of the Constitution; lack of a compulsory license provision for sound recordings was invidious discrimination and; the 1971 Act was void for vagueness. *Id.*

76 *Id.* at 590. This was a very important decision for purposes of the present digital age. *Id.* It allowed for broad interpretation of the Constitution and for the protection of new and unknown technologies where a creative work may be fixed in a tangible medium. *See id.*

new performers and arrangements.[77]

The decision was further reinforced by the United States Supreme Court in *Goldstein v. California.*[78] The Court left the interpretation of the word "Writings" in the copyright clause to the minds on Congress.[79] Furthermore, the Supreme Court found that an "author" does not necessarily create written material.[80] Instead, an author may be an originator, who is also capable of creating physical manifestations of intellectual or aesthetic labor.[81] Thus, the Court concluded that sound recordings fall within the ambit of constitutional protection.[82]

While owners of copyright in sound recordings began to receive recognition apart from musical compositions, neither code nor common law extended protection for their public performance.[83] The public performance of musical compositions was protected by copyright law and the courts.[84]

A. *Recent Concerns Raised By Technology*

The onslaught of recent technology has brought an array of new copyright infringement questions before the courts.[85] For ex-

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77 *Id.* This would occur because any licensee may copy the record and enjoy a profit without investing any time or money, or putting any real effort into the artistic process. *Id.* The primary purpose of the 1971 Act was to prevent "piracy" or unauthorized duplication. *Id.*

78 412 U.S. 546 (1973). The case stood for the proposition that creators should have control over the sale and commercial use of their works. *Id.* at 555.

79 *Id.* at 562. "The history of federal copyright statutes indicates that the congressional determination to consider specific classes of writings is dependant, not only on the character of the writing, but also on the commercial importance of the product to the national economy." *Id.* New areas of protection must be initiated to protect creators against emerging technology. *Id.*

80 *Id.* at 561

81 *Id.*(citing Burrow-Giles Lithographic Co. v. Sarony, 111 U.S. 53 (1884)).

82 *Id.* at 562. The court also recognized the congressional enactment of sound recordings as a protectable copyright interest in 1971. *Id.* at 563 n.17. Again, the court referred to tape piracy as the primary reason for recognizing and granting such an interest. *Id.* at 571.

83 17 U.S.C. § 106, 114; *RCA Manufacturing Co.*, 114 F.2d at 88.

84 17 U.S.C. § 106; Broadcast Music, Inc. v. Columbia Broadcasting System, Inc., 441 U.S. 1 (1979)(recognizing that those who publicly perform copyrighted musical compositions have a burden to obtain prior consent); Boz Scaggs Music v. KND Corporation, 491 F. Supp. 908 (D. Conn. 1980)(holding that defendants could not, with the intent to earn a profit, publicly perform a musical composition that was copyrighted by plaintiff).

85 Playboy Enterprises Inc. v. Frena, 839 F. Supp. 1552 (M.D. Fla. 1993)(holding

ample, on-line communications and electronic bulletin boards have become increasingly common sources of litigation.[86] In *Playboy v. Frena*, the court ruled that the plaintiff had the exclusive right to exploit its own copyrighted pictures.[87] Therefore, the defendant's act of unauthorized uploading of pictures on a computer bulletin board was infringement.[88]

Further common law protection of copyrights in the digital age was found in *Sega Enterprises v. Maphia*.[89] The court agreed with the *Playboy* decision, finding that unauthorized copying for the purpose of distribution constitutes an infringement.[90]

These cases clearly portray the courts' desire to protect individuals' creations and continue the incentives for future endeav-

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that the Copyright Act gives copyright owners control over any possible commercial value of their creations. Further holding that display on computer billboard was infringement); Sega Enterprises Ltd. v. Maphia, 857 F. Supp 679 (N.D. Cal. 1994) (finding that unauthorized copying and uploading of copyrighted vidoegame to computer bulletin board was infringement); *see also* Frank Music v. CompuServe (S.D.N.Y.) (currently being settled in New York).

86 Jeffrey C. Selman, *Copyright Protection in a Digital World: Judicial, Legislative, Technological, And Contractual Solutions*, 7 No. 7 J. PROPRIETARY RTS. 4 (1995). "Users may post (upload) and take (download) digital information from these bulletin boards by using a modem attached to a computer. Invariably, copyrighted works have been uploaded and downloaded . . . without authorization from their copyright owners." *Id.*

87 *See Playboy*, 839 F. Supp. at 1556-57. The court said that copyright protections extend to the distribution, copying, and display of the creator's work. *Id.; see also* Selman, *supra* note 86, at 5; § 106 of the Copyright Act, *supra* note 12 (delineating what the owner of a copyright has the exclusive right to do).

88 *Playboy*, 839 F. Supp. at 1556. This was true even though the defendant never actually made the copies, but allowed others to do so. *Id.*

89 *Sega*, 857 F. Supp. at 687. "Because users of the MAPHIA bulletin board are likely . . . to download Sega games therefrom to avoid having to buy video game cartridges from Sega, by which avoidance such users and defendants both profit, the commercial purpose and character of the unauthorized copying weighs against a finding of fair use." *Id.*

17 U.S.C. § 107, (providing for fair use as a defense for infringement actions) states that reproduction in copies or phonorecords for specific reasons, such as criticism, teaching, or research is not an act of infringement. *Id.* In determining fair use, four factors must be examined. *Sega*, 657 F. Supp. at 687. One such factor is the effect of the use upon the potential market for, or the value of the copyrighted work. *Id.* This is a prudential consideration with regard to sound recordings, because of the serious threat to record store sales that will likely occur once the digital revolution is fully realized. 141 CONG. REC. at S947 (Jan. 13, 1995).

90 *Sega*, 857 F. Supp. at 687. Saving users the cost of buying authorized versions of the video game, this speaks towards a finding of infringement. *Id.* (citing American Geophysical Union v. Texaco, Inc., 802 F.Supp. 1, 14-16 (S.D.N.Y. 1992)).

ors.[91] While it is not certain from these cases whether sound recordings, as a whole, will be afforded the same level of protection as musical compositions, it seems probable that digital transmission will be given the same level of protection as copying and distribution.[92] That question, however, will probably be answered before this note is completed; *Frank Music v. Compuserve* has recently been filed in the Southern District of New York.[93] The plaintiff in that case is suing for infringement based upon the uploading and downloading of music on the defendant's network.[94]

IV. Legislative History

Since the 1976 Copyright Act, Congress has made a number of attempts at achieving a public performance right in sound recordings.[95] However, all attempts have failed to be enacted into law.[96] On July 1, 1993, the House Intellectual Property Subcommittee

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91 *See generally Mazer*, 347 U.S. at 201.

92 *See Playboy*, 839 F. Supp. 1552; *Sega*, 857 F. Supp. 679. With regard to digital subscription services, the question appears to have already been answered by the enactment of the new Act. *See infra* part V. However, those transmissions have been defined as broadcast which are protected by the new public performance royalty. *See* 17 U.S.C. §§ 106, 114. It remains certain that on-line services will be required to comply with this royalty requirement, because of their interactive and "subscription" nature. 1995 Act, *supra* note 22. Most likely, those cases will be treated according to the well-established prohibition on copying and distribution that has been granted to sound recordings since 1971. *See* Sound Recordings Act of 1971, supra note 36.

93 Selman, *supra* note 86, at 6.

94 *Id.* Other cases are also pending. *Id.* This does not alleviate the difficulty that exists in discovering the potentially endless number of unauthorized uploading and downloading that may be occurring on-line every day. *Id.*

95 *See* H.R. 6063, H.R. 997, *supra* note 48. A high degree of income, combined with strong lobbying by broadcaster constantly acted as a barrier to the enactment of this right. N. Jansen Calamita, Note, *Coming To Terms With The Celestial Jukebox: Keeping The Sound Recording Copyright Viable In The Digital Age*, 74 B.U. L. REV.. 505, 513 (1994). Additionally, the "one pie" theory helped to sway Congress against taking such action in the past. *Id.; see also* 139 CONG. REC. at E1710 (July 1, 1993). This theory states that there is only a fixed amount of money available to those who contribute to the creation of a work. *Id.* Opponents successfully argued that a new royalty payment to copyright owners in sound recordings would lessen the established rate of compensation available to other contributors. *Id.* Rep. Hughes noted that broadcasters were quite fearful of copyright owners in sound recordings being granted a public performance right. *Id.* The fixed pool of money available to such royalties will create a problem for broadcasters, who would be forced to pay a new royalty that invades the structure of the music industry. *Id.* According to this theory, music publishers, songwriters, and performing rights societies would be damaged, because they would be forced to take less of the pie. *Id.*

96 *See* Calamita, *supra* note 95, at 513.

Chairman William Hughes (D-NJ) and Representative Howard Berman (D-Cal) introduced the Digital Performance Rights In Sound Recordings Act of 1993,[97] which was subsequently introduced in the Senate.[98] Because it so broadly encompassed all mediums of digital transmission, it was never enacted.[99]

As a result of the fervor created in 1993, the House Subcommittee on Intellectual Property and Administration of Justice held full hearings on the public performance issue.[100] A number of "roundtable" discussions were also held by interested parties outside of Congress.[101] These discussions culminated in what is now called the "May 11 Compromise."[102] This compromise was an agreement among all of the interested parties to the enactment of a public performance right in sound recordings.[103]

Additionally, President Clinton assembled the Information Infrastructure Task Force's Working Group on Intellectual Property

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97 H.R. Rep. No. 2576, 103rd Cong., 1st Sess. (1993); *see also Performance Right Bill Introduced*, 5 No. 8 J. PROPRIETARY RTS. 28 (Aug. 1993). The 1993 Act was intended to extend a public performance royalty for any digital transmission. *Id.* This right was opposed by the NAB, who argued that a public performance right should not apply to broadcast radio, "because free radio and television airplay represents a promotional windfall for artists and their record companies." *Id.* Paying fees additional to the licensing fees paid to ASCAP and BMI, radio stations argue, would threaten financial ruin upon them, because many already operate at a fiscal loss. *Id.*; see also The Digital Performance Right In Sound Recordings Act of 1995: Hearings on H.R. 1506 Before the Judiciary Subcomm. on Courts and Intellectual Property, June 21, 1995, *available in* WESTLAW, at 1995 WL 371107 (statement of Edward O. Fritts, of the National Association of Broadcasters). Broadcasters will be subjected to great harm if forced to pay a royalty fee. *Id.*

98 S. Rep. No. 1421, 103rd Cong., 1st Sess. (1993). The bill in the Senate was sponsored by Senators Diane Feinstein and Orrin Hatch. Wallace Collins, *Performance Rights For Sound Recordings*, N.Y.L.J., Mar. 11, 1994, at 5.

99 *See* 139 CONG. REC. E1710-02 (July 1, 1993) (statement of Rep. Hughes).

100 *Id.*

101 *Id.* Those present at these roundtable discussions included members of performing rights societies, music publishers, songwriters, musicians, broadcasters, restaurant owners, cable operators and satellite industry leaders. *Id.*; *Public Performance Sound Recordings Legislation Introduced*, 3 J. PROPRIETARY RTS. 31 (1995).

102 *Id.*; H.R. Rep. No. 274, 104th Cong., 1st Sess. 11; *see also The Digital Performance Right In Sound Recordings Act of 1995: Hearings on H.R. 1506 Before the Judiciary Subcomm. on Courts and Intellectual Property*, June 21, 1995, *available in* WESTLAW, at 1995 WL 371087 (statement of Wayland Holyfield, Songwriter and Member of the Board of Directors of ASCAP).

103 *Id.*; *see also Copyright Protection for Digital Audio Transmissions: Hearings on S. 227 Before the Senate Judiciary Comm.* March 9, 1995 (statement of Kurt Bestor), *available in* WESTLAW, 1995 WL 100532. Mr. Bestor was concerned that the agreements made during the May 11th Compromise had been abandoned by Congress. *Id.*

Rights ("the Working Group") to examine such important issues.[104] The Working Group issued a preliminary report of its findings concerning the National Information Infrastructure, known as the "Green Paper," in July of 1994.[105] This report addressed the protection of copyright owners with regard to the growth and ease of access to information services.[106] This report concluded that a need existed for a public performance royalty concerning the digital transmission of copyright owners in sound recordings.[107]

Prior to the enactment of the 1995 Act, the working group issued its final draft of conclusions regarding the National Information Infrastructure ("the NII").[108] This "White Paper," as it is called, revises the Green Paper to some degree.[109] However, the group's stance on public performance royalty rights with regard to

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104 *See* Seigel, *supra* note 7, at 1. Bruce A. Lehman, Assistant Secretary of Commerce and Commissioner of Patents and Trademarks, is the Chairperson of the Working Group. *Id.*

105 *See* Green Paper, *supra* note 61. Among its recommendations, the *Green Paper* discusses whether transmission of a work over a computer network constitutes a distribution of copies or recordings, even though no tangible medium is exchanged. *Id.* at 121; Thomas F. Smegal, Jr., *Proposed Amendments To The Copyright Act Would Address Concerns Raised By The Emergence Of The National Information Infrastructure*, 101 NAT'L. L.J., Nov. 7, 1994, at B5.

As the Copyright Act presently states, a transmission can only occur with respect to displays and performances. 17 U.S.C. § 101. This is a central problem with regard to sound recordings. *See* Bergman, *supra* note 14. A public performance of a sound recording is not protected by copyright law. *See* 17 U.S.C. §§ 106, 114. Furthermore, transmission can only be considered a performance or display. Therefore, individuals will be able to upload, download, copy, and reproduce artists' works, bypassing the necessity of record stores. *See* Bergman, *supra* note 14, at 353. This will eliminate any responsibility to pay a royalty or any other fee for the investment of time and money on the part of the artist, the producer and the recording company. *Id.*

Ultimately, the Green Paper recommended that for a transmission to be more than a performance, a reproduction must be made by the recipient. Green Paper, *supra* note 61, at 122.

106 Green Paper, *supra* note 61, at 122.

107 *Id.* at 132. The Green Paper states that "it is time to rectify this inequity." *Id.* Moreover, the Green Paper also states that the manufacture, distribution or importation of devices that circumvent systems which inhibit or safeguard against the unauthorized copying of copyrighted works is a criminal offense. *Id.* at 128. The working group believes that the changes necessary in the Copyright Act are minor, and that "there is no need for a new coat." *Id.* at 120.

108 *A Final Draft of The Report of the Working Group on Intellectual Property Rights*, Information Infrastructure Task Force, (1995) [hereinafter White Paper].

109 *Id.* For instance, the White Paper retreats from the Green Paper's definition of the term "transmission" and makes it clear that a transmission is a violation. Alan J. Hartnick, *Law Changes Necessary For Information Superhighway?*, N.Y.L.J., June 9, 1995, at 5.

digital transmissions did not change.[110]

After the high degree of anticipation and after extensive discussion and research, the Digital Performance Rights In Sound Recordings Act of 1995 was introduced on the floor of the Senate on January 13, 1995.[111] Its counterpart was introduced in the House of Representatives on April 7, 1995.[112] The bill is substantially narrower than its predecessor in 1993.[113] Soon after its introduction in each house of Congress, the bill was sent to the respective committees on the Judiciary.[114] On August 4, 1995, the Senate committee returned the bill to the Senate floor with a single amendment attached.[115] Four days later (August 8, 1995), the Senate passed S. 227, adopting the committee's amendment.[116] At that time the bill awaited House approval.[117] Similarly, the House Committee on Judiciary returned the bill on September 12, 1995, with the amendment.[118] On October 17, 1995, the House of Representatives passed S.227, in lieu of H.R. 1506.[119] Finally, on November 1, 1995, President Clinton signed into law, the Digital Performance Right In Sound Recordings Act of 1995.[120]

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110 *See* White Paper, supra note 108.

111 S. Rep. No. 227, 104th Cong., 1st Sess. (1995). The bill was sponsored by Senators Diane Feinstein and Orrin Hatch. *See* 141 CONG. REC. S947 (Jan. 13, 1995).

112 H.R. Rep. No. 1506, 104th Cong., 1st Sess. (1995). Representative Carlos Moorhead (R-Cal) sponsored the bill in the House. *Digital Performance Rights Bill Introduced*, 7 No. 5 J. PROPRIETARY RTS. 27 (1995).

113 *Id.*; 1995 Act, *supra* note 22; *See also* 141 CONG. REC. S947. Among its primary distinctions, the bill excused broadcast radio from the royalty requirement for public performance of sound recordings. *Id.* Additionally, nonsubscription services are also excused, regardless of their digital nature. *Id.* The Act also ensures that the royalties payable to the copyright owners of musical compositions shall not be diminished as a result of the new royalty. *See* 1995 Act, *supra* note 22.

114 H.R. Rep. No. 274, 104th Cong., 1st Sess. 12 (1995)

115 *Id.*

116 *Id.*

117 *Id.*

118 *Id.*

119 *See* Search of WESTLAW, Bltrck Library "H.R. 1506," Mar. 15, 1996.

120 *Statement by the Press Secretary on Digital Performance Right in Sound Recordings Act*, Nov. 2, 1995, *available in* WESTLAW, at 1995 WL 642659. "The law will expand consumer choice by providing greater incentives for recording artists to produce and disseminate more works." *Id.*

V. Analysis of the 1995 Act

A. *Legal Effects*

As expected, the Digital Performance Right in Sound Recordings Act of 1995 ("the Act") ensures that digital audio transmissions will be heavily watched in the new electronic era.[121] The Act's first step protects sound recordings from infringement via public performance through digital transmission[122] and interactive services.[123] Additionally, the Act demands statutory licensing of specific types of services, such as non-interactive digital services.[124]

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121 *See* Seigel, *supra* note 7, at 1. "Lawyers need to remain vigilant in identifying any gaps which may be left between the fluid state of the art and the state of the law in the wake of advancing technology." *Id.* Copyright law must be modernized to accommodate new technologies in communication. Collins, *supra* note 98, at 5. Intellectual Property law must ensure that an author be compensated for the use of his copyrighted work. *Id.* "The technological shift to a digital world brings great opportunities and great challenges." Selman, *supra* note 86, at 6. Additional rights to creators to protect against increasing forms of piracy are in the works. *Id.* "Copyright law should be brought up-to-date." *See* 139 CONG. REC. E1710.

122 1995 Act, *supra* note 22. Section 2 adds paragraph (6) which states: "in the case of sound recordings, to perform the copyrighted work publicly by means of a digital audio transmission." *Id.*

This is added to the already existing list of exclusive rights in copyrighted work. *See* 17 U.S.C. § 106. That provision originally left sound recordings out of a public performance right. *Id.;* 17 U.S.C. § 114(a).

123 1995 Act, *supra* note 22. Section 3 revises section 114 of title 17. *Id.* Subsection (d)(1) exempts: transmissions and retransmissions that are from nonsubscription services; a radio station's broadcast that is not more than a 150 mile radius from the site of the transmitter; and noncommercial education broadcast stations that are terrestrial broadcast retransmissions or confined to the vicinity of a business establishment. *Id.*

124 1995 Act, *supra* note 22. Licensing is made mandatory:

> In the case of a subscription transmission not exempt under subsection (d)(1), the performance of a sound recording publicly by means of a digital audio transmission shall be subject to statutory licensing . . . if—
>
> (A) the transmission is not part of an interactive service;
>
> (B) the transmission does not exceed the sound recording performance complement;

17 U.S.C. § 114(3)(d)(2).

The 1995 Act also requires statutory licensing where: (1) the transmitter does not announce the title of the specific sound recording, prior to the transmission; (2) the transmitter does not intentionally cause the receiver to switch the program channel, when transmitting to a business; and (3) the transmission is accompanied by the identification of the title, artists, and other related information that is provided under the authority of the copyright owner in the sound recording. *Id.*

The sound recording performance complement is defined as the transmission during any three hour period, on a particular channel, of no more than either: (1) 3 selections from one phonorecord (of which only two may be performed consecu-

Finally, the Act allows copyright owners in sound recordings to negotiate their licensing contracts with subscription services which are not entitled to statutory licensing, and provides for arbitration if no amount can be agreed upon.[125]

B. *Effects on the Entertainment Industry*

1. Effect on Record Companies

In addition to the technical aspects of the new Act, it shall have important effects upon groups within the entertainment community and consumers in general.[126] Because this is the first time in the United States that a public performance right in sound recordings has been recognized,[127] this Act will have a substantial effect upon performing artists, producers, and record companies.[128] Record companies, typically the owners of copyright in sound recordings, will profit from this royalty and licensing scheme as a result of the probable popularity of these new services.[129] Additionally, international royalty pools will now be open to reciprocate the digital performance rights offered to their artists under this Act.[130] Basen on the fact that roughly forty (40) percent of the

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tively); or (2) 4 different selections by the same recording artist, or any compilation sold as a unit in the United States. *Id.* at § 114(j)(7). Any transmission of more than this amount is not eligible for statutory licensing. *Id.* at § 114(d)(2).

125 1995 Act, *supra* note 22. Although these services may contract for the exclusive right to publicly perform or transmit sound recordings, there are extensive limits on that power. 17 U.S.C. § 114(d)(3). For example, no interactive service may be granted the exclusive right to perform a sound recording for a period longer than one year, unless the copyright owner has ownership in 1,000 or less sound recordings. *See id.* In such a case, the time for the license may be extended to two years. *Id.* at § 114 (3)(A). Also, an exclusive license may be granted to an interactive service for the purposes of advertising the sound recording. *See id.* The public performance is not permitted to last longer than 45 seconds. *Id.* at § 114(3)(B)(ii).

Regardless, the owner of copyright in sound recordings may negotiate royalty and license terms for the public performance on their services, or designate agents on a nonexclusive basis to negotiate with the entities performing sound recordings (transmitting services). *Id.* at § 114(4)(e)(1).

126 *See* O'Dowd, *supra* note 19, at 267-71; *see also* Bergman, *supra* note 14, at 362.

127 *See generally Green Paper, supra* note 61, at 120-22.

128 *See generally* Bergman, *supra* note 14, at 360-63.

129 *Id.* Smaller independent record companies will probably benefit the most from the new Act because their recording costs would be recouped. *Id.* This would lead to a great selection for the public to choose. *Id.* at 361.

130 *See* O'Dowd, *supra* note 19, at 261-63. Although the United States is the world leader of production of sound recordings, it does not receive any of the benefits for public performance offered by about 75 other countries (including nine European

music reproduced and distributed internationally comes from the United States, American artists and record companies could conceivably benefit a substantial windfall from this newly opened arena.[131]

Furthermore, record companies will have access to a new array of royalties.[132] This will probably cause them to be more willing to negotiate with a wider variety of artists, producing more music.[133] This would subsequently have the effect of enhancing the "Copyright Clause's" goal of advancing societal cultural bounds by encouraging personal achievement.[134] Moreover, while merely speculative, record companies might also be more willing to share the pool of its earnings with its recording artists.[135] Regardless of what actually occurs between recording companies and their artists, both are presently assured that their work will be protected by copyright law in the advancing technological age.[136]

2. Copyright Owners of Musical Compositions

The 1995 Act specifically states that the rights of copyright

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Community nations). *Id.* These nations include France, Germany, Spain, Sweden, and the United Kingdom. *Id.* Additionally, the World Intellectual Property Organization [hereinafter WIPO] has suggested that an exclusive right in public performance be granted to every copyright owner of sound recordings. *Id.* at 262. Furthermore, roughly 40 percent (approximately $4 billion) of the sales generated by United States sound recordings are from other nations. *Id.* at 263. However, due to the system of reciprocity that most nations follow, the United States is excluded from any royalties in foreign pools, resulting in a loss of up to $120 million. *Id.*

131 *Id.* at 263. Now that the public performance royalty scheme is in place, the reciprocity that foreign nations offer will be open to United States artists and record companies. *Id.*

132 *Id.*

133 *See* Bergman, *supra* note 14, at 362

134 *See Goldstein*, 412 U.S. at 555. In *Goldstein*, the Court emphasized the artistic creation is of great value to the nation's culture. *Id. Mazer*, 347 U.S. at 219 also examined the issue, finding that the potential for personal gain is a great inducement for the advancement of the arts. *Id.*

135 *See* Franklin, *supra* note 52, at 92. Recording companies are willing to take greater risks, because the potential returns are much greater in the wake of the new legislation. *Id.* Because these services will offer a library of choices, there will be a greater variety of music to chose from. *Id.* Therefore, record companies would be enticed to offer better deals, knowing that their investments will be likely to be recouped. Bergman, *supra* note 14, at 363. However, broadcasters may be able to dictate the fee arrangement when dealing with smaller recording companies. *Id.*

136 *See* 141 CONG. REC. S950. Joint authors of sound recordings must be entitled to reap the benefits of their own creation. *Id.* A digital public performance right would achieve such an end. *Id.*

owners of musical compositions will not be jeopardized by the new rights in favor of sound recordings.[137] While this should be comforting, it does not necessarily alleviate some practical problems.[138] There is a potential loss in revenues that copyright owners of musical compositions may experience, if and when a copyright owner of a sound recording decides not to grant a license to a particular service for transmission.[139] Although owners of copyrights in musical works are subjected to compulsory licensing for their works, sound recording owners are not.[140] Therefore, a potentially dangerous problem exists.[141] However, because money a primary motivation for both, it seems improbable that sound recording copyright owners will not grant their licenses to anyone who requests it of them.[142]

3. Effect on Radio Broadcasting

Although the 1993 proposed bill had provisions for the licensure of digital radio broadcasting,[143] the current law does not take such action.[144] Therefore, it appears that any question about the

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137 1995 Act, *supra* note 22, at 339. "It is the intent of Congress that royalties payable to copyright owners of musical works for the public performance of their works shall not be diminished in any respect as a result of the rights granted" by the 1995 Act. 17 U.S.C. § 114(i).

138 *See* Bergman, *supra* note 14, at 361-63(outlining potential problems with the 1993 Act). A struggle between the two copyright owners is certainly a potential flaw that the 1995 Act does not address. *Id.*

139 *Id.* This could result in further legislative amendment of the 1995 Act. *Id.*

140 *See* 1995 Act, *supra* note 22, at 339. The Act delineated certain statutory licensing of specific types of services, but allowed copyright owners in sound recordings to negotiate the licensing agreements with subscription services and interactive services. *Id.*

141 *See* Bergman, *supra* note 14, at 361-63.

142 *See id.* This potential problem may be nothing more than a hypothesis. *See id.* Because all parties involved seek financial compensation, a situation in which a copyright owner in sound recordings does not license his work, would be extremely rare. *See id.* This is so, because it would require the copyright owner to forego royalties. *See id.*

143 *See* 141 CONG. REC. 948. The new Act differs from its 1993 predecessor. *See* S. Rep. No. 1421, 103rd Cong., 2d Sess (1993).

144 *See generally* 1995 Act, *supra*, note 22; *see also* 141 CONG. REC. 948.

> While strong arguments can be made in favor of attaching a performance right to every performance of a sound recording, including analog and digital broadcasts, it is also true that long-established business practices within the music and broadcasting industries represent a highly complex system of interlocking relationships which function effectively for the most part and should not be lightly upset.

effect on broadcasters may be unnecessary.[145] Yet, the existence of non-subscription services poses a threat to digital broadcast stations that is not addressed by the current Act.[146] These services act as competitors to an already unprofitable radio business.[147]

The effects on the digital subscription and interactive services is much more lucid.[148] Aside from the implementation of the new licensing scheme and royalty requirement,[149] digital subscription services will now be forced to compete for the business of the copyright holders in sound recordings.[150] These copyright owners, knowing the benefits that free radio provides for them, will not necessarily be compelled to grant a license to all interactive and digital services (in search for the most lucrative contacts).[151] Consequently, the smaller services may be forced into bankruptcy by their larger, more powerful competitors.[152]

Another potential effect on digital services is the possible introduction of such services by recording companies.[153] These com-

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Id.

145 *See generally* 1995 Act, *supra* note 22. Presently, AM and FM broadcast stations do not operate through digital channels, but utilize analog ones. Bergman, *supra* note 14, at 362.

146 *See generally* 1995 Act, *supra* note 22. An examination of this issue is beyond the scope of this note. However, because a large part of radio broadcasting companies are operating at a yearly loss, the influx of non-subscription digital services that are not radio broadcast could present a real problem to the radio industry. *See Goldstein*, 412 U.S. at 562. However, these stations may be able to displace any rising costs by charging more for advertising or potential subscriptions. *See* Bergman, *supra* note 14, at 361-63.

147 *Id.*; *see* Nagarajan, *supra* note 20, at 723.

148 *See generally* 1995 Act, *supra* note 22. The effects on these services are directly explained in the language of the Act. *See* 17 U.S.C. § 114(d)(2).

149 *Id.*

150 *See generally* 141 CONG. REC. S945. Because the licensing scheme is not compulsory, sound recording copyright owners are able to negotiate freely the terms of their contract, and are free to decide with whom they will negotiate. *See id.* Thus, it is clear that these copyright owners will try to get the best possible market price available. *See id.*

151 *See id.* The larger services will have a greater position for bargaining because they can disseminate the music to a great amount of listeners. *See id.* This has the effect of bring greater profit to the service. *See id.* Consequently, they will be able to afford to pay a greater fee for the licensure of the recording. *See id.* This is obviously more appealing to the copyright owner than the smaller services who cannot afford to pay the same rates. *See id.*

152 *See id.*

153 *See generally 139* CONG. REC. E1710. One viable option will allow present record companies to eliminate the competition from digital subscription services. *See id.* They

panies, who already own the right to publicly perform their copyrighted works also have been licensed to use the musical work.[154] Therefore, they would not be required to pay additional fees or royalties.[155] Thus, they could offer the same services as present digital services for a lower fee to the listener.[156] Because they will be protected by the new Act, the likelihood of this occurrence is lessened.[157] This is especially true because it is a different type of operation than most record companies are accustomed.[158]

4. Effects on Performing Rights Societies

To obtain the requisite authorization to use a copyrighted work, the typical avenue is through performing rights societies.[159] Thus, an entirely new area of business and negotiation must be created to police the rights granted to sound recordings.[160] But, these organizations fear this eventuality.[161] While new departments and divisions are created, the amount of money available to fund this growth may not increase to meet the costs of these divisions.[162] Therefore, the 1995 Act may cause a stalemate, preventing music from being played and preventing artists from being

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can do this by offering the same service at a lower rate than outside services who are forced to negotiate a royalty fee for the play of the same music. *See id.*

154 *See id.*

155 *See id.*

156 *See id.*

157 *See generally* 1995 Act, *supra* note 22.

158 *Id.* This scheme may also be relatively uninteresting to most recording companies because they may only offer sound recordings that are a product of artists who have contracted with their label. *Id.*

159 *See* 139 CONG. REC. E1710. ASCAP, BMI and SESAC presently grant a non-exclusive license to use musical compositions. *Id.* However, there has been no requirement of authorization, licensure, or compensation for the use of a sound recording. 17 U.S.C. § 114.

160 *See* Bergman, *supra* note 14, at 365. "By acting as an intermediary, these organizations provide copyright owners, as well as broadcasters, with an efficient system of licensing the public performances of copyrighted musical works." *Id.* Now, the system must necessarily extend to copyrighted sound recordings. *See generally* 1995 Act, *supra* note 22. These societies must create divisions to cope with the emerging rights. *See id.*

161 *See* Bergman, *supra* note 14, at 363.

162 *See* 139 CONG. REC. E1710. This is based on the one-pie theory discussed in note 95. If the size of the pie does not increase, these organizations will not have the resources to compensate new employees and pay for new equipment. Bergman, *supra* note 14, at 365. This would result from added parties sharing in the same size performance royalty pie. *Id.* Moreover, broadcasters may not have enough money to pay the additional fees required by the 1995 legislation. 141 CONG. REC. S945.

compensated for their work.[163] This is a problem that must be addressed as the scope of the legislation is determined.[164]

5. Effect on Consumers

Ultimately, it is the consumer that bears the final burden of cost.[165] It is the consumer that is required to pay a tax on the purchase of digital audio recording devices.[166] It is the consumer that is responsible for paying subscription fees.[167] And, it the consumer's money who pays for the manufacturer's costs in advertising.[168] Thus, it shall be the consumer who will bear the financial burden for the royalty and licensing requirement of the transmission services.[169] Consequently, the many hours of dispute among the various interested parties to the present Act become moot.[170] Because the consuming public is of such great size, the increase in cost upon the individual will be nominal.[171]

VI. Conclusion

As the twenty first century approaches there are very few things that are certain. One thing that is irrefutable, however, is that technology is more abundant, more mature, and developing at a faster rate than ever before. Also, property rights appear to be moving away from 19th century notions of material possession, taking form in intangibles and information. This brings ever stronger authenticity to the statement that "knowledge is power." In light of these changes, our laws must be revised to keep pace with the times. The "Copyright Clause"[172] of the Constitution has been in-

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163 *Id.* If the broadcasters are not willing to, or cannot afford to pay the royalty fees, music will be rendered useless, left without any listeners. *See id.*

164 *See id.* This problem may never arise, because of the ability of broadcasters to displace their own costs. *See supra* note 146. However, those costs will eventually become the burden of the consuming public, who will buy the advertised products or subscribe to these services. *See infra* Part V(5).

165 Calamita, *supra* note 95, at 524. When these services are required to pay a licensing fee for the right to utilize the sound recording, the cost will be immediately displaced to the consumer who subscribes to the service. *Id.*

166 *See* AHRA, *supra* note 51, at 4240-41.

167 *See* Bergman, *supra* note 14, at 363.

168 *See id.*

169 *See id.*

170 *Id.*

171 *Id.*

172 U.S. CONST. art. I, § 8, cl. 8.

terpreted broadly to encourage the growth of the sciences and arts. However, the digital era poses threats to the artists of this country that the Framers could not have imagined. If an individual's creation is not protected by law, the incentive to move forward is lost. It is for this reason that the Digital Performance Right In Sound Recordings Act of 1995 is most necessary.

Until today, owners of copyright in sound recordings have not received an exclusive right to their public performance. To many this is an unfair anomaly in our copyright system, because all other artists enjoy this right. Yet, the great profits earned from the sale of records has always been a counter to the establishment of this right. The emergence of digital technology will undoubtedly obliterate that argument.

The 1995 Act meets the challenges that the digital world presents. It reimburses copyright owners in sound recordings for the losses they incur from lost sales of the physical copies of their work. This prevents creators' incentives from waning in fear of not making any personal gains. The Act also has the practical effect of precluding digital services from profiting from the blood, sweat, tears and financial investment of the recording industry. Furthermore, it sets into place a construct within these new services before they are too well established. Lastly, the Act is careful to protect the interests of the other members of the music industry. Songwriters, publishers, performing rights societies and broadcasters will not be damaged by the Act.

The prevailing purpose of copyright law is for the protection of individuals' intellectual property. The Digital Performance Right In Sound Recordings Act of 1995 is a swift and effective tool for the realization of that purpose in the digital age.